Regulating Employment Discrimination in China: A Socio-legal Perspective

I. Introduction

Prohibiting workplace discrimination in China is important, because, as the global report *Time for Equality at Work* has emphasized that the workplace—be it a factory, an office, a farm or the street—has been a strategic entry point to free society from discrimination.[1] Regulating discriminatory employment practice means striking a balance between the employers and the job applicants or the employees. The former want to have more autonomy so that they can decide more freely whom they want to hire, promote or dismiss. The latter demand that employers restrain such autonomy and certain factors must be excluded during the employment decision-making process. Fair employment law serves to strike that balance. These laws may vary between different nations because of their distinctive cultural and legal traditions. But central to all these laws is a common regulatory device—the prohibition against discrimination. Fair employment laws regulate by prohibiting employers from discriminating on the basis of certain individual traits, such as race, religion, national origin, or sex, and by authorizing or establishing procedures or remedies to induce or coerce employers to comply with that prohibition.[2]

China is undergoing profound changes in many aspects. Fighting discrimination in its workplace is one of those changes now taking place. The prevalence of workplace discrimination has been well observed and documented, but the Chinese legal institutions remain ineffective in dealing with discrimination. In general, researches from legal, social, and philosophical perspectives on discrimination-related subjects, such as the definition of discrimination and its wrongfulness, the nature of anti-discrimination law, the burden of proving discrimination, remedial measures to discrimination victims, etc. are much less sophisticated compared with many of other studies. There are particularly two issues China faces in regulating employment discrimination through its legal institutions. Firstly, the Chinese labor law system, which is largely inherited from its plan-oriented economic system, has revealed its inadequacy in deterring and redressing discrimination. Secondly, Chinese people have difficulties in perceiving discrimination as wrongful and remediable. This paper attempts to address these two issues from a socio-legal perspective.

II. Employment Discrimination in China: An Overview and Question Presented

Employment discrimination law research in China began fairly recently. If you ask a Chinese law professor some years ago about how China is in a position in regulating employment discrimination, you would probably be told that China does not have any anti-employment-discrimination rules and China has yet to establish an anti-discrimination legal scheme. I also

[1] *See* ILO: *Time for Equality at Work*, Global Report under the follow-up to the ILO Declaration on Fundamental Principals and Rights at Work, Report 1(B), International Labor Conference, 91st Session, Geneva, 2003, para. 11.
[2] *See* Owen M. Fiss, A Theory of Fair Employment Laws, the University of Chicago Law Review, p235, Volume 38, No. 2, winter 1971.

believed that China at most had a very incomplete legal system that can be used in coping with employment discrimination in the workplace. But I was wrong. China does have a good, at least seemingly, anti-employment-discrimination legal system. And its anti-discrimination rules are laid out at a multiple levels enacted by different legal authorities, from the highest in legal effect the Constitution, to the lower the basic laws, the State Council Administrative Regulations, the local regulations, to the lowest the government policy documents. In specific:

(1) Constitution: Article 33 of the Constitution, which is also known as the Chinese Equal Protection Clause provides that "all citizens of People's Republic of China are equal before the law." In addition, Article 4, 36, 48 and 89 of the Constitution explicitly prohibits discrimination based on ethnic minority status, gender and religion;

(2) Basic laws: there are four basic laws providing protection in equal employment. They are: the Employment Promotion Law of the People's Republic of China enacted in 2007, which prohibits discrimination based on ethnicity, race, gender, religious belief, migrant worker status, carrier of an infectious disease status; the Labor Law of the People's Republic of China enacted in 1994, which prohibits discrimination based on nationality, race, sex, or religious belief; the Law on the Protection of Rights and Interests of Women of People's Republic of China in 1992, which prohibits discrimination against female workers; and the Law of the People's Republic of China on the Protection of Disabled Persons in 1990, which prohibits discrimination against people with disabilities;

(3) The administrative regulations: as the top executive agency, the State Council has issued a large number of regulations that affect labor and employment in China. Among them, these having provisions dealing with employment discrimination include: the Regulation on the Employment of the Disabled People in 2007, which prohibits discrimination against people with disabilities; and the Regulations Concerning the Labor Protection of Female Staff and Workers in 1988, which prohibits discrimination again women;

(4) Local regulations (Provincial People's Congress and its Standing Committee, or the People's Congress and its Standing Committee of the municipalities directly under the Central Government, *i.e.* Beijing, Shanghai, Tianjin and Chongqing have the authority to enact local regulations effective in respective provinces or municipalities): the Guangdong Province Regulation on Protecting Employment Opportunity for People with Disabilities; the Interim Regulation of Beijing City on Social Insurance for Migrant Workers; and the Shanghai City Regulation on Protection of Women and Children.

(5) Finally, the central government as well as local government has the authority to issue governmental policy documents as long as they do not contradict with the Constitution and other superior laws and regulations. There are a large number of governmental policy documents issued by various levels of governments in forms of guideline, governmental opinion, notice, instruction, etc. Typical governmental policy documents concerning employment issue include: Notice on Improving Employment Administration and Service for Migrant Works in the Cities by the State Council General Office in 2003; Notice of Some Questions Concerning the Participation in Working Injury Insurance for Migrant Workers by the Ministry of Labor and Social Security in 2004; Guidelines on Promoting Employment for Women in Community Work

by the All China Women's Federation in 2002, etc.

It seems undebatable that employment discrimination is being well regulated in China by different authorities, from the top legislature to the top executive agency, and from the central government to the local governments. It even seems to me that the Chinese anti-discrimination in employment system is at least as good as that of the United States. In the Unites State, federal legislations prohibit employers from considering certain attributes in making employment decisions. They require employers to disregard particular characteristics of job applicants or workers in their employment practice. These attributes and characteristics include: race, color, gender, religion and national origin in the Title VII of the Civil Rights Act; disability in the American with Disabilities Act; age (people over 40) in the Age Discrimination in Employment Act. Many state laws may have provided wider protection in addition to the protected class prescribed by the federal laws. While in China, judged from the above laws and regulations, discrimination in employment based on characteristics such as ethnicity, race, gender, religious belief, migrant worker status, carrier of an infectious disease status, disability are explicitly prohibited.

However, on the one hand, employment discrimination still widely occurs. According to a survey conducted by China University of Political Science and Law on the extent people face employment discrimination, 85.5% of people surveyed responded that they experienced discrimination or observed it happening to others, and 50.5% of them see the discrimination as serious; only 6.6% reported seeing no discrimination.[3] Alleged discrimination occurs during all stages of employment from application, hiring, work assignment, compensation and benefits, to promotion and termination of employment. In specific, of those surveyed, 30.8% reported experiencing discrimination in compensation and employment benefits, 22.7% in job assignment, 21.3% in promotion and 17.6% in the application process. As a whole, 54.9% of the surveyed people responded as having been discriminated against in their employment and 15.6% of surveyed people described the discrimination they experienced as severe.[4] A broad range of factors are considered when employers review job applicants and assess employees, according to the survey. These factors include gender, age, health condition, physical appearance, height, disabilities, ethnicity, religious belief, political affiliation, registered permanent residency, sexual orientation, etc.[5] On the other hand, the number of employment discrimination cases filed in the Chinese courts appeared to be trivial. As a matter of fact, the number of employment discrimination cases coming to the court is so insignificant that employment discrimination lawsuit has not been included as a separate category of civil litigation system by the Chinese Supreme People's Court.[6] The official statistics on employment discrimination cases in China are largely unavailable. But so far, no high-profile employment discrimination cases on trial or

[3] *See* CAI DINGJIAN, THE EMPLOYMENT DISCRIMINATION IN CHINA: CURRENT CONDITIONS AND ANTI-DISCRIMINATION STRATEGIES 505-47 (China Social Science Press 2007). Directed by Prof. Cai Dingjian, the Institution of Constitutionalism Study of China University of Political Science and Law carried out a survey respectively in May 2006 and October 2006, in ten cities in China including Beijing, Guangzhou, Nanjing, Wuhan, Shenyang, Xi'an, Chengdu, Zhengzhou, Yinchuan, Qingdao, on the employment discrimination situation in China. Of the 3500 questionnaires issued, 3454 valid answers were retrieved. *Id.*

[4] *See Id.*

[5] *See Id.*

[6] The most authoritative guideline on what kinds of civil cases courts can hear—the Regulation on Cause of Action in Civil Litigation issued by the Supreme People's Court of China, has not yet listed employment discrimination as one category of civil litigation. The Regulation on Cause of Action in Civil Litigation was issued by the Supreme People's Court of China on February 4, 2008, took effective on April 1, 2008.

appeal on a national or provincial level have been seen. Such cases that are in the dockets of lower courts are believed to be trivial as well.[7]

Since employment discrimination that violates Chinese anti-discrimination rules frequently occurs in the Chinese workplace, it stands to reason that there should be a significant amount of employment discrimination lawsuits filed in Chinese courts. However, in reality the number of discrimination cases filed in Chinese courts is trivial. We could not help asking the question: Why there are so few employment discrimination disputes that came to courts in spite of wide violations? Why people don't use the existing seemingly well-designed Chinese anti-discrimination legal system to challenge illegal discriminatory employment practice? Is it because Chinese people are more tolerant on employment discrimination? Or is it because they don't know how to proceed with their complaints?

III. Barriers China Faces in Regulating Employment Discrimination

To answer above questions, I would like to begin with the discussion of how from a socio-legal perspective an injurious experience becomes a legally addressable dispute, and the processes an injurious experience must go through before it can be redressed by the legal institutions. The study of how an experience emerges and transforms into a legally remediable dispute is important, because, as socio-legal scholars have noted that "what happens at the earlier stages determines both the quantity and contents of the caseload of formal and informal legal institutions."[8] According to socio-legal scholars, while "trouble, problems, and personal and social dislocation are everyday occurrences", the responses to those events could be understood as occurring in three stages.[9] The first stage is called naming, in which a particular experience is defined as injurious. Naming is critical transformation, although hard to study empirically, the level and kind of disputing in a society may turn more on what is initially perceived as injury than on any later decision.[10] The next step is called blaming, in which a person attributes an injury to the fault of another individual or social entity. In this step, a perceived injurious experience is transformed into a grievance. By including fault within the definition of grievance, the concept of injuries is viewed both as violations of norms and as remediable.[11] The third step is called claiming, in which someone with a grievance voices it to the person or entity believed to be responsible and asks for some remedy.[12] These processes are known as the mergence and transformation of disputes. After these steps, "only a small fraction of injurious experiences ever mature into disputes", because in many cases "experiences are not perceived as injurious; perceptions do not ripen into grievances; grievances are voiced to intimates but not to the person deemed responsible."[13]

Thus, if we draw a picture of the disputing processing in socio-legal studies the mergence and

[7] *See* Jiefeng Lu, Curb Your Enthusiasm: A Note on Employment Discrimination Lawsuits in China, p214, 10 Rich. J. Global L. & Bus. 211.
[8] *See* William L.F. Felstiner, Richard L. Abel and Austin Sarat: The Emergence and Transformation of Disputes: Naming, Blaming, and Claiming, 15 Law & Soc'y. Rev. 631 (1980-81) at p631.
[9] *See Id* at p633.
[10] *See Id* at p635.
[11] *See Id.*
[12] *See Id.* at 635-36.
[13] *See Id.* at 636.

transformation of disputes can be portrayed as a dispute pyramid.[14] At the base is the number of injuries that could potentially ripen into lawsuits and at the apex is the number of cases that ultimately do emerge and progress through various stages of disputing to trial and appellate litigation. The steepness of the disputing pyramid indicates the percentage of cases that can finally come to court for legal adjudication. Although the steepness of the pyramids varies, in virtually all areas of law far fewer people pursue their claim to the top than in theory they have opportunity to do so, because different barriers exist in different stages of the disputing pyramid. Using this disputing pyramid to analyze employment discrimination dispute emerging and transformation process, we will see that at the bottom tier of the pyramid is populated with people who have suffered discrimination. If people who suffer an injury that can be redressed by law do not recognize that they have suffered harm, they will not cross what is known as the recognition barrier. Some people may name their injuries, but they do not blame the discriminating employer, they will still fall or be pushed off the disputing pyramid without crossing what is called the attribution barrier. Research finds that an individual's assessment of his injury and his decision on how to respond to it, depend to a considerable extent on factors such as how fairly he feels the employer's decision was made, and how friends and co-workers judge the event.[15] Even some people may cross these two barriers by recognizing their injuries and blaming the employer, they may encounter the claiming barrier when they have to confront the employer, presenting the problem and demanding for redress. At this stage, cases may fall off of the pyramid for at least two reasons. "One is that some people will simply be unable to articulate their injury or demand redress because they are overawed, because they perceive themselves to be vulnerable to retaliation, or because they think resistance is futile, for example. The other reason cases end here is that sometimes the person who is accused of wrongdoing apologizes or otherwise resolves the dispute. Employers commonly provide internal dispute resolution procedures that can sometimes resolve disputes."[16] Finally, after the naming, blaming and claiming process, a person must cross a litigation barrier to file a claim with the legal authority. The person must be aware that relating laws exist to enforce their rights, "must know, or be able to find out how to file a claim, and have the support, time and skills to do so."[17] Sometimes, even the person is fully aware of his right and is willing to resort to the legal authority, the problems existing in the legal institution itself—either because of bad legislation or bad enforcement, may impose significant litigation barriers.

The transformations between these processes are, according to the socio-legal scholars, caused by, and have consequences for, "the parties, their attributions of responsibility, the scope of conflict, the mechanism chosen, the objectives sought, the prevailing ideology, reference group, representatives and officials, and dispute institutions."[18] But if we think carefully of these various barriers emerged in different stages of the dispute resolution process, we will find that they generally are originated from two sources: the one that associates with the claimant itself;

---

[14] For similar discussions, *see e.g.* Scott Burris, Kathryn Moss, Michael Ullman and Matthew C. Johnsen: Disputing under the Americans with Disabilities Act: Empirical, Answers and Some Questions [hereinafter Scott Burris et al., Disputing under the Americans with Disabilities Act], 238, 9 Temp. Pol. & Civ. Rts. L. Rev. 237; Austin Sarat: Exploring the Hidden Domains of Civil Justice: "Naming, Blaming, and Claiming" in the Popular Culture, 50 DePaul L. Rev. 425.; Herbert M. Kritzer, Neil Vidmar, W. A. Bogart: To Confront or Not to Confront: Measuring Claiming Rates in Discrimination Grievances, 25 Law & Soc'y Rev. 875.

[15] *See* Scott Burris et al., Disputing under the Americans with Disabilities Act, at 240.

[16] *See Id.*

[17] *See Id.* at 241.

[18] *See* William L.F. Felstiner, et al., The Emergence and Transformation of Disputes, at p631, supra note 8.

and the one that associates with the institution—the legal system. For the former, how a person perceives discrimination, how he's aware of his legal rights and to what extent he is willing or able to guard his legal rights will affect his reaction upon discrimination. This is a typically conceptual reconstruction process. The barriers emerged during this process, such as naming, blaming and attributing barriers is what I call a conceptual barrier. The latter is what I call institutional barriers, which may be created as a result of the inconsistency in legislation, the inefficient operation of legal authorities, administrative or judiciary, and the possible corruptions among the legal officials. These institutional barriers impose significant hardship to people who successfully cross the conceptual barriers seeking legal remedy in mediation, arbitration and litigation. Furthermore, the existence of the institutional barriers will consciously or unconsciously influence a person's assessment on what kind of action should he take. From this perspective, the conceptual barrier increases if a person sees more institutional barrier. But to realize a legal right or a successful redress of a violation, both claimant-related barriers, *i.e.* the conceptual barrier and institution-related barriers, *i.e.* the institutional barrier must be overcome.

Now let's turn back to the questions that I raised in the precious discussions: Why there is so trivial number of employment discrimination cases emerged in the Chinese courts despite wide violations of employment discrimination in the Chinese workplace? Or how do we explain the ironic phenomenon that there is no lack of employment discrimination but there is a lack of employment discrimination cases—in spite of those seemingly good anti-discrimination laws and regulations in China. The answer is not hard to assert if we apply the dispute processing theories discussed above. If there is a conceptual barrier—that people in China have troubles perceiving discrimination, or don't see discrimination as injurious or let such experience goes unnoticed, or don't know how to respond to discrimination, then, no employment discrimination disputes will emerge no matter how well the anti-discrimination legal system is designed. If there is an institutional barrier—that behind these well drafted anti-discrimination laws and regulations, there are great inconsistencies or even conflicts among different rules, or these seemingly good rules simply do not practically work, no employment discrimination disputes will emerge no matter how much people want to use them. The two-barrier theory explains this question logically well. The conceptual barrier substantially limits people's ability to perceive discrimination as wrongful and remediable. The institutional barrier substantially limits people's efforts to use the legal institutions to challenge discriminatory employment practice. The other side of the story is, if we have a well designed and workable legal system regulating discrimination, and people are willing to use that system to get remedy for their discrimination experience, in light that under the current circumstances discrimination occurs frequently in the Chinese workplace, we would probably see a plentiful of employment discrimination cases filed in the Chinese courts. The significance of an increased number of employment discrimination cases filed in Chinese courts is not about the number itself. It is a signal that the employment discrimination issue is being addressed through the Chinese legal institutions. Ultimately, the only way to effectively curb employment discrimination is to establish rule of law by creating a workable regulatory system.[19]

IV. The Conceptual Barrier and a Discussion

Socio-legal scholars have urged us to pay more attention to the early stages of disputes and to the

[19] *See* Jiefeng Lu, Curb Your Enthusiasm, at p224, supra note 7.

factors that determine whether naming, blaming and claiming will occur, because "learning more about the existence, absence or reversal of these basic transformations will increase our understanding of the disputing process and our ability to evaluate dispute processing institutions."[20] As mentioned previously, only a small fraction of injurious experiences ever mature into disputes, and most of the attrition occurs at the early stages: experiences are not perceived as injurious; perceptions do not ripen into grievance; grievances are not voiced to the person deemed responsible.

Some Chinese scholars have observed that people in China who suffered discrimination in employment rarely perceived discrimination as injurious or as a violation of their equal employment rights.[21] And even fewer people would ever think of using the laws to fight against such discrimination they experienced.[22] Socio-legal scholars have referred to such harmful events as "Unperceived Injurious Experiences" in recognition of the fact that many people who suffer an injury redressable by law do not recognize that they have suffered harm.[23] An injurious experience is any experience that is devalued by the person to whom it occurs. In order for disputes to emerge and remedial action to be taken, an unperceived injurious experience must be transformed into a perceived injurious experience.[24] To some extent, the issue relating to "Unperceived Injurious Experiences" is a quite commonly seen issue. Even in some western countries, prior research indicates that most types of legally actionable grievances produce behaviors intended to obtain redress, but discrimination grievances stand out for their apparent association with what some scholars called "lumping it."[25] Based on their analysis of claiming rates for a variety of different types of common problems examined by the Civil Litigation Research Project (CLRP), Miller and Sarat reported that the rate of claiming by victims of discrimination was much, much lower than for any other kind of problem they examined.[26] Claiming rates varied from a low of 80 percent for grievances having to do with real property to 95 percent for debt-related grievances. In contrast, the claiming rate was only 29 percent for discrimination problems.[27] Foreign scholars have examined this "apparent anomaly" in detail.[28] One argument scholars have made asserts that in the discrimination context, the requirement that the victim of discrimination come forward leads to what amounts to a second round of victimization.[29] As a result, discrimination victims are unwilling to seek redress for what they see as unfair treatment.[30] This expectation of re-victimization reflects a variety of factors: lack of knowledge of the available remedies, inadequate resources or inefficient procedures at administrative agencies charged with handling discrimination problems, unwillingness of lawyers to accept cases that will be difficult to win or not profitable to handle on a contingency

[20] *See* William L.F. Felstiner, et al., The Emergence and Transformation of Disputes, at p636, supra note 8.
[21] *See* Jiao Hongyan and Li Na, Comments from the Legal Experts on the Draft of the Chinese Anti-Employment Discrimination Law, China Legal Daily, April 2, 2009, available at http://www.legaldaily.com.cn/zmbm/content/2009-04/02/content_1064009.htm
[22] *See Id.*
[23] *See* William L.F. Felstiner, et al., The Emergence and Transformation of Disputes, at p650, supra note 8.
[24] *See Id*, at p633-34.
[25] *See* FELSTINER, William L. F., Influences of Social Organization on Dispute Processing, p81, 9 Law & Society Review 63 (1974).
[26] *See* MILLER, Richard E., and Austin SARAT, "Grievances, Claims, and Disputes: Assessing the Adversary Culture," p537, 15 Law & Society Review 525 (1980).
[27] *See Id.*
[28] *See general* Kristin Bumiller, The Civil Rights Society. Baltimore: Johns Hopkins University Press (1998).
[29] *See Id.*
[30] *See Id.*

fee basis, and the likelihood that persons or organizations charged with discrimination will vigorously resist the complaints because "they see themselves as blameless and because the prospects for unfavorable court action are limited."[31]

A. Studying the Way Chinese Workers Perceiving and Responding to Employment Discrimination: An Initial Effort

The early stages of naming, blaming, and claiming are significant, "not only because of the high attrition they reflect, but also because the rage of behavior they encompass is greater than that involved in the later stages of disputes where institutional patterns restrict the options open to disputant."[32] Moreover, what happens at the earlier stages of dispute transformations determines both the quantity and contents of the caseload of formal and informal legal institutions. An important aspect of studying the transformations of perceived injurious experience, grievances and disputes is concerned with the parties, because the parties to a conflict are central agents as well as objects in the transformation process.[33] Unfortunately, in China, studies on how Chinese workers perceive, understand and respond to employment discrimination have rarely seen so far. Studies from the socio-legal perspective on the emergence and transformation of disputes, especially before they enter formal legal institutions remain very much as a neglected area. Many questions remain unanswered, including: what does discrimination mean to common Chinese workers and to what extend do they perceive discrimination as injurious, wrongful and remediable? How do they respond to discrimination—let injurious experiences go unnoticed or have injurious experience emerged and transformed into legally redressable disputes? This makes the following research exceptionally valuable because of its pioneering nature.

As the very first of its kind, in 2004 a group of sociology researchers from Peking University Department of Sociology carried out a field research in order to study how ordinary Chinese workers understand and respond to discrimination that they may have experienced in the workplace.[34] It was first in its kind because no similar research has ever been seen before in China. The research targeted 117 ordinary workers in 5 provinces and one autonomous region in different parts of China. These places include Henan Province, Zhejiang Province, Fujian Province, Inner Mongolia Autonomous Region and Liaoning Province. The researchers talked face-to-face with those workers using pre-designed questions. The questions were designed with attempts to understand the workers' ability to perceive discrimination, their understanding of discrimination and whether they were aware of any legal remedies in responding to discrimination. Typical questions include those such as: How do you understand discrimination? What does discrimination mean to you? Have you ever experienced discrimination in your work? Do you know any laws regulating discrimination? What will you do in response to discrimination?[35]

During the study, the first thing the researchers found out was that discrimination was a term that

[31] *See* Lawrence Baum: American Courts: Process and Policy (2d edition), 230-31, Boston: Houghton Mifflin (1990).
[32] *See* William L.F. Felstiner, et al., The Emergence and Transformation of Disputes, at p636, supra note 8.
[33] *See Id.* at p640.
[34] *See* Tong Xin, Zhu Xiaoyang and Hu Yu, The Methodology of Discrimination Research: The Perception of Discrimination from the Grass-roots Chinese Workers, published as Chapter 4 in the book Employment Discrimination: International Standard and National Practice, edited by Li Weiwei and Lisa Stern (2006), p80-108.
[35] *See Id.*

appeared to be strange to most of those workers. When asked during the interview whether they have experience of being discriminated in their work, the first response from the workers was "what is discrimination?"[36] Instead of trying to get to know what discrimination means to the workers, the researchers had to first give a description explaining the term itself. "Obviously they do not understand the meaning of discrimination. To them discrimination is something beyond their daily talk," as one participating researcher commented.[37] The research was continued after the researchers gave descriptions and examples of unfair treatment as discriminatory. The researchers then found that when the workers talked about their experience of being unfairly treated, many of them did not blame it as wrongful, but instead contributed such experience to their own fate, incompetency or even bad luck. According to the researchers, many workers did not know how to respond to employment discrimination, "to them, it seems as if admitting being discriminated is a shameful thing and a symbol of being in a low social class, because discrimination is understood not as an unfair treatment caused by others, but a manifestation of your own weakness."[38] "They did not seem to have the consciousness of perceiving discrimination as a violation of certain rights they have and the last thing they would think of is to use the law to protect their rights on equal employment opportunity."[39] The research concluded that Chinese workers are not sensitive about employment discrimination issue in the workplaces; they are not fully aware of their rights on equal employment opportunity and they do not know how to properly respond to discrimination and protect their own rights.[40]

The research conducted by the Peking University Department of Sociology may not be scientific enough to conclude the way people understand and respond to discrimination in China as a whole because it may not be systematic and sufficiently representative.[41] But it is ground-breaking in terms that it is an initial and pioneering attempt to study the Chinese employment discrimination issue from a very fundamental level: how people perceive discrimination and how such perception may affect their understanding of and response to discrimination. The questions that the research presented with respect to how common Chinese workers perceive, understand and react upon discrimination in the workplace entail serious attention and further study. The research especially noted the phenomenon that most workers in the research didn't know what employment discrimination is, and when told what they experienced is discrimination, workers tended to blame their own fate instead of contributing to the discriminatory employers. This phenomenon falls within the manifestation of what known to socio-legal scholars as the "Unperceived Injurious Experiences".[42]

The realization of a legal right will need to go through a series of steps in the disputing resolving pyramid. These steps include the occurrence of injuries, the process of naming, blaming, claiming and then referring to an administrative or judiciary branch for adjudication. In each of these steps there will be different barriers to a successful remedy to the claimant, which includes the recognition barriers after the happening of the injuries, the attribution barriers in naming, the

[36] *See Id.*
[37] *See Id.*
[38] *See Id.*
[39] *See Id.*
[40] *See Id.*
[41] As mentioned, the researchers only interviewed 117 ordinary workers in 5 provinces and one autonomous region out of 31 provinces and autonomous regions in China, and the reason why the researchers selected these places are not known. It is also not clear if the researchers selected these places by random or according to convenience.
[42] *See Id* at supra note 23.

confrontation barriers in blaming and the various litigation barriers in claiming. The central question concerning the emergence and transformation of disputes revolves "the conditions under which injuries are perceived or go unnoticed and how people respond to the experience of injustice and conflict."[43] Fundamentally, only when an unperceived injurious experience transformed into a perceived injurious experience, will disputes be emerged and remedial action to be taken.[44] If injurious discrimination experiences go unnoticed or people have tolerated it, no disputes will emerge. If people contributed injurious experience to their own fate, incompetency or even bad luck, as what the Chinese workers in the research did, no disputes will emerge. The attribution theory further asserts that the causes a person assigns for an injurious experience will be important determinations of the actions he or she takes in response to it; those attributions will also presumably affect perception of the experience as injurious.[45] People who blame themselves for an experience are less likely to see it as injurious, or having so perceived it, to voice a grievance about it.[46] Using the dispute emergence and transformation theory we can fully explain what the researchers from Peking University had observed with respect to the way Chinese workers perceived and responded to discrimination. If the injured person does not feel wronged or believe that something might be done in response to injurious discrimination experience, it is not likely that we will see such disputes in Chinese courts. Before we can come up with measures to change the way people perceive and respond to discrimination, it is necessary to explore a little bit why people in China reacted to discrimination in the way as the Peking University School of Sociology research had found.

B. Factors Contributing to the Existence of Conceptual Barrier

As mentioned, the phenomenon relating to "Unperceived Injurious Experiences" is not unique in China but a quite commonly seen issue in many countries. Even after perceiving discrimination as injurious, discrimination victims in general are still less willing to seek redress for what they see as unfair treatment.[47] This can be caused by many reasons. People who are identified as the victim of discrimination may simply not want to come forward in fear of a second round of victimization.[48] According to socio-legal scholars, the processes through which disputes emerge, or through which people decide to "lump it," are "subjective, unstable, reactive, complicated, and incomplete."[49] What factors may have led to people in China treat discrimination in the way as the Peking University research had found out? And why people in China are not sensitive about equal employment opportunity rights and the discrimination issue in the workplace? Answers to these questions may be more complicated than we can imagine, since China is very different economically, culturally and traditionally from those countries where anti-discrimination notions are well developed. But there are some points that I would like to make with respect to why such barrier exists.

From a economic perspective, the plan-oriented economic system—China's once dominating economic form—may have a profound influence on the way people perceive discrimination in

[43] *See Id.*, at p632.
[44] *See Id.*, at p633.
[45] *See* Kelley, H. H., & Michela, J. L., Attribution Theory and Research, Annual Review of Psychology, 31, 457-501 (1980).
[46] *See Id*.
[47] *See Id* at supra note 26.
[48] *See* Kristin Bumiller, The Civil Rights Society, supra note 28.
[49] *See* William L.F. Felstiner, et al., The Emergence and Transformation of Disputes, supra note 8, at p637.

employment.[50] China used to be dominated for decades by the socialism plan-oriented economic system, under which "everyone has an equal share of rice and everyone has an equal share of work" was the old fashion thinking for many Chinese working class.[51] In specific, the competitive market was not recognized and accepted in the socialism China before 1970's while the whole country was monopolized by the plan-oriented economic system. Under such system, the government made employment need-and-supply plans and was responsible for assigning available working positions to people with working capacities. The employers at that time, mostly if not exclusively, were composed of state-owned enterprises, whose company management was made in accordance with the state-issued economic plans. There was no such thing as employment discrimination of the modern sense under the strict plan-oriented economy in the first three decades after the establishment of the socialism New China.[52]

The reason why the modern sense of employment discrimination did not exist in the strict plan-oriented economic system has not been well discussed in China. This author believes that under a strict plan-oriented economic system, it lacks incentives to the discriminators to employ discriminatory practice. Here is the analysis. Discrimination has to do with treating people differently. Discrimination in employment occurs when an employer treats employees or applicants for employment differently because of certain traits. The economic literature offers two basic explanations of why an employer might treat employees or applicants differently. In one model, discrimination results from a "taste for discrimination" that has its origin outside the economic system.[53] In the other model, discrimination in the workplace is a product of "statistical discrimination."[54] In the first model, the taste is, for instance in a race-based discrimination, an antipathy to a racial minority group on the part of some relevant economic actor. Accordingly either the employer itself or someone whose tastes the employer has an incentive to consider—such as employees or customers—dislikes members of a minority group and does not want to associate with them.[55] The effect of this taste is that the employer incurs an additional cost for employing a minority group member. If the taste for discrimination is held by the employer, that cost will be the employer's own disutility. If the employer itself lacks any antipathy to minorities, it will still incur an additional cost if its nonminority employees dislike minorities and demand additional wages (or show reduced productivity) when forced to work with minorities. Similarly, the employer will incur an additional cost if customers are less willing to do business with firms that have minority employees.[56] The second model of statistical discrimination can occur in the absence of any antipathy toward a minority group. Instead, the employer discriminates against a minority group because it is using membership in that group as a proxy for characteristics that are legitimate employment qualifications. Discrimination of this form occurs as the result that information about an employee's qualifications is often costly to obtain. An employee's race, however, is cheaply ascertained. Therefore, if a firm concludes that

[50] Discrimination in employment is not only a legal question, but also an economic question, and sometimes it is the combination of both the legal question and the economic question. *See* David A. Strauss: The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards, 1621, 79 Geo. L.J. 1619.
[51] *See* Lin Jia, Yang Fei & Lin Haiquan, Labor and Employment Legal Issues Research [thereinafter Lin Jia et al., Labor and Employment Legal Issues research], China Labor and Social Security Press, (2005), p35-41.
[52] *See Id* at p35-38.
[53] *See general* Gary. Becker, The Economics of Discrimination (2d ed. 1971).
[54] For principal early works on statistical discrimination, *see e.g.* Arrow, The Theory of Discrimination, in Discrimination in Labor Market, 3, (1973); Phelps, The Statistical Theory of Racism and Sexism, 62 AM. ECON. REV. 659 (1972).
[55] *See general* David A. Strauss: The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards, p1622, 79 Geo. L.J. 1619.
[56] *See Id*.

an employee's race correlates with his or her qualifications, and if better information about the qualifications is too costly to discover, it will be rational, profit-maximizing behavior for the firm to offer lower wages to a minority employee than it would offer to a nonminority employee.[57] In the strict plan-oriented economy, it lacks incentives under both models of discrimination for the employers and other actors like the customers to discriminate because state-issued plan, rather than personal taste or statistics-based information is the exclusive market rule to be obeyed. As a result, the employment discrimination issue was practically a non-issue for most working Chinese in the plan-oriented economy of socialism China. But the way companies doing business suddenly changed when China embraced free market system and governmental control over enterprises was loosened. Nowadays, people have to compete with each other for a relatively limited number of employment positions. However, changes in people's mind that one could be rejected for employment because of discrimination seem to have come much late. In fact, people started to pay attention to employment discrimination issues only after the starting of litigation of several high-profile ground-breaking discrimination lawsuits in beginning years of the twenty-first century.[58]

There may also be cultural reasons why people are reluctant to sue discriminating employers. Scholars have observed that most of what occurs in the domain of civil justice is cultural, not just legal.[59] Culturally, people in China usually do not prefer litigation, and traditionally lawsuits are deemed as the least preferred resolution for resolving disputes among people. The concept of "harmony" and "no suits" are in general considered as the basic value orientation of traditional Chinese legal culture.[60] As the founder of Confucianism and a great and influential Chinese philosopher, Confucius also said, "To handle lawsuits, I am resolved to eliminate lawsuits."[61] As a result of that cultural and traditional value, many people in China tend to deem lawsuit as a very unfriendly way of dispute resolution, especially those disputes arose from the workplace.[62] From this point of view, the implication from Chinese "no suits" culture reinforced the conceptual barrier in terms that even if people are aware of their rights on equal employment opportunity, know their rights infringed and contribute the violation to discriminating employer, to some extent it may still be a reluctant effort to bring such dispute to legal authorities.

C. Measures to Tackle Conceptual Barrier

---

[57] *See Id*.

[58] Among these high-profile cases, the most pioneering one began in 2002, when the plaintiff, a graduate from Sichuan University sued the People's Bank of China Chengdu Branch for height discrimination. This case was followed by a remarkable Hepatitis-B employment discrimination case against a local government agency in Anhui Province in 2003. Other high-profile cases at the time included gender-based discrimination in the mandatory retirement policies at the China Construction Bank Pingdingshan Branch in 2005, age-based discrimination against the Ministry of Personnel of the State Council in 2006, and physical appearance-based discrimination against an education investment group in Shanghai in early 2007. *See* Jiefeng Lu, Employment Discrimination in China: Current Situations and Principle Challenges, 32 Hamline. L. Rev. 133 (2009); *see also* Zhou Wei, From Height to Gene: the Legal Development of Anti-discrimination in China, Tsinghua Law Journal, Vol. 6， No. 2 (2012). Jiefeng Lu, Employment Discrimination in China: Current Situations and Principle Challenges, supra note ;

[59] *See* Austin Sarat: Exploring the Hidden Domains of Civil Justice: "Naming, Blaming, and Claiming" in the Popular Culture, 50 DePaul L. Rev. 425, at page 427.

[60] *See* Zhang Wenxiang, Saqironggui: The Dilemma of Traditional Litigation Conceptions—the Intrinsic Logic among "No Suit", "Dropping Suit" and "Disgusting Suit", Hebei Law Review, Volume 22, Number 3, page 79-82.

[61] *See* The Analects, Chapter 12, Verse 13.

[62] As noted in the previous paper that it would be not a likely scenario in China even nowadays that someone will be willing to seek an order from the court against an employer to ask to be hired. *See* Jiefeng Lu, Employment Discrimination in China: Current Situations and Principle Challenges, p189, supra note 58.

It is critically important to tackle the conceptual barrier in effectively fighting against employment discrimination in China. And the critical thing to tackle that barrier is to properly educate and convince Chinese people that discrimination is wrongful and they don't have to tolerate it. People must be equipped with sufficient knowledge about employment discrimination and how to respond to it. They must also be educated that when discrimination occurs, taking the weapon of relating laws to guard their rights on equal employment opportunity by referring the discriminating practice to legal authorities is both necessary and important, in terms that such actions may not only get remedies for their losses but may also deter discriminating actors from further discriminating against others in the future. Achieving the goal of educating Chinese people not to tolerate discrimination entails a lot of efforts; however, there are two practical issues that need particular attention. The first is that people must be educated to have a better understanding on the nature of discrimination and why it is wrongful. As the study conducted by Peking University has reflected, there are lots of confusions about the concept of discrimination among Chinese workers. And second is we must increase people's sense of legal entitlement of equal employment opportunity right. People must be educated to be confidently certain that they deserve an equal treatment on employment opportunity and they are entitled not to be discriminated against. Strong sense of legal entitlement on equal rights will increase people's intolerance on the occurrence of discrimination.

As to the first issue, what is discrimination and why it is wrongful are important questions, although they have not been fully addressed in China. It is customarily a methodological approach, at least among many Chinese scholars, to analyze the legal concept by studying the original meaning of the words. In plain English, the word "discriminate" means to distinguish, single out, make a distinction, or to distinguish by discerning or exposing differences.[63] In the abstract, "discrimination" is a completely neutral term referring to "perceiving, noting, or making a distinction or difference between things."[64] When used as a legal term, "discrimination" refers to "the effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex, nationality, religion, or handicap" or the "differential treatment, especially a failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored".[65] From these classical interpretations, we can draw a basic conclusion on the two accounts of meanings "discriminate" has, which is to: (1) treat differently or (2) to unreasonably and wrongfully treat differently. Thus the term discrimination can be explained in a descriptive or a moralized way. Descriptively, to "discriminate" is merely to draw distinctions among people on the basis of the presence or absence of some trait. When used in a moralized way, it means to wrongfully draw such distinctions.[66] Discrimination is wrongful when the distinct treatment is generated by biases, stereotypes or even hatred. Such discriminatory treatment demeans by treating people in the way that denies his or her equal moral worth.[67] To demean is not merely to insult but also to put down, to diminish and denigrate.[68] Furthermore, wrongful discrimination usually is motivated by prejudice and results in disadvantageous treatment. Disadvantageous treatment occurs when a

[63] *See* Merriam-Webster's Online Dictionary, "discriminate", available at: http://www.merriam-webster.com/dictionary/discriminate
[64] IV Oxford English Dictionary 758 (2d ed. 1989)
[65] *See* Bryan A. Garner (editor in chief), Black's Law Dictionary, Second Pocket Edition, West Publishing Co. (2001), 209.
[66] *See* Deborah Hellman: When Is Discrimination Wrong? Harvard University Press (2008), p13.
[67] *See Id*, at p29.
[68] *See Id.*

decision based on personal characteristics produces harmful results—results which are to some extent invidious, victimizing or stigmatizing.[69] Prejudice occurs and leads to a decision that is based on personal characteristics which are devalued by others. Devalued worth may appear in many forms: fear, hostility, antagonism, indifference, paternalistic or stereotypical assumptions of inferiority, or being shunned or mistreated. Each of these responses supposes that members of one group are less worthy than other people.[70] If we can clearly educate Chinese people about the nature of discrimination and why wrongful discrimination is not right, people will be in a better position in overcoming the conceptual barrier.

As to the second issue, Chinese people must be educated to increase their sense of entitlement on equal rights. The individual's sense of entitlement to enjoy certain experiences and be free from others is "a function of the prevailing ideology, of which law is simply a component."[71] It is critically important that people in China feel they deserve the protection of their rights on equal employment opportunity. By the same token, if people are more confident that they are entitled to not be discriminated it will be less likely that they will tolerate discrimination. China has been long characterized as a country of collectivism, in which collective rights are considered superior to individual rights, and individuals were considered to be less important when compared to collective objectives. When talking about equal right, people would tend to think equality as an individual right is not typically Chinese but something from the west.[72] As some people have argued that for over thousands of years China remained as a country with clear social stratifications, no such thing as the notion of equality as a legal right ever existed in the Chinese society.[73] This causes a misunderstanding even among Chinese that equal rights are foreign human rights notions. It is not necessarily so. Chinese people need not to feel strange about notions on equal rights or human rights, and need not to consider those notions as foreign notions. They are exactly ingrained in what makes us a Chinese—the Chinese culture and tradition. Equality has been always considered as an important ingredient of a harmonious society and part of Chinese social ideals. For instance, many ancient Chinese philosophers have discussed the notion of equality and have considered it as an important social value.[74] Those discussions were seen in many Chinese philosophical literatures, from the most famous Confucius *the Analects* to other masterpieces representing Daoism and Legalism.[75] The Confucian's idea of equality is known as "Da Tong", which means "great unity or solidarity", emphasizing that the emperor, the officials and the common people live in unity and harmony.[76] As the representative of Taoism,

---

[69] *See* Glenn Patmore: Moving Towards a Substantive Conception of the Anti-Discrimination Principle: *Waters v Public Transport Corporation of Victoria Reconsidered*, Melbourne University Law Review, [1999] MULR 4, also available at: http://www.austlii.edu.au/au/journals/MULR/1999/4.html

[70] *See* Paul Brest, Foreword: In Defense of the Anti-discrimination Principle, 90 Harv. L. Rev. 1 (1976).

[71] *See* William L.F. Felstiner, Richard L. Abel and Austin Sarat: The Emergence and Transformation of Disputes: Naming, Blaming, and Claiming, at page 643, supra note 8.

[72] *See* Zheng Jinggao, The Notion of Equality in Ancient China, Journal of Ocean University of China (social science edition), 43-47, No.1, 2003.

[73] *See Id*.

[74] Although the idea of equality in that time was presented in a much broader and more abstract form, focusing more on a collective than individual equal treatment and was sometimes interpreted as same to egalitarianism. *See* Meng Xiangzhong, Xin Baohai: Ancient Chinese Thinkers' View on Equality and Efficiency, Journal of Shandong University, p150-54, No. 5, 2007.

[75] *See e.g.* Meng Xiangzhong, Xin Baohai: Ancient Chinese Thinkers' View on Equality and Efficiency, Journal of Shandong University, p150-54, No. 5, 2007; Feng Yadong, The Ideal of Equality and the Chinese Society, Journal of Forum on Chinese Culture, p42-47, Volume 4, 2001. In general, Confucianism focuses on man in his social and political relationships, Taoism on man's status in the larger cosmetic sphere and the Legalism on state administration. *See* Charles O. Hucker, China's Imperial Past: An Introduction to Chinese History and Culture, Stanford University Press 1975, at 69.

[76] In Chinese it reads as "大同", *see* Zheng Hui, Equality Ideology between China and the West: Historical Evolvement and the

Zhuang Zi, or Master Zhuang, proposed "Qi Wu", which means "equality of all things".[77] The Legalism emphasized on the equal application of laws.[78] The most outstanding was from Mozi who stood for "Jian'ai", which means "love without distinction".[79] Compiled by his students from his lecture notes, Mozi's philosophy was embedded in the book *Mozi*. In that book, he attributed national chaos, wars between states, strife between people and fratricides to "failure to love without distinction."[80] In his opinion, "the strong should be willing to help the weak, the rich ready to share his wealth with the poor, and the enlightened eager to enlighten those who are not."[81] When everybody loves other states and families as much as his or her own, he said, the world would be in peace and tranquility.[82] We can even find connections between the ancient Chinese equality ideas and the more sophisticated forms of equality notions in modern society. For example, the notion of substantive equality can be found in the Confucianism masterpiece *the Analects*. The Confucius said that "people are not troubled with poverty, but troubled with the unequal distribution of goods."[83] The implication of this remark has emphasis on the substantive equality, namely equality on result. The Legalists' doctrine of "equal before law" pretty much presents for the notion of formal equality. It says in the masterpiece of the Legalism *Han Feizi* that "law should not give in to the rich and the powerful" and that "punishment should equally apply to all people from the prime minister to generals and grand marshals and to all levels of officials, same as common people".[84] The most interesting part is their articulation of equality in personality. As we may know, "virtue" is the core value of the Confucianism. Though realized that natural inequalities exist between human beings, Confucians consider people equal in personality. It says in *the Analects* that "what you do not want done to yourself, do not do to others."[85] It also says that "the man of perfect virtue, wishing to be established himself, seeks also to establish others; wishing to be enlarged himself, he seeks also to enlarge others."[86] These sentences reflect the moral principle of being virtue, indicating the notion of personality equality by viewing others equal in personality as one self. For those who are in need of care and sympathy, the Confucians believe they should be equally considered, because the Confucians think everyone has the right to live, *i.e.* the right to subsistence, viewing from the modern concept of the basic human rights. The Confucianism strongly advocates for education, believing that education is essential for the well-being of people and nation.[87] The notion of equality of people to education is very remarkable. As it is recorded in *the Analects* that "the Master said, in teaching there should be no distinction of classes."[88] The Mohists' notion of Jian'ai, which means love without distinction, is a more broad-embracing concept. Mozi said that "all states on

---

Difference, Wuhan University Journal (Philosophy and Social Science), p618-28, Vol. 57, No. 5, 2004.

[77] In Chinese it reads as "齐物", *see* Zhou Cuibin, Concepts of Equality in the Feudal Society of China, Journal of Wuhan University of Science and Technology (Social Science Edition), p44-47, Vol. 6, No. 3, 2004.

[78] *See* Zheng Jinggao, Notion of Equality in Ancient China, Journal of Ocean University of China (Social Science Edition), p43-47, Vol. 1, 2003.

[79] In Chinese it reads as "兼爱". Mozi is also known as Mo Di, lived between about 470 BC to about 391 BC. *see* Zhou Cuibin, Concepts of Equality in the Feudal Society of China, Journal of Wuhan University of Science and Technology (Social Science Edition), p44-47, Vol. 6, No. 3, 2004..

[80] *See* Mozi, Jian'ai, *Id.*

[81] *See Id*.

[82] *See Id*.

[83] *See* the Analects, Book 16, Ji Shi.

[84] *See* Han Feizi, Youdu.

[85] *See* the Analects, Book 15, Wei Ling Gong.

[86] *See* the Analects, Book 6, Yong Ye.

[87] The Analects begin with the enlightenment from the Master that "Is it not pleasant to learn with a constant perseverance and application?" *See* the Analects, Book 1, Xue Er.

[88] *See* the Analects, Book 15, Wei Ling Gong.

the earth, regardless of the size big or small, are states of the Heaven; all people, regardless of the old or young, the rich or poor, are all subjects of the Heaven."[89] He also advocated fairness and justice among people for that on the level of personality all people are equal.[90] These Chinese ancient philosophical discussions on equality are powerful evidence to demonstrate that Chinese cherish equality. It is part of our cultural legacy to pursue equality. Chinese should not feel shameful to claim their rights against discrimination. Chinese shall thus be confidently proud to claim equal right because it is a social ideal Chinese have admired for thousands of years.

In addition to the cultural aspect that equality is highly acclaimed, increasing people's sense of legal entitlement on equal employment opportunity also requires us to realize that Chinese legal tradition respects equality. As mentioned in the very beginning, now there are a large volume of rules regulating employment discrimination in China. But even in the earlier times when China just ended feudalism and had its first modern government, equality has been an important concern for the legislature. This can be mostly indicted from the languages in the former Chinese constitutions. Ever since the founding of the Republic of China, which was considered the first modern government in China, the "equality before law" or "equal before law" clause was included in all constitutions in China. For instance, in 1912, Article 5 of the Temporal Constitution of the Republic of China provided that: "All people of the Republic of China, irrespective of their race, class and religion, are all equal."[91] This is the earliest version of equal protection clause we can trace in the history of China. In 1923, Article 5 of the Constitution of the Republic if China reiterated the equal rights of its citizens regardless of their race, class and religious belief.[92] In 1946, Article 7 of the Constitution of the Republic of China revised the equal right clause to the following: people of the Republic of China, irrespective of gender, religious belief, race, class and partisanship, are all equal before law."[93] At the same time, areas ruled by the Chinese Communist Party also had equal protection clause in its constitutional legislations. For instance, Article 4 of the General Outline on the Constitution of the Chinese Soviet Republic (the regime existed from 1931 to 1934 as an independent government established by the Chinese Communist Party with its capital in Ruijin Jiangxi Province in southeastern China) provided that workers, peasants, Red Army soldiers, all life-struggling people and their families, regardless of gender, nationality (Chinese, Manchurian, Mongolian, Hui (a Chinese ethical minority living in most part of China), Tibetan, Miao (a Chinese ethical minority mostly living in Guizhou Province, Hunan Province, Yunnan Province, Sichuan Province, Hubei Province and Guangxi Zhuang Nationality Autonomous Region in China.), Li (a Chinese ethical minority living in Hainan Province in China), and Chinese Taiwanese, Chinese Korean, Chinese Vietnamese, etc.), religion, are all equal before soviet laws.[94] In 1949, the People's Republic of China was established after the civil war. In 1954, the first Constitution of the People's Republic of China was promulgated in which Article 85 regulated that "All citizens

[89] *See* Mozi, Fa Yi.
[90] *See Id.*
[91] The Constitution was issued in Nanking on March 11, 1912, for the whole version of the Temporal Constitution of the Republic of China, please see at: http://baike.baidu.com/view/644174.htm
[92] The Constitution was issued on October 10, 1923, in Beijing, for the whole version of the Constitution of the Republic of China, please see at: http://fzs.cupl.edu.cn/resource/flsl_4/flsl_4_p7.htm
[93] The Constitution was passed on December 25, 1946, and was issued on January 1, 1947, in Nanking, for the whole version of the Constitution of the Republic of China, please see at: http://zh.wikipedia.org/wiki/%E4%B8%AD%E8%8F%AF%E6%B0%91%E5%9C%8B%E6%86%B2%E6%B3%95
[94] The Constitutional Outline was issued on November 7, 1937, in Ruijin, Jiangxi province. For the whole version of the Constitutional Outline of the Chinese Soviet Republic, please see: http://news.xinhuanet.com/ziliao/2004-11/27/content_2266970.htm

of the People's Republic of China are equal before law." This provision established the constitutional principle of equality before law for all citizens in this newly founded republic and it is henceforth the constitutional principle providing Chinese equal protection of law. All these constitutional provisions provide us a simple fact that it is our legal tradition to respect the right to equality. Chinese people should be confidently certain that the right to equality is not something recently transplanted from the west but has been in our constitutions for almost a century. They deserve it because they are entitled to.

IV. The Institutional Barrier and a Discussion

The conceptual barrier exists in the process when an injurious experience emerges and transforms into a legally redressable dispute. It manifests in terms that people are not able to perceive discrimination, tolerate it or let injurious experience go unnoticed, or do not know how to respond to it. The conceptual barrier seen among Chinese workers reflects the way Chinese people perceive, understand and respond to discrimination. Although the formation of the conceptual barrier has deep cultural, traditional and historical reasons, it substantially limits people's ability to challenge discriminatory employment practice. I argued that in order to deal with the conceptual barrier, it is critically important that Chinese people be educated not to tolerate discrimination and to see discrimination as wrongful and redressable. As noted previously that the dispute resolution process represents a pyramid and an injurious experience needs to go through various steps in order to obtain a final adjudication. In addition to the conceptual barrier—which socio-legal scholars call as naming, blaming and attributing barriers, a disputant must also overcome the institutional barriers in order to get remedies for his or her injurious experience.

The institution barrier may exist as a result of the inconsistency in legislation, the inefficient operation of legal authorities, administrative or judiciary, and the possible corruptions among the legal officials. In dealing with employment discrimination, the institutional barrier imposes significant hardship to people who have successfully overcome the conceptual barrier in perceiving and claiming discrimination, seeking legal remedy in the process of mediation, arbitration and litigation. From this perspective, how well an anti-discrimination regime can be enforced depends to a large extent on how much the institutional barrier can be reduced. This part of the paper attempts to address the institutional barrier and how to enforce Chinese anti-discrimination in employment law. I argue that while it may not be necessary as some people have proposed to create an individual anti-discrimination in employment law regulating workplace discrimination in China, modifications of current fair employment laws is a must. The law shall be revised particularly in three aspects. Firstly, it is critical for the law to distinguish two types of employment discrimination, *i.e.* discrimination by government employers and discrimination by non-government employers. The paper argues that discrimination by government employers should be included in the Chinese administrative litigation system by revising and expanding the scope of acceptable cases prescribed in the current Chinese administrative litigation law. Discrimination by non-government employers should be included in the Chinese civil litigation system by clearly prescribing a protected class in two major laws regulating employment issue in China: the labor law and the employment promotion law. Secondly, the scope of statutory protection should be expanded to cover discriminatory practice occurred before the formation of a contractual labor relationship, for instance, during the process

of hiring. The law must also provide protection against indirect discrimination in employment. Thirdly, the law must provide sufficient incentives for people claiming employment discrimination by prescribing meaningful remedies.

A. An Overview on the Chinese Anti-discrimination System

As noted, attention to and research on employment discrimination issues in China were triggered largely by the emergence of several groundbreaking discrimination cases about a decade ago. By groundbreaking I mean before these cases, no employment discrimination lawsuits were seen in any Chinese courts. I was involved in some of these cases and by personally participating in the litigation, I had the chance to have a practical experience in the system. The following table breaks down those pioneering cases. [95]

Breakdown on Important Employment Discrimination Cases in China

	Defendant	*Court Ruling*	*Quoted Supporting Laws on Anti-discrimination*	*Remarks*
Height Discrimination Case in 2002	Government Agency	Dismissed for lack of legal basis	Article 33 of the Con. Law;	Defendant removed height requirement in their recruitment ads;
HB Discrimination Case in 2003	Government	Partially Win	Article 33 of the Con. Law;	No remedy granted to the plaintiff
Gender Discrimination Case in 2005	Public Institution	Dismissed for lack of legal basis	Article 33 of the Con. Law;	
Age Discrimination Case in 2006	Government	Dismissed for lack of legal basis	Article 33 of the Con. Law;	
Physical Appearance Discrimination Case in 2007	Enterprise	Settled by Mediation in local Arbitration Committee	Article 33 of the Con. Law;	Defendant agreed to enter a three-year employment contract with plaintiff

[95] For the details of these cases, please *see* Jiefeng Lu, Employment Discrimination in China, supra note 58.

From this table, there are three characteristics shared by these cases that worth mentioning. Firstly, we can see that most cases were dismissed by the court for lack of legal basis. Secondly, all cases used the Article 33 of the Constitution as substantive supporting laws for their claims. And thirdly, no remedies were granted to the plaintiff even when the plaintiff won the case. When viewed as a whole the way the legal institutions treat discrimination claims, we can see that there are three levels of barriers posed to a claimant. First, you must convince the court to hear you case, but because of inconsistencies in the labor law system and the narrow scope of protection of relating laws, court often refused to grant judiciary review on employment discrimination claims. Such claim will be dismissed. The second level is, even when a court agrees to hear a case, it may still dismiss the plaintiff's claim by finding such claim not supported by sufficient legal basis. And finally, even the court agrees to hear a case and finds for the plaintiff, no remedies are available to the plaintiff. Under such circumstances, the plaintiff only has a symbolic winning. From a practical perspective, these three levels of barriers have caused great difficulties and disincentives for people to challenge discriminatory employment practice in Chinese courts. I consider them to be the main manifestations of the institutional barrier in the Chinese anti-discrimination legal system.[96]

The reason that a court may refuse to hear a case or dismiss the claims by plaintiff is because the court said Article 33 of the Constitution cannot be used either as supporting laws to file an employment discrimination claim or as a substantive legal basis to vindicate plaintiff's claims. What about the other laws? Can they be used to file and support an employment discrimination claim? At the time when these cases were filed, the Employment Promotion Law of the People's Republic of China, which provides universal right to sue for employment discrimination claims, has not been enacted. And the other major rules—the rules from Chinese labor law system are basically dead rules in regulating employment discrimination. They are dead rules because they are the product of the plan-oriented economy. I argued in the precious chapter that the economic status affects the treatment of employment discrimination in a profound way. In case of China, the legacy from the plan-oriented economy caused great inconsistencies in the Chinese labor law rules in regulating workplace discrimination. For instance, according to the labor law rules, Chinese workers, except for those who are self-employed, are divided into three big categories: (1) The Enterprise Employees, referring to workers employed by enterprises or companies, have employment contracts with their employers, and are regulated by the Chinese Labor Law; (2) The Civil Servants, referring to those who work for the government or government agencies, perform public duties according to law, have been included in the state administrative staffing, have wages and welfare borne by the state public finances, and are regulated by the Chinese Civil Servant Law; (3) Public Institution Employees, referring to people employed by public institutions—some have come under the regulation of Labor Law while others are covered by Civil Servant Law.[97] A different worker status will lead to a different approach for possible legal actions one may take. However, incoherence and contradictions in the relevant regulations have presented hardships for employment discrimination claimants seeking legal protections and legal remedies. In specific, first, for the enterprise employees, Chinese labor law prescribes its application only in cases where the contractual employment relationship exists, while most discrimination in China under current conditions emerges in the process of hiring, which is

[96] Of course, there may be other problems in the Chinese anti-discrimination legal institution, such as the evidence issue, the burden of proof, and possible legal aids to indigent plaintiff, etc.
[97] *See* Jiefeng Lu, Employment Discrimination in China, p179-183, supra note 58.

before the establishment of a contractual employment relationship between the employer and the applicants, it is thus not within the scope of the applicability of the Chinese labor law system; second, for the civil servants, the Administrative Procedure Law of People's Republic of China excludes government employees from seeking judicial recourse with respect to possible discriminatory treatment by government employers; finally, for the public institution employees, as far as filing a claim for discrimination is concerned, the problems for public institution employees generally combine the problems of enterprise employees and civil servants. [98]

Now, classifications based on worker status have become less and less important as China has largely abandoned the plan-oriented economy. The newly enacted law—the Employment Promotion Law provides all workers regardless of their status the right to sue for employment discrimination.[99] However, even with this newly issued law, the number of employment discrimination cases still appeared to be trivial. Strictly speaking, the Employment Promotion Law is not particularly enacted to cope with Chinese employment discrimination issue. The purpose of this law is to promote employment. Article 1 of the law provides that: "this law is enacted to promote employment, promote positive interaction between economic development and increase of employment, and promote the harmony and stability of society."[100] In this law, prohibition on employment discrimination is said to serve the goal of promoting employment. Article 25 of the law provides that the people's governments at all levels shall create an environment for fair employment, eliminate employment discrimination and formulate policies and take measures to support and aid the people who are difficult to get a job.[101] Does prohibition on employment discrimination serve to the promotion of employment? This is debatable. It is obvious that the Chinese legislature considers the purpose of prohibiting discrimination in employment is to promote employment by increasing the number of jobs.[102] And promoting employment is important in maintaining the harmony and stability of the Chinese society.[103] But we can argue that prohibition on discrimination only excludes employers from considering certain traits or factors from their decision-making process with respect to an employment practice. It barely has connection with or serves to promote the number of employment positions. As the United States Supreme Court said in *Griggs v. Duke Power Co.* that "congress did not intend by provisions of Civil Rights Act pertaining to employment opportunities to guarantee a job to every person regardless of qualifications; the Act does not command that any person be hired simply because he was formerly subject of discrimination, or because he is a member of a minority group; discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed; what is required by Congress is

[98] *See Id.*
[99] Article 62 provides that anyone who violates this Law due to employment discrimination, workers may lodge a lawsuit in the people's court, *see* The Employment Promotion Law of the People's Republic of China, adopted at the 29th session of the Standing Committee of the Tenth National People's Congress of the People's Republic of China on August 30, 2007, and was promulgated and came into force as of January 1, 2008.
[100] *See Id* at Article 1.
[101] *See Id* at Article 25.
[102] In addition to Article 1 and Article 25, Article 2 and Article 5 also reiterate the importance of increasing employment. Article 2 provides that the state highlights the increase of employment in the development of economy and society, implements active employment policies, upholds the guiding principles of workers choosing their own jobs and the market regulating employment and the government promoting employment, and increases employment through multiple channels. Article 5 provides that The people's governments at and above the county level shall regard the increase of employment as an important goal for the development of economy and social development, integrate it in the plan on development of national economy and society and work out medium and long term plans and annual work plans on promoting the increase of employment. *See Id* at Article 2 and Article 5.
[103] *See Id* at Article 1.

removal of artificial, arbitrary, and unnecessary barriers to employment when barriers operate invidiously to discriminate on basis of race or other impermissible classification."[104]

To some extent, the kinds of remedies a law provides and whether these remedies are effective are critical elements to evaluate whether a law is good law. Remedies are important means to serve the purpose a law enacted to achieve because sound legal remedies provide incentives for people to use the law to challenge illegal practice the law designed to eliminate. Remedies also serve to deter violations by prescribing sanctions. This leads us to another major barrier in the current Chinese anti-discrimination legal system—lack of meaningful remedies for people claiming employment discrimination. As shown in the case breakdown table, in the famous HB discrimination case, the court actually ruled for the plaintiff and supported some of his claims. However, no remedies were granted because the court said remedies would be granted only if the law provides so, but no remedies were prescribed in the law for employment discrimination claims. Even under the newly enacted Employment Promotion Law, there is only a very general provision which say that "for anyone who violates this law by impairing the legitimate rights and interests of workers and causing property losses or other damage, he shall bear civil liabilities. If any crime is constituted, he shall be subject to criminal liabilities."[105] Many scholars have commented that such provision in the law is far away from sufficient in remedying employment discrimination claimant.[106] Lack of meaningful remedies is a major problem in the Chinese anti-discrimination legal system. It acts as a disincentive for people to use legal channels to challenge employment discrimination. Especially in light that many employment discrimination plaintiffs may be the group of people who are economically disadvantaged, if people see no effective remedies even after winning the case, we can hardly imagine they will be willing to hire a lawyer to bring such dispute to the court.

B. Measures to Tackle Institutional Barriers and A comparative View

The above discussion revealed from the practical approach the barriers existed in the current Chinese anti-discrimination legal system in dealing with workplace discrimination. These barriers have substantially limited people's ability to challenge discriminatory employment practice through current anti-discrimination legal institutions. To make the Chinese anti-discrimination system work in an effective way, we must resolve these barriers. One way to resolve these barriers is to totally tear down the current anti-discrimination system and then build a new one. Some people in China have proposed that China should adopt a new specially designed individual anti-discrimination law in response to widespread employment discrimination;[107] and China should create a new specially designed administrative agency resembling the Equal Employment Opportunity Commission (EEOC) in the United States in enforcing anti-discrimination laws.[108] I tend to believe that a revision on the current laws may

[104] *See* Griggs v. Duke Power Co., 401 U.S. 424.
[105] *See* Article 68, supra note 99.
[106] *See e.g.* Ning Chengli, The Prohibition on Employment Discrimination in the Perspective of Humanism, Legal Forum, No. 2 (Volume 24, Ser. No. 122), March 2009; Ding Daqing, On Defects and Perfection of Agricultural Workers' Rights to Equal Employment in the Law of PRC on Promotion of Employment, Northern Legal Science, Volume 3, 2010; Han Guijun and Liu Jin, Employment Promotion Law from Perspective of Social Harmony, Law Review, Volume 5, 2008.
[107] *See* e.g. Cai Dingjian (chief editor), The Employment Discrimination in China: Current Conditions and Anti-discrimination Strategies, China Social Science Press, p43 (2007); Li Weiwei and Lisa Stearns (chief editors): Employment Discrimination: International Standard and National Practice, China Law Press, p240-241 (2007).
[108] *See. e.g.* Zhang Weidong, On Equal Right of Employment, Political Science and Law Journal, Issue 2, 2006, p18-25

serve the goal of reviving Chinese anti-discrimination legal institutions. Enacting new laws may not be necessary, since the problem in China is not how many laws we need, but how to make laws work. As listed in the very beginning, China does have a large volume of laws and regulations in regulating employment discrimination in the Chinese workplace. The real issue is how they can be best functioned in accordance with Chinese reality.

a. Distinguishing Two Types of Employment Discrimination Claims and Separating the Administrative Claims from the Civil Claims

As analyzed, the first issue is the barrier lies between a discrimination claimant and the court in terms of the difficulties an individual has to bring a lawsuit to court. In the dispute pyramid, the grieved individual falls off the pyramid instantly if the court is not able to hear the dispute. Such barrier must be cleared and the law must be revised to make it easier for an individual to bring an employment discrimination claim. To do so, we need first to distinguish in China two types of employment discrimination, *i.e.* discrimination by government employers and discrimination by non-government employers. The purpose for distinguishing these two types of discrimination is due to the unique setting of Chinese courts system. The people's courts are generally divided into three divisions: civil, criminal and administrative. Each division hears the corresponding type of cases. Typically, the civil cases involve disputes between civil entities, such as individuals and companies. Administrative cases are those brought by individuals against government entities. Criminal cases are prosecutions against individual or certain entities in violation of the Chinese criminal code. Currently there is no provision in the Chinese criminal code that imposes criminal liability on employment discrimination violators. Cases claiming employment discrimination are either civil cases, if defendant is a non-government employer or administrative case if the defendant is a government employer. A civil division of people's court will not hear an employment discrimination claim by an individual if it is against a government employer. Vice versa, an administrative division of people's court will dismiss an employment discrimination claim by an individual if it is against a company.

In addition to the unique setting of the Chinese courts system that distinguishing civil and administrative claims, there are practical motivations why administrative employment discrimination claims being separated from civil claims. That is, in China the government employers are considered to be the largest discrimination imposers. Every year, numerous job applicants are denied government employment because they are too short, too fat, too old, or for other various reasons. The central national government employee recruitment exemplifies this discrimination: each year a large portion of applicants are screened out in the qualification examination process. For instance, in 2004, 178,752 people, which is 49.62% of the total registered applicants, were thrown out and, in 2005, 221,896 people, or 40.97% of the total registered applicants, were turned down.[109]

According to the Chinese law, all administrative claims must be brought to the administrative division of the people's court based on the Administrative Procedure Law of the People's

(proposing that China should create an equal employment opportunity commission in the labor and social security department); Zeng Xun, Enlightenment from the United States Anti-discrimination in Employment Legislation, South China Journal of Economic, Issue 5, 2003, p73-76 (suggesting a creation of a similar administrative agency in China as the equal employment opportunity commission in the United States).

[109] *See* Jiefeng Lu, Employment Discrimination in China, p139, supra note 58.

Republic of China.[110] Article 2 of the Administrative Procedure Law provides that a citizen, legal person or other organizations have the right to bring a lawsuit to the people's courts if they consider that a concrete administrative action by administrative organs or personnel infringes their lawful rights and interests.[111] Does the government employer infringe people's lawful rights and interests by turning down their application for government employment, and thus give affected people the right to file an administrative lawsuit? If so, what kinds of lawful rights and interests does the government employer infringe? Legal scholars in China have argued that if an employer fails to employ someone for discriminatory reason, the employer infringes that person's right to work and right to subsistence.[112] But we have more authoritative sources to claim that discriminatory employment practice by government employers infringes people's lawful rights and interests. That source lies in the Chinese Constitution. The government was created as the executive body according to the Chinese Constitution. The Constitution grants powers to all levels of government in China.[113] Article 42 of the Constitution provides that citizens of the People's Republic of China have the right to work.[114] Article 42 further provides that the government shall create conditions for employment through various channels, enhance occupational safety and health, improve working conditions and, on the basis of expanded production, increase remuneration for work and welfare benefits.[115] If during the process of selecting government employees, the government adopts discriminatory employment practices, it infringes the lawful rights and interests provided by the Constitution. Another argument that government employers' discriminatory employment practice infringes people's lawful rights and interests can be made based on the Preamble and the Article 2 of the Constitution. The Preamble of the Constitution declares that Chinese people are the masters of the country.[116] Article 2 provides that all power in the People's Republic of China belongs to the people.[117] The people administer state affairs and manage economic, cultural and social affairs through various channels and in various ways in accordance with the law.[118] By becoming a government employee, a citizen exercises the administration of state powers that is granted by the Constitution as the master of the country. If government denies to a citizen such power by unlawful discrimination, it infringes people's lawful rights and interests.

The Constitutional ground makes it sufficient for an individual to file an administrative lawsuit to administrative division of people's court based on Article 2 of the Administrative Procedure Law that government employer's discriminatory employment practice infringes that individual's

[110] The Administrative Procedure Law of the People's Republic of China was adopted at the Second Session of the Seventh National People's Congress on April 4, 1989, promulgated by Order No.16 of the President of the People's Republic of China on April 4, 1989, and effective as of October 1, 1990.
[111] *See Id* at Article 2. A concrete administrative action is different from an abstract administrative action. Abstract administrative action means general policy making functions by administrative agencies, and those rules and regulations, or decisions and orders with general binding force formulated and announced by administrative organs. *See* Jiang Bixin, The Administrative Procedure Law and the Abstract Administrative Action, Administrative Law Review, Volume 3, 2009.
[112] *See e.g.* Han Guijun and Liu Jin, Employment Promotion Law from Perspective of Social Harmony, Law Review, Volume 5, 2008; Ning Chengli, The Prohibition on Employment Discrimination in the Perspective of Humanism, Legal Forum, No. 2 (Volume 24, Ser. No. 122), March 2009; Zhu Yingping, The Constitutional Protection of Equality in Employment for Chinese Citizens, Legal Science Monthly, Volume 8, 2002.
[113] *See* Chapter Three of the Constitution of the People's Republic of China, adopted at the Fifth Session of the Fifth National People's Congress on December 4, 1982 and amended in 1988, 1993, 1999 and 2004.
[114] *See Id at* Article 42.
[115] *See Id.*
[116] *See Id* at the Preamble of the Constitution.
[117] *See Id* at Article 2.
[118] *See Id.*

lawful rights and interests. Thus, Article 2 of the Administrative Procedure Law seems to be a good source of law for people to challenge employment discrimination by government employers. However, the tricky thing also comes from the Administrative Procedure Law. Article 12 of the Administrative Procedure Law provides that people's courts shall not accept suits brought by citizens, legal persons or other organizations against any of the following matters: decisions of an administrative organ on awards or punishments for its personnel or on the appointment or relief of duties of its personnel.[119] This provision explicitly exempts the government employer's action on appointment or relief of duties of its personnel from the judicial review of the court. It basically closes the door of the court for employment discrimination claims against the government even the government employment action infringes the lawful rights and interests of people. It creates a concrete barrier for employment discrimination claimants who are in seek of judicial adjudication on governmental discriminatory employment practice.

The reason why Article 12 of the Administrative Procedure Law exempts the government employer's action on appointment or relief of duties of its personnel from the judicial review is unknown so far. Neither legislative interpretation nor judiciary interpretation has been seen so far regarding the meaning of such provision in the administrative procedure law. It is my guessing or a possible reason that at the time when the Administrative Procedure Law was drafted and issued, the legislature did not expect that employment discrimination will become an issue in the process of government employee recruitment. After all, this law was adopted in early 1990's—only a decade and some years after China abandoned the plan-oriented economy in late 1970. But anyway, nowadays, the government employer has become giant employment discriminator. It is necessary to subject government employment actions under the scrutiny of judicial review. To achieve so, the Administrative Procedure Law must be revised. Section (3) of Article 12 of the Administrative Procedure Law shall be abolished. Or there must be an additional provision to the Administrative Procedure Law that very explicitly grants the administrative division of people's court the power to review government employment practices.

b. Expanding the Scope of Protection against Discrimination in Civil Claims to Include Discrimination before the Formation of Employment Contract and the Indirect Discrimination

Those claims for employment discrimination not involving government employers are required under the Chinese laws to be filed in the civil division of people's court. I argued in the previous chapters that creating a new special individual law dealing with employment discrimination may not be necessary because China does have a system with sophisticated anti-discrimination rules. We do not need more laws. What we need to do is to make these rules workable and effective in dealing with employment discrimination in the Chinese workplace. To achieve so, we shall clarify the confusions, resolve the inconsistencies and expand the scope of protections in the existing anti-discrimination laws.

Currently, there are four basic laws, *i.e.* the Labor law, the Employment Promotion Law, the Law on the Protection of Rights and Interests of Women, and the Law on the Protection of Disabled Persons that provide a protected class against discrimination in China. The laws for women and

[119] *See* Article 12 of the Administrative Procedure Law, supra note 110.

disabled persons prohibit discrimination against women and people with disabilities on a wide range of their social life, among which employment is an important area. These two laws can be viewed as special laws for particular protection purpose. They seem to be well designed and their protections against gender-based and disability-based discrimination in employment are clear and consistent. Take the law for disabled people as an example, the law defines disabled person as a person who suffers from the loss or abnormity of a certain organ or function, psychologically, physiologically or in human structure, and has lost all or in part the ability to normally carry out certain activities.[120] The law prohibits employment discrimination against people with disabilities in terms of recruitment, promotion, compensation, determination of technical and professional titles, welfare, rest and vacation, social insurances, etc.[121] Where any of the lawful rights and interests of a disabled person is infringed upon, the disabled person shall have the right to require the relevant department to deal with it, or apply to the arbitral institution for arbitration, or bring a lawsuit in the people's court according to law.[122] Where anyone, in violation of this Law, discriminates against a disabled person in employment or any other aspect, the relevant competent authority shall order correction; and the disabled worker may bring a lawsuit in the people's court.[123] The Law on the Protection of Rights and Interests of Women has similar provisions to guarantee that women have equal rights in employment opportunities.[124]

1. Regulating Employment Discrimination before the Formation of the Contractual Employment Relationship

Compared with the specially designed laws for women and disabled persons, the Labor Law and the Employment Promotion Law can be viewed as general laws providing protection against employment discrimination based on certain traits. In specific, the Labor Law prohibits discrimination based on nationality, race, sex, or religious belief.[125] The Employment Promotion Law prohibits discrimination based on ethnicity, race, gender, religious belief, migrant worker status, carrier of an infectious disease status, etc.[126] As discussed previously, because the Labor Law only applies to situations where there is an employment relationship between the employer and employee,[127] it possesses substantial limitations in regulating employment discrimination. For instance, if an employer refuses to hire an applicant because the applicant is a Catholic, the Labor Law is not applicable since there is no employment relationship between the employer and the applicant. But the employer's practice of refusing to hire the applicant because of his religious belief obviously is religion-based discrimination. The Employment Promotion Law eliminates the requirement of an employment relationship to invoke its application. It in theory offsets the shortcomings of the Labor Law in regulating employment discrimination in the

[120] *See* Article 2 of the Law of the People's Republic of China on the Protection of Disabled Persons, amended and adopted at the 2nd Session of the Standing Committee of the 11th National People's Congress on April 24, 2008, promulgated, and became effective as of July 1, 2008..
[121] *See Id* at Article 38.
[122] *See Id* at Article 60.
[123] *See Id* at Article 64.
[124] *See* Article 22-29 of the Law of the People's Republic of China on the Protection of Women's Rights and Interests, adopted at the 5th Session of the Seventh National People's Congress on April 3, 1999 and amended according to the Decision of the 17th Session of the Standing Committee of the Tenth National People's Congress about Amending the Law of the People's Republic of China on the Protection of Women's Rights and Interests on August 28, 2005.
[125] *See* Article 12 of the Labor Law of the People's Republic of China, which was adopted at the Eighth Meeting of the Standing Committee of the Eighth National People's Congress on July 5, 1994, effective as of January 1, 1995.
[126] *See* Article 25-31 of the Employment Promotion Law, supra note 99.
[127] *See* Article 2 of the Labor Law of the People's Republic of China, supra note 125.

process of hiring. However, from a practical point of view, it is still unsatisfactory because the provisions in the law are too general and lack clarity.

First of all, it is worth mentioning that discriminatory employment practice in the process of hiring is considered to be the most rampant and overt forms of employment discrimination in China.[128] Discriminatory practice often involves the publication of notice or advertisement indicating preference, limitation or discrimination. Even nowadays, statements such as "prefer man" or "only man" included in job advertisements are widely seen.[129] The Chinese Labor Law can do nothing about this. Neither can clear provisions be found in the Employment Promotion Law. For a comparative purpose, let's see how the anti-discrimination laws in the United States regulate similar issues. Section 704 (b) of Title VII of the Civil Rights Act of 1964 provides that it is an unlawful employment practice for an employer, labor union, or employment agency to publish any notice or advertisement indicating any preference, limitation, specification, or discrimination in employment based on race, color, religion, sex, or national origin.[130] Section 4(e) of the Age Discrimination in Employment Act (ADEA) contains a similar provision that prohibits age-based want ads. It is provided that "it shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age."[131] The intent of the law makers in the United States to proscribe discriminatory employment practice in want ads is very clear indicated from these two laws. To effectively deal with the rampant discriminatory employment practice in want ads in China, it is very necessary for the Chinese law to include provisions that specifically and clearly prohibit those ads indicating any preference, limitation, specification, or discrimination in employment based on unlawful considerations. In addition, in practice, there are two questions we shall pay attention to in regulating discriminatory want ads in China. The first question is what kind of language can be viewed as discriminatory and how do we judge them? Are there any trigger words based on which we say that want ads containing such words are illegal? Let's take a look at how in the United States want ads with age preference are treated. In the United States, although want ads traditionally have not been segregated by age, they often have contained languages indicating a preference for younger applicants. In judging whether want ads with certain words indicating age preference are illegal, the court emphasized that such ads must be considered in the context. The court rejected the argument that want ads with words such as young or recent college graduate are illegal per se. For instance, in *Hodgson v. Approved Personnel Service, Inc*., the Fourth Circuit rejected the Department of Labor's guidelines, which indicated that certain "trigger" words, such as "young," "boy," and "recent college graduate," were per se illegal under the ADEA.[132] Instead the court held that the context must be considered. If the trigger words are used as part of a general invitation to prospective customers to use the employment agency's services, the court held, then

[128] *See e.g.* Zhou Wei (chief editor), Employment Discrimination in China: Legislation and Reality, China Law Press (2006); Cai Dingjian (chief editor), The Employment Discrimination in China: Current Conditions and Anti-discrimination Strategies, China Social Science Press (2007).
[129] For instance, reviews of job advertisements appearing in four issues of Labor Journal (Volume 18, 19, 20, 21) found that 26% of advertised positions explicitly specified "men only." *See* Jiefeng Lu, Employment Discrimination in China, supra note 58.
[130] 42 U.S.C.A. § 2000e-3(b).
[131] 29 U.S.C.A. § 623(e).
[132] *See* Hodgson v. Approved Personnel Service, Inc., 529 F.2d 760, 765 (4th Cir. 1975).

they are not illegal; if they refer to qualifications for a specific job, then they are.[133]

The second question relates to the qualification of the plaintiff to file a lawsuit challenging discriminatory want ads. In employment discrimination cases, as in other civil cases filed in Chinese courts, a plaintiff must have certain qualifications in order to file a lawsuit in people's court. Article 108 of Chinese Civil Procedure Law provides that the following conditions must be met before a lawsuit can be filed: (1) the plaintiff must be a citizen, legal person, or an organization having a direct interest with the case; (2) there must be a specific defendant; (3) there must be a concrete claim, a factual basis, and a cause for the lawsuit.[134] The issue with discriminatory want ads is whether the individual plaintiff has a direct interest in filing a claim for reading the published discriminatory want ads. In the well-known Height Discrimination case *Jiang Tao v. the People's Bank of China Chengdu Branch* in 2002, the court dismissed the plaintiff's case in part because the court found that the actions of the defendant, *i.e.* placing discriminatory want ads in the local newspaper did not cause factual and direct harm to the plaintiff who saw the ads.[135] Did the court properly rule that the plaintiff did not have direct interest in the case? For a comparative purpose, in the United States, to bring an action under section 704 (b) of Title VII of the Civil Rights Act, which provides that it is an unlawful employment practice for an employer, labor union, or employment agency to publish any notice or advertisement indicating any preference, limitation, specification, or discrimination in employment based on race, color, religion, sex, or national origin,[136] an individual must be aggrieved. In *Hailes v. United Air Lines*, the Fifth Circuit held that for purposes of section 704 (b), an aggrieved person is someone who is "able to demonstrate that he has a real, present interest in the type of employment advertised and is able to show he was effectively deterred by the improper ad from applying for such employment."[137] The "real and present interest" standard the court used is a more objective standard, and the plaintiff's feeling of deterrence by the improper ads is a more subjective standard. Using the combination of objective and subjective standards to evaluate the impact of a discriminatory employment advertisement on the plaintiff is a proper way to determine whether the plaintiff has a real case.

In addition, Article 108 of Chinese Civil Procedure Law also provides that for a case to be accepted by the court there must be specific defendants. The employer who places the ads is obviously a defendant. What about the liabilities of the media, such as newspaper, websites and TVs, that are publishing discriminatory want ads? Nothing in the Chinese law has any clues as to this question. In the United States, although employers, unions and employment agencies would violate Title VII by placing gender-segregated want ads, it was not clear from the statute and regulations whether newspapers could be held responsible under Title VII for running the discriminatory ads.[138] Based on the legislative history of Title VII, the courts have been

[133] *See Id.*
[134] *See* Article 108 of the Civil Procedure Law of the People's Republic of China, adopted on April 9, 1991 at the Fourth Session of the Seventh National People's Congress, and revised according to the Decision of the Standing Committee of the National People's Congress on Amending the Civil Procedure Law of the People's Republic of China as adopted at the 30th Session of the Standing Committee of the 10th National People's Congress.
[135] *See* Zhou Wei (chief editor), Employment Discrimination in China, page 197, supra note 128.
[136] 42 U.S.C.A. § 2000e-3(b).
[137] *See* Hailes v. United Air Lines, 464 F.2d 1006 (5th Cir. 1972) (in Hailes, the court held that the plaintiff had met this test because, even though he did not apply for United's "stewardess" position under a "help wanted-female" column, he had been rejected because of gender when he had answered a similar ad run by another airline.).
[138] *See* Mark A. Rothstein, Charles B. Craver, Elinor P. Schroeder & Elaine W. Shoben, Employment Law Treatise, p8, Volume 1, West Group, (4th ed. 2009).

unanimous in holding that newspapers are not liable for these ads under Title VII.[139] However, some states have enacted "aiding and abetting" laws, which have been used to charge newspapers with violations for running discriminatory want ads.[140] It is necessary for the Chinese legislature to consider the liabilities for the media that are running discriminatory employment advertisements. The Employment Promotion Law shall include a provision prescribing liabilities for posting or running discriminatory employment ads. Imposing certain level of liabilities will deter the publication of discriminatory employment advertisement.

2. Regulating both Direct and Indirect Discrimination in Employment in China

Most employment discrimination seen in the Chinese workplace now can be described only as "overt and blatant".[141] Such discrimination occurs as a result of intentional differential treatment based on group-based stereotypes and prejudices. The existing Chinese anti-discrimination rules prohibit the intentional infliction of prejudice upon individuals on the basis of statutorily-protected characteristics such as race, sex, religion, etc. These rules can be used to deal with the overt discrimination. For instance, gender-based employment discrimination can be challenged if an employer says "prefer man", "man only", or "women do not apply". However, what about those facially neutral rules and practices by employers? For instance, in the above scenario when instead of overtly saying no to females, employers may apply strategic measures by requiring that applicants be "very good at playing soccer".[142] Is such experience qualified as gender based discrimination and thus giving an affected female applicant the right to sue discriminating employer under current Chinese laws? For another example, while Chinese laws explicitly prohibit discrimination against ethnic minorities, is it an illegal employment practice for an employer to require applicants to be fluent in speaking the mandarin and free of accent, in light that most ethnic minorities can at most speak mandarin with accent? We cannot find any answers or clues as to these questions from the current anti-discrimination rules in China. That means, under current Chinese rules, an affected ethnic minority applicant would probably not be able to challenge the employment practice of requiring candidates to speak accent free mandarin in order to be hired as ethnicity discrimination. This has to be changed.[143]

Looking globally, early anti-discrimination laws focused on differential treatment and discriminatory intent. Later enactments and judicial precedent also prohibit the unjustifiable failure of neutral practices to take into account relevant differences when the effect of the practice produces disadvantage for a particular group. Employers may assert that they do not discriminate since they treat all applicants or employees the same. However, facially neutral rules and practices may result in serious disadvantages for groups because of race, sex, disability, etc. Take the accent-free mandarin requirement for employment as an example again. Such requirement seems fair because it applies to all applicants. However, most ethical minority

---

[139] *See* e.g., Barns v. Rourke, 8 FEP Cases 1112 (M.D. Tenn. 1973); Greenfield v. Field Enter., Inc., 1972 WL 155 (N.D. III. 1972). But cf. Morrow v. Miss. Publisher Corp., 1972 WL 236 (S.D. Miss. 1972) (Newspaper may be liable if it participated in the decision to place the ads in a gender-segregated column.).
[140] *See* Mark A. Rothstein, et al, Employment Law Treatise, p9, supra note 138.
[141] *See* Jiefeng Lu, Employment Discrimination in China, supra note 58.
[142] *See Id.*
[143] Although Chinese anti-discrimination laws have not addressed the indirect discrimination issue so far, some Chinese scholars have proposed amendments to include provisions in existing laws regulating indirect discrimination in the Chinese workplace, *see* Zhou Wei, Academic Proposal on the Draft of Anti-discrimination Law of People's Republic of China, Hebei Law Review, Vol. 25, No. 6, 2007.

candidates will be adversely affected. Chinese law must be adjusted to deal with both the direct discrimination and the indirect discrimination.

Direct discrimination is addressed at some countries, for instance in the US, as disparate treatment. Direct discrimination occurs when "rules, practices and policies exclude or give preference to certain individuals just because they belong to a particular group".[144] Examples of forms of direct discrimination include "job advertisements stating that persons above a certain age need not apply, or human resource practices that require regular pregnancy tests of female employees with a view to refusing to hire or even dismissing those who happen to be pregnant."[145] The underlying theory for legislations eliminating direct discrimination is the idea of formal equality, also known as formal justice, aiming at the goal that like cases must be treated alike, and different cases must be treated differently. This principle is largely evolved from the Aristotelian concept of distributive justice, as Aristotle asserted that "All men agree that what is just in distribution should be according to merit of some sort".[146] The concept of direct discrimination has proved to be effective in addressing extreme and overt forms of discrimination where discriminatory intent and gross prejudice are clearly apparent or poorly disguised.[147] When a claim of direct discrimination is made the court or enforcement agency is typically concerned with the following three questions: 1) whether the complainant has been treated less favorably than others who are in comparable circumstances as the complainant; 2) Whether there is a causal connection between that less favorable treatment and a statutorily-protected characteristic such as sex, ethnicity, disability, etc.; 3) Whether there is an exception or justification which permits the less favorable treatment.[148] Anti-discrimination laws have been successful in reducing direct discrimination by explicitly laying out certain forms of discrimination as arbitrary, unacceptable and illegal.

Indirect discrimination refers to apparently neutral norms and practices that have a disproportionate effect on one or more identifiable groups, without justification. By definition, indirect discrimination involves neutral rules or practices, neutrally applied. It has therefore always been accepted that proof of indirect discrimination does not require a showing of discriminatory intent. European Union Directives provide one statutory definition of indirect discrimination as follows: "indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons [having a protected characteristic] at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary."[149] It is also categorized as disparate impact type of discrimination. In a typical disparate impact case *Griggs v. Duke Power Co.*,[150] the disputed employment practices involve a requirement of having a high school diploma and passing scores on two general intelligence tests in order to be considered for hiring or to be promoted to higher-level departments, from which

[144] *See* Equality at Work: Tracking the challenges: Global Report under the Follow-up to the ILO Declaration of Fundamental Principles and rights at Work 2007, International Labor Office, Geneva, paragraph 28.
[145] *See Id.*
[146] Aristotle Book E, section 6 (1131a:25).
[147] *See* Li Weiwei and Lisa Sterns (chief editors), Employment discrimination, p20, supra note 34.
[148] *See Id.*
[149] Article 2 in all three directives: Equal Treatment Directive 76/207/EEC (as amended by 2002/73EC); the Race Directive 2000/43/EC and the Employment Directive 2002/78/EC. In the Employment Directive the definition of indirect discrimination differs somewhat with respect to disability discrimination.
[150] 401 U.S. 424.

African-Americans had formerly excluded entirely. These are facially neutral criteria.[151] However, evidence before the Court showed that 34% of white males in North Carolina, compared to only 12% of black males, had completed high school.[152] The Court also found in an unrelated case that 58% of whites compared to only 6% of blacks had passed a similar battery of tests. The Court interpreted the relating anti-discrimination law, the Title VII of Civil Rights Act as not only proscribing overt discrimination but also practices that are fair in form but discriminatory in operation. It further reiterated the objective of the law-makers in enacting the Title VII as to "achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees" and "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices."[153] In addition, the Court proposed a job performance related criteria in judging the reasonableness of facially neutral tests: "Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins….What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract."[154] The second example of how courts have defined the concept of indirect discrimination is the Canadian O'Malley case.[155] The complainant worked in a department story which required all its sales employees to work on Saturdays. However, the complainant belonged to a religion that forbids its members to work from Friday sundown to sundown Saturday. As a result the complaint lost her full-time position because she could not follow the Saturday work rule.[156] In finding this was a case of indirect discrimination, the Court said:"[Indirect discrimination] arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force."[157] From the above two cases we can find two of the key analytic questions that courts consider in establishing and remedying cases of indirect discrimination. First, has a neutral employer practice resulted in disproportionate disadvantage for a protected group? Second, is there a justification which permits the employer to take the apparently discriminatory action? If the answer to the first question is "yes" and to the second question is "no", then court probably will find the employer liable for alleged discriminatory employment practice for indirect discrimination.

We do not expect Chinese anti-discrimination laws to regulate indirect discrimination in employment in the near future, since at current stage direct discrimination is the major focus of Chinese anti-discrimination laws. However, as the anti-discrimination development in China will inevitably continue to reach to a higher and newer stage, regulating indirect discrimination in

[151] *See Id.*.
[152] *See Id.* at n.6.
[153] *See Id.*
[154] *See Id* at 436.
[155] *See* Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd., [1985] 2 S.C.R. 536.
[156] *See Id.*
[157] *See Id. at* paragraph 18.

employment will become imperative in China. The legislature and the judiciary shall be prepared in advance so that when the time comes, both the legislature and the judiciary can make prompt response to deal with more covert forms of employment discrimination.

c. Providing Meaningful and Effective Remedies for Employment Discrimination Claims in China

If delayed justice is not justice, a law without meaningful remedy is not a just law. In practice, a major issue for employment discrimination litigation in China is lack of effective remedies for discrimination claimants. In one of those high profile employment discrimination cases, even though the trial court ruled for the plaintiff who asserted Hepatitis B based discrimination, no remedies were granted because the court was not able to find a supporting law based on which possible remedy could be granted.[158] Lacking of clear remedies for discrimination claims is not only a big loophole in the anti-discrimination legal institutions in China; it also serves as a disincentive for people who would like to challenge discriminatory employment practice. The latter reinforces the conceptual barrier in terms that people are less willing to bring an employment discrimination claim to court if he or she sees no effective remedies even with a winning result. We'll first take a look at the provisions in Chinese anti-discrimination laws that may be used to support to remedy employment discrimination claims in litigation.

Although Article 12 of the Labor Law prohibits discrimination based on nationality, race, sex, or religious belief, no specific remedies are prescribed in the law for violations on employment discrimination.[159] However, if we make an argument that discriminatory employment practice is a general wrongdoing by an employer, then there are possible administrative and civil liabilities that can be imposed to the employer. According to Article 89 of the law, if any practice of an employer runs counter to the provisions of the law, the employer "shall be given a warning by labor administrative departments, ordered to make corrections, and asked to hold responsibility over harms that may be done to laborers."[160] Here, warning by labor authority and order to make corrections are administrative liabilities; responsibilities over harms to laborers are civil liabilities. But the law does not specify what kind of harms can be remedied to laborers that are generated by employment discrimination. In fact, as far as this author has known, Article 89 of the Labor Law has never been used as a legal basis for remedies on employment discrimination claims. The Employment Promotion Law was enacted quite recently and its enactment was believed in large part as a legislative response to demands from the civil society on regulating employment discrimination in China.[161] The law prohibits discrimination based on ethnicity, race, gender, religious belief, migrant worker status, carrier of an infectious disease status.[162] The law gives any individual the right to sue if such individual suffers from employment discrimination.[163] However, provisions in the Employment Promotion Law that can be used to remedy employment discrimination claims are so general that they are almost non-feasible. Article 68 of the Employment Promotion Law provides that "for anyone who violates this Law

[158] *See* Jiefeng Lu, Employment Discrimination in China, supra note 58.
[159] Chapter 12 of the Labor Law is about "Legal Responsibilities" of violations of the law. No single provision remedying employment discrimination is found in this chapter, *see* Labor Law, supra note 125.
[160] *See Id* at Article 89.
[161] *See* Jiefeng Lu, Curb Your Enthusiasm, supra note 7.
[162] *See* Chapter Three of The Employment Promotion Law, supra note 99.
[163] *See Id* at Article 62.

by impairing the legitimate rights and interests of workers and causing property losses or other damage, he shall bear civil liabilities. If any crime is constituted, he shall be subject to criminal liabilities."[164] Because the Chinese criminal code does not impose criminal liabilities for discriminatory employment practice,[165] so an employer is subject to civil liabilities only for violations of the Employment Promotion Law for discriminatory employment practice. What kinds of civil liabilities can be imposed to a discriminating employer? The Employment Promotion Law does not provide us an answer to that question. More importantly, the law does not specify what kinds of remedies available to the plaintiff either. The consequence is, although the law authorizes the right to sue to individuals experiencing employment discrimination, it fails to prescribe remedies that will reward such individuals. In order to effectively remedy employment discrimination claimants as well as deter discriminating employers, Chinese anti-discrimination laws must include sufficient remedial measures. In the United States, anti-discrimination laws provide a wide range of remedial measures for employment discrimination claimants. The range of judicial remedial authority is prescribed by section 706 (g) of the Civil Rights Act. This section provides for injunctions and "such affirmative action as may be appropriate," including orders directing reinstatement or hire, back-pay, and other equitable relief.[166] I will examine these remedial measures respectively and see the possibility of using them in remedying Chinese employment discrimination claims.

Back-pay is an important remedial measure for employment discrimination claims in the United States. In addition to Title VII of the Civil Rights Act, back-pay relief is also available in actions brought under the ADEA, the Equal Pay Act, the Rehabilitation Act of 1973, the Uniformed Services Employment and Reemployment Rights Act of 1994, and etc. Before the amended version of the Civil Rights Act of 1991, back pay was the primary monetary relief available to employment discrimination plaintiffs. Now, compensatory and punitive damages are also recoverable in cases of proven intentional discrimination.[167] Back-pay serves to achieve two purposes of Title VII. First, it is to achieve the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination. This was very clearly stated in the Supreme Court case *Albemarle Paper Co. v. Moody*.[168] In this case, the Court held that "make whole" purpose of Title VII was made evident by the legislative history that the provisions "are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible," "the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for unlawful discrimination."[169] The general rationale for the "make whole" is that when a wrong has done and the law gives a remedy, the compensation shall be equal to the injury.[170] "The latter is the standard by which the former is to be measured. The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not

[164] *See* Article 68 of the Labor Law, supra note 125.
[165] *See* Jiefeng Lu, Curb Your Enthusiasm, supra note 7.
[166] *See* 42 U.S.C.A. § 2000e-5 (g)(1).
[167] *See* Barbara Lindemann and Paul Grossman (Editor), Employment Discrimination Law, p2753, 4th Edition, ABA Section of Labor and Employment Law.
[168] 422 U.S. 405, 95 S.Ct. 2362.
[169] Albemarle Paper Co. v. Moody (422 U.S. 405), quoting Congress Record 118 Cong. Rec. 7168 (1972).
[170] Wicker v. Hoppock, 6 Wall. 94, 99, 18 L.Ed.752 (1867).

been committed."[171] The second purpose of Title VII, as the Court observed in *Griggs v. Duke Power Co.*, is a prophylactic one: "it was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." Back-pay has an obvious connection with this purpose. If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a back-pay award that provides "the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history."[172] Thus back-pay serves both to restore discrimination victims to the approximate status they would have enjoyed absent discrimination and to deter employer violations. The Supreme Court held in *Albemarle Paper Co. v. Moody* that back pay may be denied only for unusual reasons which if applied generally would not impede those two remedial objectives.[173] Consequently, whiling recognizing that federal judges enjoy some discretion to withhold any Title VII remedy in particular circumstances, the Court left lower courts with extremely limited discretion to deny back-par relief to prevailing plaintiffs.[174]

Back-pay awards compose several elements. They normally reflect not just lost wages or salary, but also other benefits lost due to discrimination.[175] The first element is wages and salaries. This is the core component of back-pay award, which include such items of lost compensation as overtime, shift differentials, commissions, tips, cost of living increases, merit increases, and raises due to promotions, so long as the plaintiff can prove that he or she would have earned those items absent discrimination.[176] The second element is fringe benefits. These items include vacation pay, pension and retirement benefits, stock options and bonus plans, savings plan contributions, cafeteria plan benefits, and profit-sharing benefits.[177] The third element is interest. According to the Supreme Court decision in *Loeffler v. Frank*, prejudgment interest as part of the back pay remedy in suits against private employers is consistent with the make whole remedial scheme of Title VII.[178] Most courts continue to hold that prejudgment interest may be awarded against public employer defendants.[179] The fourth element of back-pay is the expenses incurred in mitigating damages. Some damage awards account for either increased expenses or expense savings associated with a discharged plaintiff's new position. They are used to modify a plaintiff's gross back-pay award to account for mitigation earnings.[180]

Reinstatement is a preferred remedial measure to compensate for future damages. It makes the victim whole by putting him or her in the position he or she would have occupied in the absence

[171] Griggs v. Duke Power Co., 401 U.S. 424.
[172] Albemarle Paper Co. v. Moody (422 U.S. 405), quoting United States v. N. L. Industries, Inc., 8 Cir., 479 F.2d at 354, 379(1973).
[173] *See Id.*
[174] *See* Harold S., Jr. Lewis and Elizabeth J. Norman, Employment Discrimination Law and Practice (Second Edition) (Hornbook), page 331, West Group Publishing (2004). The circuits continue to recognize that successful Title VII claimants are presumptively entitled to back-pay, *see Id.*
[175] *See* Barbara Lindemann and Paul Grossman (Editor), Employment Discrimination Law, p2759, supra note 167.
[176] *See Id.* at 2759-60.
[177] *See Id.* at 2761.
[178] 486 U.S. 549.
[179] *See* Barbara Lindemann and Paul Grossman (Editor), Employment Discrimination Law, p2766, supra note 167.
[180] *See Id.* at 2769.

of discrimination.[181] However, in case when reinstatement is not feasible, front pay will be awarded instead. In determining whether to order reinstatement or to award front pay, court will consider factors such as whether parties agree that reinstatement is a viable remedy, whether the plaintiff has acquired other work, whether the plaintiff's career goals have changed and whether the plaintiff is able to return to work.[182] There is also a common law concern about the statutory provision for reinstatement orders. Compelled reinstatement was contrary to the common law rule that "equity would not be force the acceptance of unwanted service".[183] The basis for the common law avoidance of such order was a fear that a "court-ordered working relationship would require constant court supervision and would not result in a productive endeavor."[184] But in the context of employment discrimination, the statutory authority for reinstatement orders has prevailed over the common law concerns. The reason that common law concern is less favored is because the Title VII applies to not very small business employers,[185] there is a less concern that a reinstatement order will produce an intolerable situation for the parties. A court may nevertheless deny a reinstatement order on the grounds that the antagonism of the parties would "preclude an effective working relationship."[186] The antagonism must be more than the feelings of hostility that are normally generated in a lawsuit, however. A court may deny the order if the position requires an unusually close relationship, or confidential relationship, between the antagonistic parties.[187] Although reinstatement is the strongly preferred remedy in cases of discriminatory discharge, it will not be ordered where it would produce a dysfunctional working environment or excessive friction, hostility, or antagonism. Courts have found reinstatement inappropriate if some intervening nondiscriminatory event would have ended the plaintiff's employment; if there have been substantial changes in the company that have made reinstatement impracticable; if, in a mixed-motive case, the defendant proves that the plaintiff would not have been (for example) hired, promoted, or retained even in the absence of discrimination; of the plaintiff is not capable of performing the job in question.[188] As mentioned, where reinstatement is not feasible, some courts allow front pay in lieu of reinstatement. For example, front pay in lieu of reinstatement may be granted when no comparable position is available or when the plaintiff's approaching retirement makes the front-pay period of short duration. [189]

An important feature of the remedial provisions of Title VII is the availability of attorneys' fee. Section 706 (k) of Title VII provides that "in any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.[190] The availability of such fees encourages attorneys to take employment discrimination cases even in

[181] *See Id.* at 2801.
[182] *See Id.* at 2802.
[183] *See* Mark A. Rothstein, et al, Employment Law Treatise, p446, supra note 138.
[184] *See Id.*
[185] Title VII defines employer as a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. 42 U.S.C.A. § 2000e(b) (Title VII was amended in 1972 to reduce the threshold for coverage from twenty-five to fifteen employees.).
[186] *See* Mark A. Rothstein, et al, p446, supra note 138.
[187] Berndt v. Kaiser Aluminum & Chemical Sales, Inc., 789 F. 2d 253; Goss v. Exxon Office Systems Company, 747 F. 2d 885.
[188] *See* Barbara Lindemann and Paul Grossman (Editor), Employment Discrimination Law, p2722-23, 4th Edition, ABA Section of Labor and Employment Law.
[189] *See Id.* at page 2723-24.
[190] 42 U.S.C.A. § 2000e-5(k).

the absence of large monetary recovery for the plaintiff. Unlike most civil litigation where the cost are funded through private contingency contracts between the plaintiffs and their attorneys, employment discrimination litigation can proceed without concern about the source of funds for fees if the plaintiff prevails.[191] This difference enables individuals to act as "private attorneys general" to vindicate the national interest is eradicating discrimination in the workplace.[192] The prevailing party in a civil lawsuit in the United States ordinarily does not recover attorneys' fees from the losing party. That is called the "American Rule", that each party bears its own costs of litigation. The rationale for the rule is that there should be no penalty for instituting non-frivolous claims or for asserting non-frivolous defenses.[193] There are a number of exceptions to this rule. One of the most importance exceptions to the rule is the statutory one for civil rights, including provisions for attorneys' fees in each of the employment discrimination acts. When it is the plaintiff who is the prevailing party, the award of fees is supported by the statutory embodiment of the private attorney general theory. When it is the defendant who is the prevailing party, the same rationale does not support the recovery of fees.[194] The general rule for the award of attorneys' fee is that a prevailing plaintiff should be awarded reasonable attorneys' fee absent unusual circumstances.[195] However, there is a practical question, which is, the court must determine whether the plaintiff achieved enough success in the lawsuit to be considered the prevailing party. There were two views as to this question. Under the first view, it was required that a party succeed in the "central issue" in the litigation and "achieve the primary relief sought" in order to be eligible for a fee award.[196] Under the second view, a less demanding standard was applied, "requiring only that a party succeed on a significant issue and receive some of the relief sought in the lawsuit to qualify for a fee award."[197] The Supreme Court adopted the second view in the case *Texas State Teachers Ass'n v. Garland Independent School District* articulating the standard for determining whether a party has "prevailed" in an action.[198] The Court described the minimum threshold for a fee recovery as: if the plaintiff has succeeded on "any significant issue in litigation which achieved some of the benefit the parties sought in bringing suit", the plaintiff has crossed the threshold to a fee award of some kind.[199]

In addition, the 1991 Act provides for punitive damages under Title VII if "if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory

---

[191] *See* Mark A. Rothstein, et al, p457, supra note 138.
[192] Newman v. Piggie Park Enter., Inc., 390 U.S. 400.
[193] *See* Mark A. Rothstein, et al, p457, supra note 138 .
[194] The question of whether a prevailing defendant is entitled to recover attorneys' fee was addressed in Christiansburg Garment Co. v. EEOC. The question before the Supreme Court in Christiansburg Garment Co. v. EEOC was how to interpret the statutory provision for fees to "prevailing parties" when the rationale for such recovery was much stronger for prevailing plaintiffs than for prevailing defendants. The Court rejected the defendant's argument that prevailing defendants should recover attorneys' fees on the same basis as prevailing plaintiffs. The Court held that although the statute simply uses the word "parties," Congress intended plaintiffs to vindicate the public interest as private attorneys general, and the same rationale does not apply to defendant. Nonetheless, there are equitable considerations on the side of prevailing defendants. The Court observed that "many defendants in Title VII claims are small-and moderate-size employers for whom the expense of defending even a frivolous claim may become a string disincentive to the exercise of their legal rights." The Court held that defendants can recover attorneys' fees in a Title VII case "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not in subjective bad faith." By ruling so, the Court rejected the plaintiff's claim that defendants should recover attorneys' fees only when the plaintiff has litigated in bad faith. *See* Christiansburg Garment Co. v. EEOC, 434 U.S. 412.
[195] *See e.g.,* Hensley v. Eckerhart, 461 U.S. 424 (the Court held that prevailing plaintiff should ordinary recover an attorneys' fee unless special circumstances would render such an award unjust).
[196] *See e.g.,* Simien v. City of San Antonio, 809 F.2d 255.
[197] *See* Lampher v. Zagel, 755 F.2d 99.
[198] 489 U.S. 782.
[199] *See Id.*

practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual."[200] This provision is limited to respondents "other than a government, government agency or political subdivision" Some courts had held that for punitive damages a plaintiff must have evidence of egregious behavior beyond the level of intentional conduct necessary to establish the disparate treatment claim.[201]

In sum, a wide range of remedial measures available to employment discrimination claims in the United States, such as back-pay, reinstatement or front pay, award of attorneys' fee and punitive damages, effectively redress discrimination victims. They also serve as a disincentive and deterrence against possible discriminating employers. The Chinese anti-discrimination laws must provide effective remedies for employment discrimination claims. Such remedial provisions shall be included in the Employment Promotion Law explicitly and clearly, although not all remedial measures available to employment discrimination claimants in the United States may be feasible in China. For instance, civil remedies in China reflect a compensatory nature, so punitive damages are not likely an option even for intentional reckless discriminating employers. However, for employers engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to statutorily protected rights of an aggrieved individual, administrative liabilities can be considered. For instance, such employer may be asked to pay a certain amount of money as fine to the labor authority in local government. Also, Chinese law does not support awarding attorneys' fee to any party. In the case of employment discrimination litigation, the plaintiff shall be awarded, in addition to the compensatory damages, the attorneys' fee, if the plaintiff wins his or her claim.

V. Conclusion

Employment discrimination laws forbid employers from considering various attributes, such as race, sex, or religion in making employment decisions. This formal command to disregard particular characteristics of job applicants or workers is based on the premise that bearers of these characteristics should be treated equally with members of some favored comparison group who lack these traits. The problem with China, as this author sees, is not that the law has not prohibited what should have been prohibited according to Chinese culture and tradition; or, the law has prohibited what should have not been prohibited according to Chinese culture and tradition. Rather, the problem relates to (1) people's response to discrimination and discrimination related disputes; and (2) the inconsistencies and issues within its legal system itself. If we have a well designed legal system and people are willing to use that system, then employment discrimination can be properly dealt with.

But because of cultural, traditional or other factors such as government's concern on economic growth, the anti-discrimination notion is not well disseminated. People are not equipped with sufficient knowledge to deal with workplace discrimination. That results in what I call as conceptual barrier. If you don't know you have a right not to be discriminated, you probably won't use that right. But what is the best way to educate people, I think, is using the thing what makes us a Chinese—these resources ingrained in the Chinese culture and tradition: that from

[200] 42 U.S.C.A. § 1981A. This provision is limited to respondents other than a government, government agency or political subdivision, *Id*.
[201] *See* Mark A. Rothstein, et al, p439, supra note 138.

cultural perspective, equality has always been a cherished social value in the Chinese society; that Chinese constitutional legal tradition has always been reiterating the importance of equal rights. As to the institutional barriers, it is critical to distinct two types of employment discrimination, *i.e.* discrimination by government employers and discrimination by non-government employers. The paper argues that discrimination by government employers should be included in the Chinese administrative litigation system by revising and expanding the scope of acceptable cases prescribed in the current Chinese administrative litigation law. Discrimination by non-government employers should be included in the Chinese civil litigation system by clearly prescribing a protected class in two major laws regulating employment issue in China: the labor law and the employment promotion law. The scope of statutory protection should also be expanded to cover discriminatory practice occurred before the formation of a contractual labor relationship and the more covert forms of indirect discrimination. Last but not least, Chinese antidiscrimination law must provide incentives for people claiming employment discrimination by prescribing meaningful remedies.

We do not expect what has been discussed in this paper turns into reality overnight. As mentioned in the very beginning of this paper, regulating employment discrimination in China is one of those profound changes taking place in the Chinese society. A significant characteristic of these changes in China is that they do not come quickly. But we are positive that anti-discrimination in China will move forward.