

Ambivalence and Activism: Employment Discrimination in China

*Timothy Webster**

Chinese courts have not vigorously enforced many human rights, but a recent string of employment discrimination lawsuits suggests that, given the appropriate conditions, advocacy strategies, and rights at issue, victims can vindicate constitutional and statutory rights to equality in court. Specifically, carriers of the hepatitis B virus (HBV) have used the 2007 Employment Promotion Law to bring legal challenges against employers who have discriminated against them in hiring. Plaintiffs' relatively high success rate suggests official support for making one prevalent form of discrimination illegal. Central to these lawsuits is a broad network of lawyers, activists and scholars who actively support plaintiffs, suggesting a limited role for civil society in the world of Chinese law. While many problems remain with employment discrimination, China has made concrete steps toward repealing a legal edifice of discrimination stretching back decades, and reshaping both policies and attitudes to eradicate discrimination in the workplace.

In 2003, two young college graduates almost got jobs in China's elite civil service. Zhou Yichao, handsome and 23, scored well on both the written test and the oral interview, ranking eighth of the 157 applicants. Zhang Xianzhu, 25 and bespectacled, ranked first among the thirty applicants in his hometown. Both men then took medical examinations, the final phase of the Chinese hiring process. Their medical examinations revealed both men carried the hepatitis b virus ("HBV"), rendering them ineligible for government posts, according to provincial regulations on civil service examinations. Both were surprised by this result.

Zhou Yichao first contemplated suicide, but upon reconsideration, bought a paring knife, went to the government

* Lecturer-in-Law & Senior Research Scholar, Yale Law School; Senior Fellow, The China Law Center. I thank Jerry Cohen, Cindy Estlund, Paul Gewirtz, Doug Kysar, Mitch Lasser, Annelise Riles, Randy Peerenboom, and Yan Tian for informative comments at various stages. I also appreciate feedback from audiences at the Social Science Workshop on China at Yale, Clarke Colloquium Series at Cornell Law School, the Law and Society's Association Early Career Workshop, and the Overseas Young Chinese Forum at the University of Chicago.

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office to ask about the results, and then stabbed two civil servants, killing one. Zhang Xianzhu also took an unexpected course of action. He retained a prominent discrimination lawyer and sued the government agency for violating his constitutional rights. Around these two cases—the murder trial of Zhou Yichao, and the administrative litigation initiated by Zhang Xianzhu, a legal movement coalesced. China's HBV community—which at that point comprised a couple of online chat rooms and discussion boards—seized upon these cases to launch a multifaceted campaign to introduce antidiscrimination laws, eliminate employment discrimination, and change social attitudes more generally. Somewhat remarkably, HBV advocates have largely succeeded on the first mission, lobbying government bodies to institute legal protections. But discrimination by employers, and discriminatory attitudes more generally, remain deeply rooted in contemporary China.

Since these events unfolded in 2003, advocates have petitioned government bodies, conducted campaigns to increase public understanding of the actual health risks of HBV, and litigated dozens of discrimination lawsuits. The government's response has been impressive. In at least three national laws (*faliu*), and six administrative regulations (*guize*), Chinese government bodies have addressed the employment rights of disadvantaged Chinese, including women, ethnic minorities, the disabled, and carriers of infectious diseases (like HBV and AIDS). Central to the government's various legislative responses has been the careful mobilization of the HBV community, which has drafted recommendations and petitions to government agencies, sent open letters to Chinese government leaders, and commented on draft legislation prepared by the national legislature. This has opened a discussion about the nature of discrimination in China, but also about the role that citizens play in eradicating it.

Discrimination is a prevalent, if little poorly understood, social problem in China. The shift from a state-controlled to a market-based economy in the past thirty years has impacted virtually every aspect of Chinese society, from raging economic growth to a floating population larger than most countries. But it has also opened up new opportunities for people to assert their freewill, whether in the form of new products to purchase, new forms of leisure, and new occupations. It has also given employers, once bound by the *diktat* of centralized economic

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planning, considerable autonomy to hire, and to discriminate in that process.

Discriminatory practices and attitudes do not, of course, materialize out of thin air. One of this article's primary arguments is that the Chinese government—at all levels—plays a leading role in promoting discrimination.¹ By mandating an earlier retirement age for women, as it has since the early 1950s, the Chinese government signals to society that women are frail, merit special treatment, and cannot work as hard or long as men. Likewise, the household registration system (*hukou*) stamps a person as either rural or urban, and links his access to social benefits to the locality where he registered. Given the enormous gap between rich cities and poor villages, and the difficulty of changing one's *hukou* status, Chinese villagers face dim job prospects, and a thicket of municipal restrictions on hiring out-of-towners. Official barriers against carriers of infectious diseases also remain intact. As seen above, civil service positions require applicants to be free of infectious diseases, even when the job itself presents no risk of contagion.

Facing such policies, and social attitudes that reflect similar distrust and disfavor, advocates of various stripes—non-governmental organizations (NGOs), public interest lawyers, concerned citizens, government-operated non-governmental organizations (GONGOs) and others—have mobilized in various ways to challenge discrimination. In close contact with the media and online channels, these advocates have raised awareness, lobbied legislative and administrative bodies to repeal discriminatory regulations and pass protective ones, and filed dozens of lawsuits claiming employment discrimination. This article argues that the mobilization efforts, as well as the legislative and administrative responses by government bodies, indicate a

¹ The Chinese government is by no means unique in this regard. Over the years, the United States federal government and state governments have promulgated numerous facially discriminatory laws, from the Chinese Exclusion Act (1882) and Asian Exclusion Act (1924), to the Jim Crow laws passed in many. Most recently, a new Arizona law requires law enforcement officials to determine the immigration status of any person “where reasonable suspicion exists that the person is in an alien who is unlawfully present in the United States.” Ariz. Law SB 1070, sec. 2(1) (2010). In July 2010, a federal judge blocked this provision of the law, and several others, from going into effect. *See* Randal C. Archibold, *Judge Blocks Arizona's Immigration Law*, N.Y. TIMES, July 28, 2010, <http://www.nytimes.com/2010/07/29/us/29arizona.html>.

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newfound responsiveness of the Chinese government to a core issue of human rights: equal employment. More important, the fact that courts have routinely found for victims of discrimination suggests the level of commitment is more than merely “discursive,” or paper on the books. While we can, and will, rightly question the efficacy of remedies ordered by Chinese courts, it is clear that officials across various sectors of the Chinese government agree that discrimination against HBV carriers, if no one else, is worth proscribing.

This article proceeds in five parts. Because the field of employment discrimination is so vast, this article narrows the scope by focusing on three large disadvantaged groups: women, migrant workers, and carriers of infectious diseases. Because discrimination itself is a multifaceted phenomenon, this article adopts several methodologies to analyze the current status of discrimination in China, and laws that prohibit it. , including interviews with lawyers and activists involved in discrimination issues, analysis of verdicts brought by victims of discrimination, sociological materials on social movements, and conventional methods on the excavation and interpretation of current (and annulled) Chinese law and regulation. An interdisciplinary approach permits reflection both on the nature of existing Chinese law, as well as the processes and peoples that have led to its reformulation and revision.

Part I briefly describes the historical context in which to situate the issues, and reviews competing concepts of employment discrimination as developed in the West.

Part II describes the most common, and perhaps most serious, manifestations, encountered in contemporary China. These can be overt: job advertisements openly express preferences or limitations based on gender, health status, age, height, household registration and so on. The prevalence of discriminatory preferences in job advertisements reflects both the popularity of such attitudes, and the impunity employers enjoy in screening candidates in this manner. Alternatively, more covert forms of discrimination are practiced in the selection process itself. Employers deploy a wide range of techniques to exclude women, hepatitis B carriers, and other disfavored groups (women under 5’2,” or over 30 years; men under 5’5,” or over 35 years old). Medical examinations, photographs, CVs, written examinations, and other “objective” forms of documentation provide employers

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the pretextual grist needed to weed out undesirable applicants. During the interview itself, employers may ask female candidates about their marital status and future plans for children. Through such processes, distinctively discriminatory workspaces are produced, reproduced and normalized in factories, stores, and offices.

Part III outlines the law of employment discrimination prior to the Employment Promotion Law. It attends to laws that both promote and proscribe discrimination, highlighting the essentially *ambivalent* role that the Chinese government has played in this regard. On the one hand, China has instituted a number of discriminatory laws and practices in its sixty-year history. Women, for instance, must retire before men, a form of paternalism perhaps plausible in 1958, when the regulation was first passed, but no longer apposite half a century later. Likewise, State Council regulations issued in the 1980s – and still in effect – foreclose job opportunities to infectious diseases carriers due to concerns about contagion. But these restrictions sweep too broadly, and do not accurately reflect the likelihood that a potential worker could spread the disease if given the position. On the other hand, national legislation—such as the Labor Law and the Women’s Law—has prohibited discrimination against various groups since the early 1990s, albeit with only modest legal protections and remedial mechanisms. More recent regulations have furthered the cause of antidiscrimination against migrant workers and infectious disease carriers, though with varying degrees of success.

Part IV explains how advocates for one particular disadvantaged group—HBV carriers—have effected legal change in the area of employment discrimination. Using sociological and political theory, this part describes how a social movement has coalesced around the issue of HBV discrimination. Spurred by the cases of Zhou Yichao and Zhang Xianzhu, HBV advocates have activated a wide range of civil society actors—carriers, public interest lawyers, concerned citizens, online discussion boards, NGOs—to champion the rights of HBV carriers. Using media pressure and online tools to mobilize public opinion, HBV advocates adopted a multipronged strategy to challenge many forms of discrimination, including employment discrimination. By litigating cases, and encouraging thwarted jobseekers to come forward and sue, they frame the struggle as one with deeply human

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consequences. As employment rights are the core socioeconomic rights that China claims to privilege, judges are often sympathetic to the discrimination claims of HBV carriers. Activists also petition Chinese government bodies to suggest ways to resolve problems with existing law, and point out areas which law should cover. These various strategies have convinced several government agencies to issue regulations to protect the rights of roughly 120 million carriers.

Part V examines the 2007 Employment Promotion Law, and its progeny of lawsuits. The law expands existing legal protections, but also offers victims of employment discrimination a new tool by which to challenge discrimination: access to courts. By suing, affected jobseekers can vindicate labor rights that have existed almost exclusively as theory or principle for the past two decades. It is too early to decide whether litigation will meaningfully alter the practices and attitudes of Chinese employers, but the threat of losing a lawsuit may deter some from discriminating. Still, a great deal of work must still be done to advance this key human right. Accordingly, the end of this part offers ways to make the law more effective.

I. BACKGROUND

A. *Historical Background*

Throughout its short history, the PRC has *always* had antidiscrimination law. The 1954 Constitution, in a nod to the recently annexed Tibet and Xinjiang, guaranteed the right to equality for all ethnic groups: “The People’s Republic of China is a unified multiethnic nation. All ethnicities shall be equal. It is prohibited to *discriminate* against or oppress any ethnicity”² This is the sole usage of the word in the 1954 Constitution,³ and one of two in the current Constitution.⁴ But it was not the only provision to address discrimination. Its close correlate, equality, also appeared—as it has in all four of China’s constitutions—to guarantee equality between men and women in the social, political,

² XIANFA [CONSTITUTION] art. 3 (1954) (italics added).

³ The 1982 Constitution prohibits discriminating between religious believers and non-believers. XIANFA [CONSTITUTION] art. 36 (1982).

⁴ XIANFA [CONSTITUTION] (1982) (P.R.C.). Article 4 provides “Discrimination against and oppression of any nationality are prohibited.” Article 36 prohibits discriminating “against citizens who believe in, or do not believe in, any religion.” Both provisions remain aspirational.

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cultural and educational fields.⁵ Gender equality has long been a central concern for the Chinese government, but it remains an elusive goal to achieve.

During the early years of the PRC, women gained traction in the fields of culture, education and employment, but made less progress in social rights, and remained largely invisible in the political sphere (as they do today). In other words, a wide gulf separates the aspirations of equality enshrined in the Chinese Constitution from the promotion of equality and proscription of discrimination in everyday life. And since individuals cannot assert constitutional rights,⁶ without some kind of implementing legislation, the Constitution continues to inspire, but not safeguard, basic rights.

In the early days of the People's Republic, the Chinese government made concerted efforts to increase the role and visibility of women in the workplace. The central government issued administrative regulations to staff women in fields traditionally dominated by men, such as the commercial and service sectors.⁷ Women were also encouraged to enter professions formerly monopolized by men, such as tractor drivers, railroad engineers and pilots. In this period, women worked in “every sector of the national economy, every industry, and every profession, revealing a huge potential labor force that had never been recognized or understood by the society or by women themselves.”⁸

Under the planned economy, government personnel offices

⁵ See XIANFA [CONSTITUTION] art. 96 (1954) (P.R.C.) (providing that men and women enjoy equal rights in politics, economics, culture, society, family life, and all other aspects); XIANFA [CONSTITUTION] art. 27 (1975) (providing that women and men enjoy equal rights in all aspects); XIANFA [CONSTITUTION] art. 53 (1978) (as the 1954 Constitution, but further specifying the principle of equal pay for equal work (*tonggong tongchou*)); XIANFA [CONSTITUTION] art. 48 (1982) (as the 1954 Constitution, but further providing that “The state protects women’s rights and interests, implements equal pay for equal work between men and women, and cultivates and promotes female cadres.”).

⁶ See, e.g., ZHOU WEI, XIANFA JIBEN QUANLI SIFA JIJI YANJIU [STUDIES ON JUDICIAL REMEDIES FOR BASIC RIGHTS IN THE CONSTITUTION] 118-119 (2003). Instead, lawyers must rely on statutes that implement constitutional protections in order to file cases in People’s Courts. *Id.* at 119.

⁷ Jiang Yongping, *Employment and Chinese Urban Women under Two Systems*, in HOLDING UP HALF THE SKY: CHINESE WOMEN PAST, PRESENT, & FUTURE 207, 210 (Tao Jie et al. eds., 2004).

⁸ *Id.* at 210-11.

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made most employment decisions, which filled quotas in line with national economic policy.⁹ If an employee had little education, she was assigned usually to the same work unit as her parent. A more educated employee could take an examination for entry into more specialized positions like teacher, scientist or engineer.¹⁰

At the same time, China also put in place restrictions that, however well-intentioned, have laid the foundation for today's discriminatory edifices, practices and attitudes. The differential retirement age for men and women is the leading example of unintended consequences. Aimed at shortening the time a woman had to work in acknowledgement of her role in delivering and rearing children, the policy was initially seen as a boon to women when promulgated in 1957.¹¹ Even now, fifty years later, the policy has come to signify something different: that women are somehow less capable or suitable than men for both labor and cadre positions. As a result, many women are let go, often forcibly, five to ten years before their male counterparts, even if they want to keep working.¹²

Likewise, when instituted in 1958, the household registration system (*hukou*) restricted the movement of all Chinese citizens, keeping urban residents in cities and rural residents in the countryside.¹³ Since that time, the Chinese government has systematically privileged the development of urban areas over rural ones. The concentration of revenue into urban education, transportation, health care, social benefits and other services has made China's cities much more attractive places to live. But since the government restricted travel, and made changing one's *hukou* status very difficult, rural residents were condemned to a lifetime of poverty,¹⁴ enjoying none of the "access to economic and social opportunities, activities and benefits" that their urban compatriots

⁹ See Yong-Qing Fang et al., *National policy influence on women's careers in the People's Republic of China*, in EMPLOYMENT OF WOMEN IN CHINESE CULTURES: HALF THE SKY 49, 51 (Cherlyn Skromme Granrose, ed., 2005).

¹⁰ *Id.* at 51.

¹¹ Ding Hua, *Laodong zhengce/zhengce zhidingzhongde shehui xingbie pingdeng huigu yanjiu* [Review of Gender equality in Labor Law and Policymaking], in XINGBIE PINGDENGDE FALÜ YU ZHENGCE [LAWS & POLICIES TOWARDS GENDER EQUALITY] 167, 187 (Tan Lin & Du Jie eds., 2008).

¹² See *infra*, Part III.B.

¹³ FEI-LING WANG, ORGANIZING THROUGH DIVISION & EXCLUSION: CHINA'S HUKOU SYSTEM 24 (2005).

¹⁴ See *infra*, Part III.B.

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enjoyed.¹⁵ At present, urban residents tend to view rural residents (many of whom migrated to the cities for low-end jobs) with a mixture of contempt and hostility. In addition, city governments have issued a raft of ordinances that privileges local (urban) residents over outside (rural) residents in employment, education, and social services.

With the opening up of the market economy in the 1980s and 1990s, and move away from central planning, the problem of discrimination crept into employment decisions. No longer firmly fixed to their work units, Chinese citizens had greater mobility to pursue a broader range of employment opportunities. Employers, no longer bound by state hiring ordinances, could decide whom to employ with little outside input. In this newly emergent space resurged a host of traditional attitudes about women, outsiders, illness and disability. Stereotyped thinking still retains currency in the minds of many Chinese, and finds analogues across a wide variety of government policies and legislation.

B. *Defining Discrimination*

Before examining the legal edifices that promote and proscribe employment discrimination, and both are central to understand any society's patterns and configurations of discrimination, some discussion of discrimination itself is needed. Employment discrimination is a complicated phenomenon, involving conscious decisions and unconscious assumptions about a person due to qualities supposedly possessed by virtue of her sex, race, national origin or other immutable characteristic. In the United States, federal courts distinguish direct discrimination, also known as disparate treatment, from indirect discrimination, or disparate impact. Direct discrimination—"the most easily understood type of discrimination"¹⁶—occurs when an employer treats a person less favorably than someone else due to a protected trait, such as her gender, age or race.¹⁷ Indirect discrimination is somewhat harder to grasp, as it involves a facially neutral practice or policy with "a disproportionately adverse effect on minorities."¹⁸ Chinese scholars are fond of citing an 1870 ordinance from the San Francisco City Council banning the use of

¹⁵ FEI-LING WANG, ORGANIZING THROUGH DIVISION & EXCLUSION: CHINA'S HUKOU SYSTEM 24 (2005).

¹⁶ See *Teamsters v. U.S.*, 431 U.S. 324, 335 n 15 (1977).

¹⁷ See *Ricci v. DeStefano*, 129 S. Ct. 2658, 2672 (2009).

¹⁸ *Id.*

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shoulder poles (or *danbao*).¹⁹ Though facially neutral, the ordinance clearly targeted Chinese immigrants, who retained the use of the pole to transport objects in their adoptive homeland. Finally, systemic discrimination refers to policies or practices that have a disproportionately broad impact on a larger subpopulation (racial, geographical, professional, or otherwise).²⁰ The *hukou* system, it will be argued, constitutes the most pernicious form of systemic discrimination in contemporary China. These concepts, though first articulated in the US and EU, have found currency among Chinese scholars researching discriminatory laws and policies in the PRC. At the very least, they provide a framework upon which Chinese forms of discrimination can be compared and evaluated.

The preceding definitions are particularly important because, like U.S. federal law,²¹ Chinese law does not define discrimination, even as many laws proscribe it. The lack of a formal definition has not hobbled the judicial development of antidiscrimination law in the United States, where courts routinely step in to fill gaps in legislation, whether by defining discrimination, creating judicial mechanisms such as burdens of proof by which to capture discriminatory conduct, or prescribing remedies.²² But Chinese courts play a far less active role in defining and creating law and legal mechanisms. Chinese courts do not have the power to review legislation, nor are they bound by precedents of higher courts, as they are in the United States. Instead, Chinese courts play a more active role in the enforcement of existing laws, rather than the creation or critique of law and policy.²³

¹⁹ See, e.g., ZHONGGHUA RENMIN GONGHEGUO JIUYE CUJIN FA JIEDU [AN INTERPRETATION OF THE EMPLOYMENT PROMOTION LAW OF THE PEOPLE'S REPUBLIC OF CHINA: AN INTERPRETATION] 70 (Xin Chunying ed., 2007)

²⁰ See U.S. Equal Employment Opportunity Comm'n, *Systemic Task Force Report to the Chair of the Equal Employment Opportunity Commission* 1 (2006).

²¹ See *Washington v. Ill. Dep't of Revenue*, 420 F.3d 658, 660 (Aug. 22, 2005). "Title VII does not define 'discrimination' Lack of a definition leaves unresolved the question *how important* a difference must be to count as 'discrimination.'"

²² See HAROLD S. LEWIS, JR. & ELIZABETH J. NORMAN, *EMPLOYMENT DISCRIMINATION LAW & PRACTICE* 164-66 (2004).

²³ Of course, the Supreme People's Court can issue judicial interpretations (*sifa jieshi*) of a particular law, which offer guidance to judges applying the law. But the SPC has issued no such document regarding employment discrimination.

II. CHINESE DISCRIMINATION

Chinese scholars have identified all manner of discrimination in China. One Chinese scholar identified over a dozen forms of discrimination in employment alone.²⁴ Some forms, such as age and disability, are similar to U.S. federal law. Others would not properly be considered discrimination in the United States, but rather proxies of an employee's abilities, such as academic background, CV, and work experience. Still others reflect China's unique socio-political conditions, such as region (e.g. antipathy for people from Henan province), household registry, and membership in the communist party. Other bases reflect concerns about the human body such as height and appearance, or concern over the spread of disease, such as health status. To this list one must add categories already protected in Chinese national legislation, such as sex, religious belief, race and ethnicity.²⁵

Despite this profusion of categories, certain classifications are more pernicious than others. Discrimination based on a person's academic background, CV and work experience may usefully identify talent, giving employers a useful shortcut to wade through large number of job applicants in China's crowded job market. Yet other forms of discrimination—such as sex, health status, and household registration—serve only to disqualify persons based on outmoded thinking and irrational presumptions about the capacity to work productively.

This section examines three common manifestations of employment discrimination: job advertisements, statistical surveys, and personal narratives. Job advertisements, both in print and online, help depict the culture of job recruitment. Since these ads are often the first link in the chain of the hiring process, they are particularly valuable indicia of what is permissible, indeed expected, of applicants in hiring practices. They also reveal the expectations and preferences that employers bring to bear on their personnel decisions. Second, statistical surveys about attitudes and

²⁴ Lou Yaoxiong, *Woguo "Jiuye Qishi" de Fali Fenxi ji Duice* [Analysis and Countermeasures for the Law of "Employment Discrimination" in China], BEIJING YOUDIAN DAXUE XUEBAO (SHEHUI KEXUEBAN) [JOURNAL OF BEIJING UNIVERSITY OF POST & TELECOMMUNICATIONS (SOCIAL SCIENCE EDITION)], July, 2004, 63, 64.

²⁵ See, e.g., *Laodong fa* [Labor Law], promulgated by the Standing Comm. Nat'l People's Cong. July 5, 1994, Art. 12.

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experiences of discrimination provide an empirical basis to understand which forms of discrimination are most widespread. Different studies have arrived at divergent conclusions about which forms of discrimination are most prevalent, perhaps inevitable whenever perceptions, personal experiences and other subjective forms of knowledge are analyzed. Finally, personal narratives shed additional light on the experience of discrimination from the applicant's perspective, while illuminating the techniques used to weed out candidates. Interview questions, email exchanges, requests for photographs and other devices to smoke out "undesirable" job candidates may not be captured by statistics or other sources, but are critical to understanding the mechanics of employment discrimination in China.

A. *Job Advertisements*

In the U.S. and U.K., critical assessment of job advertisements has provided important insights into the discriminatory preferences of employers. In the U.S., for instance, gender and age discrimination surfaced in advertisements throughout the 1980s, even though federal law banned such preferences since the 1960s.²⁶ In one survey, researchers found 9.5% of advertisements in the classified section of various Sunday newspapers to be either "questionable or blatantly illegal."²⁷ Of these, 90% discriminated based on sex, whether for men or women.²⁸ In the U.K., researchers noted a decline in the number of advertisements with age preferences from 1981 to 1991, suggesting that one form of illegal discrimination was on the wane, but still evident.²⁹

More recently, it has become common for U.S. employers to *counter* discriminatory preferences in job advertisements. Companies and organizations now routinely state that they are "Title IX" employers or that they "encourage applications from women and minority candidates." Whether this reflects greater tolerance by employers, or a heightened recognition of the value (moral, economic, or otherwise) of a diverse workforce remains an

²⁶ John P. Kohl et al., *The Ongoing Battle of Discrimination in Help Wanted Ads*, 15 BUSINESS FORUM 8 (1990).

²⁷ *Id.* at 10.

²⁸ *Id.* at 11.

²⁹ Ann E. McGoldrick & James Arrowsmith, *Recruitment advertising: Discrimination on the basis of age*, 15 EMPLOYEE RELATIONS 54, 55 (1993).

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open question. Alternatively, this greater openness could simply respond “to tightened government regulation and threats of lawsuits.”³⁰ Whatever the underlying reason, a notable shift away from discriminatory job advertisements is clearly detectable in the U.S. and U.K.

China presents a far different picture, as recent studies show. Zhihong Gao’s study of online recruiting, and Zhou Wei’s research on print advertisement,³¹ suggest that age, gender, and physical appearance remain critical criteria for employers. Other factors, such as household registration and height, appear less frequently than age and gender, instead surfacing in more specialized or exotic positions. Many advertisements contained multiple forms of discrimination—women under the age of 30, men over 5’5”—so these categories should not be thought of in isolation.

Gao surveyed 955 white-collar job advertisements on ChinaHR.com, a leading employment website.³² She found that the most frequently cited discriminatory basis was age, which appeared in 24.2% of the ads, followed by gender (12.3%), and physical appearance (10.5%).³³ Further break down of the categories led to interesting, if predictable, results. For example, gender restrictions targeted both men (5.5%) and women (6.7%); most of the former were for managerial positions, while most of the latter were for sales and clerical positions.³⁴ Such advertisements reinforce the traditional power structure that subordinates women to men. Moreover, many ads for women contained other restrictions, such as age (typically under 30), and appearance (“good looking and fine-tempered”). This multiplicity of restrictions suggests “a more demeaning dimension to gender discrimination” in China, namely that Chinese women “are treated . . . as sex objects . . . to please the eyes of male bosses and clients.”³⁵

Other surveys of China’s advertising restrictions reveal that

³⁰ Zhihong Gao, *Gender Discrimination in Chinese Recruitment Advertisements: A Content Analysis*, 9 J. ASIA-PAC BUS. 395, 404 (2008).

³¹ ZHOU WEI, FANQISHIFA YANJIU: LIFA LILUN YU ANLI [STUDIES ON ANTIDISCRIMINATION LAW: LEGISLATION, THEORY, CASES] (2008). Professor Zhou’s analysis is omitted from this draft.

³² Gao, *supra* note 30, at 405.

³³ *Id.* at 406-07.

³⁴ *Id.* at 407.

³⁵ *Id.* at 411.

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age and gender weigh heavily on employers' minds. One study surveyed 568 firms across eight different job sectors, including goods/manufacturing, research/development, commerce/logistics, finance/public finance, and administrative/personnel.³⁶ To ensure a broad snapshot of the picture of discrimination, the authors surveyed state-owned enterprises, collective enterprises, privately owned companies, foreign invested companies, and shareholding companies.³⁷ Again, age was the preeminent factor, appearing in 54.4% of the advertisements examined. Among the more discriminatory sectors were finance, administration/personnel, and commerce and logistics; in these sectors, over half of the advertisements contained age restrictions, targeting candidates who were either 18 to 25, or somewhat more commonly, 25 to 35.³⁸ By contrast, few employers specifically targeted persons aged 35 to 45, or 45 and over.³⁹

Gender was less prominent than age, but showed considerable variation across sectors. Certain sectors preferred men. 22% of the advertisements in the production required men, while only 4% required women.⁴⁰ Research and development was similarly skewed: 14% required men, while only 2% required women.⁴¹ Commerce and logistics likewise favored males by a ratio of 28% to 6%.⁴² But other sectors sought women, including administrative/personnel, by a ratio of 31% to 8%, and education/hygiene, by a ratio of 33% to 6%.⁴³ These statistics certainly support the idea that men are preferred in industries that require physical labor or scientific skills, while women are valued for administrative skills or ability to teach.

Though somewhat less prevalent than age or gender, *hukou* status also matters to many employers. Though statistical evidence

³⁶ See Zhu Aisheng, Sun Weixiang & Zhao Butong, *Zhaopinzhong Qishi Xianxiangde Shizheng Yanjiu* [An Empirical Study of Discriminatory Phenomena in Recruitment], 20 SHENGCHANLI YANJIU [STUDIES ON PRODUCTION] 74, 74 (2007). The categories themselves include the backslash.

³⁷ *Id.*

³⁸ *Id.* Several of the bases discussed in this article—such as academic background, professional title, or work experience—would not constitute discrimination under U.S. law. This reveals an important difference in American and Chinese conceptions of discrimination.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

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is limited, one survey of Chongqing showed that 7% of advertisements contained *hukou* restrictions, but that over 20% of employing units restricted labor in this way.⁴⁴ The author then conducted phone interviews with twenty of the employers that included the restrictions. Among the reasons for the restrictions were (1) “We don’t know what to make of outside laborers; we do not know if they are thieves or hooligans;” (2) “We have never hired outsiders, nor thought to hire them;” (3) outsiders require a certain period of time to acclimate to Chongqing; and (4) “Outsiders’ habits are different from ours’. We hired one before, but he was stubborn as a mule.” Whether based in ignorance or limited experience, prevailing attitudes in at least one of China’s metropolitan areas suggests that deep prejudice towards outside labor.

A culture of discrimination has congealed at the first step of the hiring process in China, presaging a process replete with discrimination. Little wonder that workspaces in China are so clearly gendered, with men occupying posts at the managerial levels, and women suffusing the lower rungs of the service sector.⁴⁵ While the evidence is more limited, negative attitudes towards “outsiders” (Chinese citizens with non-local residency status) likewise characterizes many employers. If China seriously intends to rid of employment discrimination, some effort must be made to end discrimination in advertisements, which both naturalize and reproduce artificially segregated workspaces.

B. *Statistics*

Statistical surveys provide another glimpse at the problem

⁴⁴ See Yuan Weiqin, *Chongqing Wailai Wugong Jiuye Qishi Diaocha* [Survey of Employment Discrimination against Chongqing’s Outside Workers], in JINZHI JIUYE QISHIDE FALÜ ZHIDU YU ZHONGGUO XIANSHI [LEGAL SYSTEMS OF ANTI-DISCRIMINATION IN EMPLOYMENT & CHINA’S REALITY] 171 (Zhou Wei et al. eds., 2008). 683 of 9,606 advertisements contained such restrictions, while 142 employers out of 683 implemented such restrictions. *Id.* at 183-84.

⁴⁵ Given the Chinese preference for numerical slogans, it is no surprise that scholars have described this phenomenon as “the three manys and the three fews.” Namely, “many deputies, but few executives; many low-level workers, few high-level workers; many idle, few busy.” See generally Yi Xiaorong, *Zhongguo Funü Quanyi Baohu Tanwei: yi Falü Yuanyuan wei Shijiao* [A Micro-exploration of the Protection of Chinese Women’s Rights and Interests: From the Perspective of Legal Sources], in SHEHUI XINGBIE PINGDENG YU FALÜ: YANJIU HE DUICE [GENDER EQUALITY & LAW: RESEARCH & SOLUTIONS 17, 22 (Jia Lin & Jiang Xiuhua eds., 2007).

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of employment discrimination. Surveys usefully reflect both reality—which groups work at what level of society—and perceptions of reality—have you ever been discriminated against? Both reality and its perception are critical in understanding discrimination given the important role that perception plays in perpetuating discrimination.

In May, 2006, scholars at China University of Political Science and Law interviewed 3,500 people and their attitudes and experiences with discrimination in ten large cities: Beijing, Guangzhou, Nanjing, Wuhan, Shenyang, Xi'an, Chengdu, Zhengzhou, Yinchuan, and Qingdao.⁴⁶ The results provide a relatively comprehensive picture of the circumstances of discrimination in today's China.

One important indicator surfaced in responses to the question, "Is there discrimination in the field of employment today?" 85.5% responded affirmatively, while 50.8% of respondents—over one half—believed it was "extremely severe."⁴⁷ A mere 6.6% replied that there was no discrimination.⁴⁸ Likewise, a majority of respondents (54.9%) believed they had personally experienced some kind of discrimination in the hiring process.⁴⁹ Almost one-sixth (15.7%) of respondents experienced "very severe" or "relatively severe" discrimination.⁵⁰

Further breakdown of the types of discrimination is also revealing. The most commonly cited form of discrimination, 62.6% of respondents said, is academic discrimination, meaning the employer overemphasizes a candidate's academic background, or that the educational requirement exceeds the actual necessities

⁴⁶ Zhongguo Zhengfa Daxue Xianzheng Yanjiusuo [Constitution Research Center of the China University of Politics and Law], *Zhongguo shida chengshi jiuye qishi zhuangkuang wenjuan diaocha* [Questionnaire survey on the situation of employment discrimination in ten large Chinese cities], in ZHONGGUO JIUYE QISHI XIANZHUANG JI FANJIUYE DUIXIANG [EMPLOYMENT DISCRIMINATION IN CHINA: CURRENT CONDITIONS AND ANTI-DISCRIMINATION STRATEGIES] 505 (Cai Dingjian ed., 2007).

⁴⁷ *Id.* at 507.

⁴⁸ Cai Dingjian, *Fanjiuye Qishi Zonghe Yanjiu Baogao* [Comprehensive Research Report on Antidiscrimination in Employment], in ZHONGGUO JIUYE QISHI XIANZHUANG JI FANJIUYE DUIXIANG [EMPLOYMENT DISCRIMINATION IN CHINA: CURRENT CONDITIONS AND ANTI-DISCRIMINATION STRATEGIES] 1, 23 (Cai Dingjian ed., 2007).

⁴⁹ *Id.*

⁵⁰ *Id.*

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of the job.⁵¹ Health discrimination came in second at 47.7%, followed by appearance (36.7%), age (32.9%), household registration status (28.7%), and finally sex (21%).⁵² While this study did not find that sex discrimination is a particularly widespread strain of employment discrimination, other studies have concluded otherwise. For instance, in a survey conducted by the Women's Federation of Jiangsu Province, 80% of female college students had been rejected for a position due to their gender.⁵³ And over a third of these women had multiple rejections of this sort.⁵⁴

Likewise, the China Women's Federation, together with the National Bureau of Statistics, conducted national surveys on women's employment and social status in 1990 and 2000. Over the course of that decade, employment rates for men and women dropped, but the decline was steeper for women. In 1990, 90% of men were employed, but only 82% in 2000 (representing a 9% decrease). For women, on the other hand, 76% were employed in 1990, but only 64% in 2000 (representing a 16% decrease).⁵⁵ For young and middle-aged urban women, the employment rate dropped from 88% to 72%.⁵⁶ Women also accounted for a larger proportion of those laid off (56%), even though they make up a minority of the work force.⁵⁷

Local surveys also indicate the relative absence of women in positions of leadership. Hebei province, for example, conducted a survey of government employment in 1994. The percentage of women in high-level management positions—whether in government enterprises, agencies or institutions—was well below 1%.⁵⁸ A more recent survey has found that only 4.1% of top

⁵¹ *Id.*

⁵² *Id.* at 23-24.

⁵³ Zhang Lixia, *Shilun Woguo Funü Jiuyequande Falü Baohu* [*Theorizing Legal Protection of Chinese Women's Employment Rights*], HENAN DAXUE XUEBAO (SHEHUI KEXUEBAN) [HENAN UNIVERSITY JOURNAL (SOCIAL SCIENCE EDITION)], Jan. 2004, 104, 104 n. 2.

⁵⁴ *Id.*

⁵⁵ See Jiang Yongping, *Zhongguo Xingbie Pingdeng Zhuangkuang ji Xingbie Pingdeng Zhengce Tuijin* [*The Situation of Chinese Gender Equality and Gender Equality Promotion Policies*], <http://www.china-woman.com/rp/fs/open/html/mtgjb/tj.ppt#447,16>, 中国两性社会地位差距.

⁵⁶ Yi, *supra* note 45, at 22.

⁵⁷ *Id.*

⁵⁸ Yong-Qing Fang, *Women's development in Hebei Province, PRC*, in EMPLOYMENT OF WOMEN IN CHINESE CULTURES: HALF THE SKY 157, 162

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leaders in government were women.⁵⁹

The situation is not much better for carriers of infectious disease, especially China's 120 million HBV carriers. Yirenping, a leading NGO that advocates on behalf of people with HBV, has recently surveyed the hiring practices of multinational corporations with offices in China. According to a 2006 survey, 77% of multinational corporations claimed that they would refuse applicants carrying HBV.⁶⁰ Two years later, the same survey found that (a) 84% of multinationals still require job applicants to take physical examinations and submit the results, and (b) 44% would *still* turn down applicants who tested positive.⁶¹ The 33% decrease from 2006 to 2008 is a positive development. But the fact that 44% would still discriminate, despite the fact that such discrimination is now clearly illegal after the 2007 Employment Promotion Law, is surprising. It suggests, among other things, that foreign corporations are either unaware of legal developments in Chinese labor law, or unconcerned about their consequences.⁶² As we shall see below, this ignorance has led many foreign employers to face legal challenges in the past two years.

Likewise, scholars have conducted their own independent research on various subpopulations in China. Ye Jingyi and Shi Yuxiao surveyed carriers of the hepatitis B virus about their

(Cherlyn Skromme Granrose ed., 2004).

⁵⁹ See Yong-Qing Fang et al., *National policy influence on women's careers in the People's Republic of China*, in *EMPLOYMENT OF WOMEN IN CHINESE CULTURES: HALF THE SKY* 49, 65 (Cherlyn Skromme Granrose ed., 2000).

⁶⁰ *Discrimination against Hepatitis B carriers rising – survey*, CHINA DAILY, Mar. 5, 2009, http://www.chinadaily.com.cn/china/2009-03/05/content_7542374.htm.

⁶¹ *Id.* The second survey was conducted in October to December, 2008, but the results were released in March, 2009.

⁶² Chinese public sector employers, on the other hand, are perhaps more enlightened. The majority of cases I have found online target corporations, Chinese or foreign. Moreover, five government departments conducted a “knowledge competition,” complete with prizes, concerning the contents of the Labor Contract Law and Employment Promotion Law in November and December 2007. Three of the eighty questions concerned employment discrimination. See *Wubumen Lianhe Juban Laodong Hetong Fa he Jiuye Cujin Fa Zhishi Jingsai* [Five Bureaus Unite to Conduct a Knowledge Competition on the Labor Contract Law and the Employment Promotion Law], LAODONG BAOZHANGBU WANGZHAN [DEPARTMENT OF LABOR & SOCIAL SECURITY WEBSITE], Nov. 11, 2007, http://www.gov.cn/gzdt/2007-11/05/content_796320.htm

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experiences with employment discrimination.⁶³ Over half of the respondents (52.3%) claimed that they had been refused a job.⁶⁴ Of these people, 72.3% claimed they were denied the job because they failed to pass a physical examination,⁶⁵ while only 11.7% believed the denial was for another reason.⁶⁶ Over half of respondents (56.3%) claimed to have experienced some form of discrimination while on the job, while almost one-third (32%) had been fired at one time.⁶⁷ In this last category, over 70% of respondents claimed that their employers told them the truth, that they were fired because they carried the hepatitis B virus, while 18.8% said their employer used an excuse to terminate them.⁶⁸

Statistics offer another window onto the realities of employment discrimination, illuminating the experiences of employees and applicants, as well as the attitudes and perceptions of employers and society at large. A degree of subjectivity infuses many of these surveys, reflecting the nature of discrimination itself. The experience of discrimination involves subjective determinations by job applicants who feel discriminated against, particularly if the reason for their refusal is never explicitly stated. But it also includes conscious and unconscious discrimination by employers, who may be unaware of their own biases. Still, the surveys make clear that discrimination, perceived and otherwise, is widespread against various groups of people.

C. *Personal Experiences*

Though unverifiable through statistical means or numerical measures, anecdotal experience rounds out the portrait of discrimination. Personal narratives explain three related themes. First, they bring to light actual techniques used by employers to

⁶³ Ye Jingyi & Shi Yuxiao, *You canji qishi dao jiankang qishi* [From disability discrimination to health discrimination], in JINZHI JIUYE QISHI: GUOJI BIAOZHUN HE GUONEI SHIJIAN [EMPLOYMENT DISCRIMINATION: INTERNATIONAL STANDARDS & NATIONAL PRACTICE] 318, 319 (Li Weiwei & Lisa Stearns eds., 2006).

⁶⁴ *Id.*

⁶⁵ The Chinese hiring process typically involves three examinations. If one passes the written examination, she may then be invited for an oral examination. If successful at this stage, the candidate then must typically go for a physical examination at a nearby hospital.

⁶⁶ *Id.*, 319.

⁶⁷ *Id.*

⁶⁸ *Id.*

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exclude qualified candidates. Second, when repeated across over time and space, anecdotal experience illuminates which forms of discrimination are most prevalent. Third, and with the first two explanations in mind, such narratives can guide discussions of ways to stop discrimination in the workplace. If employers can pose personal questions to female job applicants during an interview—about marital status, boyfriends, plans to have children, and so on—women will never gain a foothold in the Chinese workforce. Though dozens of anecdotes portray the actualities of hiring, two in particular shed light on the techniques used to weed out women.

First, a female job applicant emailed her resume into a company.⁶⁹ She did not indicate her sex on the application, nor did she include a photograph, a common accompaniment of many job applications in China. The employer called her the next morning, telling her that she did not include a photograph. The applicant offered to send one off right away, but the employer stalled, saying they still wanted to “research other applications.” She never heard back from the company, but believes the company nevertheless liked her resume. Upon realizing she was female – as they could determine through the phone call – they lost interest. The authors of this study suggested that this is a common method of ferreting out female candidates, constituting a hidden form of direct discrimination.⁷⁰

Second, a female law graduate described her interview with a small research institute.⁷¹ The interview centered around three questions: Are you married? Do you have a boyfriend? How much do you want for a salary?⁷² Interviewers frequently question women about child care or pregnancy (planned or past), something that would be illegal under U.S. law.⁷³ They do this directly, or by

⁶⁹ See Tong Xin & Liu Meng, *Tamen Weihe Chenmo: Nüdasheng Zai Qiuzhi Guochengzhong Suozaoshoude Xingbie Qishi Yanjiu* [Why Do They Keep Silent: Research on the Gender Discrimination Encountered by Female College Graduates in the Hiring Process], in XINGBIE PINGDENGDE FALÜ YU ZHENGCE: GUOJI SHIYE YU BENTU SHIJIAN [LAW AND POLICIES TOWARDS GENDER EQUALITY: INTERNATIONAL PERSPECTIVES AND LOCAL IMPLEMENTATION] 243, 251 (Tan Lin & Du Jie eds., 2008).

⁷⁰ *Id.*

⁷¹ *Id.* at 254.

⁷² *Id.* at 256.

⁷³ See *King v. Trans World Airlines, Inc.*, 738 F.2d 255, 258 n. 2 (8th Cir. 1984) (“We note that . . . questions about pregnancy and childbearing would be

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asking them if they would be willing to move around to different cities with the job; if the applicants are unwilling, the employer will ask if she has a boyfriend.⁷⁴ While this may seem like an unwelcome intrusion into one's personal life, employers are not simply being nosy. Rather, they are expressing concern about the high costs of hiring of an employee who may one day become pregnant. She may be less active while pregnant, and will likely take maternity leave after the birth. Since employers typically pay for the ninety days of maternity leave required by the Labor Law, many profit-minded employers would prefer to avoid this liability altogether.⁷⁵ To extirpate discrimination against women, then, will require a change in thinking about responsibilities for child care (a normative matter), and the reallocation of the costs of providing maternity leave and child care (a policy matter).

With some understanding of the manifestations of employment discrimination, and a basic grasp of their underlying rationales, we now turn to the laws that both proscribe and promote discrimination.

III. THE LAW OF EMPLOYMENT DISCRIMINATION

A. *Antidiscrimination Law*

Only in the 1990s did Chinese law start to guarantee equal rights in employment. The 1990 Law to Protect Disabled Persons mandated that “[n]o discrimination shall be practiced against disabled persons in recruitment, employment, obtaining permanent status, technical or professional titles, payment” and other areas.⁷⁶ The 1992 Law on the Protection of Rights and Interests of Women (“Women’s Law”) first extended protections to women in numerous areas of employment: hiring and firing; titles, promotions, and salaries; and marriage, pregnancy and nursing.⁷⁷

unlawful per se in the absence of a bona fide occupational qualification.”). Questions about child care are technically neutral, but may disparately impact upon women. *See id.*

⁷⁴ Xin & Meng, *supra* note 69, at 256.

⁷⁵ Laodong fa [Labor Law], promulgated by the Standing Comm. Nat’l People’s Cong. July 5, 1994, Art. 62.

⁷⁶ Canjiren Baozhang Fa [Law on the Protection of Disabled Persons], promulgated by the Standing Comm. Nat’l People’s Cong. Dec. 28, 1990, Art. 34.

⁷⁷ Funü Quanyi Baozhang Fa [Law on the Protection of Women’s Rights and Interests], promulgated by the Standing Comm. Nat’l People’s Cong. Apr. 3, 1992. Art. 24 (guaranteeing equal pay for equal work), Art. 25 (guaranteeing

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Likewise, the 1994 Labor Law ensured that workers “shall not be discriminated against in employment due to their nationality, race, sex, or religious belief.”⁷⁸ Despite these provisions, employers could discriminate with impunity against any protected class because the mechanisms to implement these laws were either weak or non-existent.⁷⁹ Unlike the United States, China does not have an Equal Employment Opportunity Commission to investigate allegations of employment discrimination. Nor are there implementing regulations or judicial interpretations that tell courts how to handle employment discrimination claims, or how to remedy successfully litigated claims.⁸⁰ Indeed, some courts refuse to accept employment discrimination claims on the grounds that they are not listed in the Regulation on the Causes of Action for Civil Cases, issued by the Supreme People’s Court.⁸¹

Before the passage of the Employment Promotion Law in 2007, Chinese law proscribed employment discrimination, but offered very little by way of remediation. Before turning to the impact of the EPL, however, it is first necessary to examine the obverse of Chinese antidiscrimination law: those promoting discrimination.

B. Discriminatory Laws and Their Repeal

The Chinese government, both at the central and local levels, has promulgated a number of laws, regulations and ordinances that exclude persons from certain jobs, force women to retire early, or otherwise disadvantage them. State-sponsored discrimination both naturalizes discriminatory practices (if the state discriminates, why shouldn’t I?) and perpetuates the marginalization of various groups outside the power structures of Chinese society. The continued development of antidiscrimination law must carefully review the underlying rationale of these laws, compare it with contemporary realities, and decide whether amendment or withdrawal may be appropriate. Many policies

equality in post, rank, and titles), Art. 26 (providing “special protection during menstrual period, pregnancy, obstetrical period and nursing period”);

⁷⁸ Laodong fa [Labor Law], promulgated by the Standing Comm. Nat’l People’s Cong. July 5, 1994, Art. 12.

⁷⁹ Cai Dingjian, *supra* note 48, at 39.

⁸⁰ Interview with Professor Liu Minghui, China University of Women, Mar. 18, 2009 (on file with author). Other courts have, of course, accepted such cases as falling within the “other torts” category.

⁸¹ *Id.*

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developed in the 1950s—when the P.R.C. was a “new” country inculcating a revolutionary spirit in its people—no longer match contemporary realities. Upon reexamination, the issuing body may very well annul certain provisions. In some instances, the government has already responded with appropriate changes, often after sustained pressure from the public, petition drives, and media scrutiny. This work should continue, either through incremental revisions, or by passing an all-encompassing Antidiscrimination Law.⁸² This section outlines some of the major laws and policies that promote discrimination based on gender, *hukou* status, and infectious disease. It then discusses recent changes or revisions to these discriminatory laws and policies.

IA. *Gender Discrimination*

A number of Chinese laws promote employment discrimination against women. The most widely cited is the differential retirement age, mandating that women must retire five to ten years earlier than men. In 1958, China’s highest executive body, the State Council, issued “Temporary Guidelines Handling the Retirement of Workers and Professionals,” which initially set the differential retirement ages.⁸³ Though these temporary guidelines were withdrawn in 2001, other State Council Guidelines from the 1970s continued the practice into the present.⁸⁴

Differential retirement ages may have made sense in the 1950s. Government departments explained that women were generally weaker than men, and experienced considerable physical stress during the birth of children. They thus needed time for leave and special maternal protections. Since women were primarily responsible for raising children, it was “reasonable” for them to work less, and hence retire earlier.⁸⁵ In the immediate post-

⁸² Scholars such as Zhou Wei and Cai Dingjian have both drafted comprehensive antidiscrimination laws (on file with author).

⁸³ Guowuyuan Guanyu Gongren, Zhiyuan Tuixiu Chuli de Zanxing Guiding [State Council’s Temporary Guidelines Handling the Retirement of Workers and Professionals], Nov. 16, 1957, *withdrawn* Oct. 6, 2001. Article 2(1) set the retirement age for male workers and professional at 60 years, female workers at 50 years, and female professional at 55 years. In addition, for particularly laborious work, such as jobs at high altitudes or high temperatures, the retirement age for men was 55 years, and 45 years for women. *Id.* at 2(2).

⁸⁴ See *infra*, notes 87 & 88 and accompanying text.

⁸⁵ See “Laodongbu Bangongting, Guowuyuan Renshiju, Quanguo Zonggonggui Laodong Baoxianbu Guanyu Gongren, Zhiyuan Tuixiu Chuli Zanxing

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revolutionary period, traditional notions about the division of labor still prevailed, despite some revolutionary stirrings about the proper role of women. In practice, however, women would handle more of the domestic responsibilities, and men would provide for the family through outside work.⁸⁶

A generation later, the State Council issued another set of “temporary” guidelines mandating differential retirement ages, both of which remain in effect. In 1978, it promulgated both the “Temporary Measures on the Retirement and Resignation of Workers” (“Workers’ Measures”) and the “Temporary Measures on the Proper Arrangement of the Elderly, Weak, Infirm and Disabled Cadres” (“Cadres’ Measures”). The Workers’ Measures provide, in relevant part, that “Workers in state-owned enterprises, institutional units, government or [communist] party organs, or mass organizations *must* retire upon reaching any of the following conditions: (1) males reaching 60 years, and females reaching 50 years, after they have worked continuously for ten years”⁸⁷ The Cadres’ Measures, on the other hand, provide that “Cadres working in party or government organs, mass organizations, enterprises or institutional units *can* retire upon reaching any of the following conditions: (1) males reaching 60 years, and females reaching 55 years, after they have participated in revolutionary work for ten years.”⁸⁸ In other words, the retirement age for men

Guidingde Wenti Jieda” [Answers to Questions on Temporary Regulations Related to Handling the Retirement of Workers and Professionals from the General Office of the Ministry of Labor, the Bureau of Personnel of the State Council, and the Labor Insurance Department of the National Federation of Trade Unions], *cited in* Chen Weimin & Li Ying, *Tuixiu Nianling Dui Zhongguo Chengzhen Zhigong Yanglaojin Xingbie Chayide Yingxiang Fenxi* [An Analysis of the Influence of the Retirement Age on Gender Differences in Pensions of Chinese Urban Workers and Professionals], *in* SHEHUI XINGBIE PINGDENG YU FALÜ: YANJIU HE DUICE [GENDER EQUALITY & LAW: RESEARCH & SOLUTIONS 39, 45 (Jia Lin & Jiang Xiuhua eds., 2007).

⁸⁶ Feng Yuan, *Cong Tongling Tuixiude Zhenglun Kan Gonggong Zhengcede Juece Guocheng* [Looking at Decisional Process in Public Policy from the Point of View of the Controversy on Retiring at the Same Age], *in* SHEHUI XINGBIE PINGDENG YU FALÜ: YANJIU HE DUICE [GENDER EQUALITY & LAW: RESEARCH & SOLUTIONS 61, 62 (Jia Lin & Jiang Xiuhua eds., 2007).

⁸⁷ Guowuyuan Guanyu Gongren Tuixiu, Tuizhide Zanxing Banfa [State Council’s Temporary Measures on the Retirement and Resignation of Workers], Doc. 104 (1978) (emphasis added).

⁸⁸ Guowuyuan Guanyu Anzhi Laoruobingcan Ganbude Zanxing Banfa [State Council’s Temporary Measures on the Proper Arrangement of the Elderly, Weak, Infirm and Disabled Cadres], ratified by the Second Meeting of the

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is 60, whether they are cadres or workers. But female cadres must retire at 55, and female workers at 50. It is important to note that private companies are not bound by either directive, though they frequently force women to retire before men.⁸⁹

Based on the national “Temporary Measures,” many female professionals are let go upon reaching the age of 55. According to lawyers who litigate these cases, employers interpret the measures somewhat creatively. The Cadres’ Measures state women “can” retire at 55, which would appear to give women the choice of whether to retire at 55. But in reality, employers claim they “can” make women retire at 55, and quite a few have. The employer’s decision to do so may be buttressed by local legislation that strengthens the position of the employer vis-à-vis the employee.⁹⁰

Differential age restrictions harm women in several ways. First, for many women, their professional lives may only begin to blossom at age 50, particularly if they deferred professional commitments to raise children, obtain advanced degrees, or both. To require women to retire at 55, 5 years before their male counterparts, nullifies a lifetime of toil, trouble and deferred gratification.

Second, retirement pensions are tied directly to the number of years worked. If a woman retires five to ten years before a man, her pension will be somewhere between 7% and 20% less than a man’s.⁹¹ This ensures that differential treatment persists long after

Standing Committee of National People’s Congress, May 24, 1978 (emphasis added).

⁸⁹ Interview with Professor Guo Huimin, Sept. 22, 2009 (on file with author). Professor Guo explained that women may make more money from social security than from their working wage. From the company’s perspective, replacing older employees with younger ones can significantly lower payroll expenditures.

⁹⁰ See FUNÜ ZHONGGUO—ZHONGGUO [WOMEN’S WATCH—CHINA], ZHONGGUO NÜXING ZHUANYE JISHU RENYUAN TIQIAN TUOXIU: ANLI YANJIU [CASE STUDIES OF EARLY RETIREMENT OF FEMALE PROFESSIONAL AND TECHNICAL PERSONNEL IN CHINA] 58-62 (2008) (describing cases brought by women forced to retire in Shanghai and Tangshan (Hebei), where courts held that employers had the right to make employment and termination decisions based on local legislation).

⁹¹ Chen Weimin & Li Ying, *Tuixiu Nianling dui Zhongguo Chengzhen Zhigong Yanglaojin Xingbie Chayide Yingxiang Fenxi* [Analyzing the Impact of the Retirement Age on the Gender Gap in Pensions of Urban Cadres and Workers], in SHEHUI XINGBIE PINGDENG YU FALÜ: YANJIU HE DUICE [GENDER EQUALITY & LAW: RESEARCH & SOLUTIONS 39, 46 (Jia Lin & Jiang Xiuhua eds., 2007).

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retirement.

In addition to early retirement, Chinese law also prohibits women from engaging in certain jobs. Labor regulations prohibit women from working in mines,⁹² felling and stacking timber, setting up scaffolding, demolishing buildings, working on electric power lines, and other jobs requiring dangerous or intense physical labor.⁹³ The regulations establish broader protections for menstruating women, pregnant women, and nursing mothers, who are barred from working in walk-in refrigerators, cold water, or other frigid jobs.⁹⁴ It is unclear whether this form of paternalism is any more justifiable than the concerns underlying the early retirement system. Some test of strength, stamina or agility would better replicate a person's physical capacities than a blanket ban. Though arguably well-intended, these regulations underscore the general notion that women are not fit for the workplace, or some sizable fraction of it.

Local regulations likewise discriminate against women. In 2003, Hunan published "Temporary Measures for Physical Examinations of Civil Servants," which apply to civil servants, but also to those working in state-sponsored institutions such as universities and hospitals. Article 22 requires that women who work in a medical facility's gynecological department have "normally developed secondary sexual characteristics; symmetrical breasts symmetrical without lumps; vulva not be inflamed, ulcerous or tumorous; and uterus not be prolapsed."⁹⁵ This certainly sounds like *per se* discrimination, at least to one trained in U.S. antidiscrimination law, since there are no corresponding anatomical specifications for male workers. As they stand, however, these requirements heighten the burden on women, subjecting their bodies to notions of anatomical correctness that have no bearing on her capacity to perform the job at hand. Moreover, they also eliminate disabled persons, as well as disease carriers such as breast cancer survivors, suggesting a multiplicity of discrimination.

⁹² This is also covered in the Labor Law, *supra* note ___, Art. 59.

⁹³ Nüzhi Gong Jinji Laodong Fanweide Guiding [Regulation on the Scope of Prohibited Labor for Female Workers], promulgated by the Ministry of Labor, Jan. 18, 1990. Article 3 establishes a blanket ban on these and other activities.

⁹⁴ *Id.*, art. 4.

⁹⁵ See Cai, *supra* note ___, at 23.

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1B. Efforts to Reform Gender Discrimination

The most significant legal reform in the area of women's rights generally,⁹⁶ and discrimination specifically, was the 2005 revision of the Law on the Protection of Women's Rights and Interests ("Revised Women's Law").⁹⁷ The law addresses several weaknesses in China's existing legal structure, such as the underrepresentation of women in national and local politics, the fragility of women's property rights, and the prevalence of sexual harassment in the workplace.⁹⁸ For the first time,⁹⁹ the law explicitly states that the promotion of equality between men and women is a "basic national policy,"¹⁰⁰ lending additional rhetorical support to a position that the government has long exhorted.

A group of elite scholars and officials began drafting revisions to the law in 2003, drawing heavily on international and comparative experience.¹⁰¹ This group included both members of government-run entities like the All China Women's Federation and the Chinese Academy of Social Sciences, as well as civil society actors such as the Center for Women's Law and Legal Services at Peking University.¹⁰² Through workshops, conferences and roundtables, these scholar-activists helped channel recommendations from United Nations committees and other countries' laws into the legislative process of the PRC. While not all their suggestions made it into the law, they have laid out several issues—including discrimination, domestic violence and property rights—for future regulations and provincial implementing regulations.

Despite various improvements made in the law, the

⁹⁶ To be sure, other areas of gender reform are important, including the passage of regulations on domestic violence by the Supreme People's Court and Ministry of Public Security. But these do not focus specifically on the issue of discrimination or employment discrimination. See Sheji Jiating Baoli Hunyin Anjian Shenli Zhinan [Adjudication Guidance on Cases Involving Domestic Violence in Marriage], promulgated by the Sup. People's Ct., Mar. 16, 2008.

⁹⁷ See Funü Quanyi Baozhang Fa [Law on the Protection of Women's Rights & Interests], promulgated by the Standing Comm. Nat'l People's Cong., Aug. 28, 2005 ("Revised Women's Law").

⁹⁸ See Rong Jiaojiao, *Law Revised to Protect Women's Rights*, CHINA FEATURES, Sept. 20, 2005, <http://www.chinese-embassy.org.uk/eng/zt/t213042.htm>.

⁹⁹ *Id.*

¹⁰⁰ Revised Women's Law, *supra* note 96, art. 2.

¹⁰¹ See generally Rangita de Silva de Alwis, *Opportunities & Challenges for Gender-Based Legal Reform in China*, 5 EAST ASIA L. REV. 197, 199 (2010).

¹⁰² *Id.* at 205.

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Committee on the Elimination of All Forms of Discrimination against Women¹⁰³ issued a long list of concerns and recommendations in its 2006 Report (“Report”). Three in particular relate to the present discussion. First was China’s “capacity to understand the meaning of substantive equality and non-discrimination.”¹⁰⁴ Since many Chinese still do not understand the concept or problems of discrimination, the Report specifically recommended China include “a definition of discrimination against women in its domestic law, encompassing both direct and indirect discrimination.”¹⁰⁵ As we saw above in Section II, the problem is quite widespread in China; one reason may be a lack of understanding as to *why* discrimination is a problem.

A second concern was the lack of “effective legal remedies” for violations of the Convention, as well as “awareness-raising and sensitization measures about such legal remedies against discrimination so that women can avail themselves of them.”¹⁰⁶ Indeed, the lack of effective remedies, and failure to implement laws more generally, are constant criticisms leveled at the Chinese legal system. As we will see later, in Section V, the discrimination against women in hiring continues in China, even while no plaintiff has stepped forward to challenge it.¹⁰⁷

A third concern was “traditional stereotypes regarding the role of women and men in society.”¹⁰⁸ In other words, the divide between men’s work and women’s work remains relatively clear in China, with men occupying higher rungs, and women in down below. The Committee recommended a broad campaign of education and awareness raising, “in particular to men and boys,” through radio, television and print media.¹⁰⁹ The Committee also suggested the inclusion of gender sensitivity into school curriculum and textbooks.¹¹⁰ The Committee had other suggestions as well, but they lie beyond the remit of this article.

¹⁰³ See Comm. on Elimination of Discrimination against Women, CEDAW Comm., 36th Sess., 743d to 744th mtg., U.N. Doc. CEDAW/C/CHN/CO/6 (Aug. 25, 2006) (“CEDAW Report”).

¹⁰⁴ *Id.* at para. 10.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*, para. 12.

¹⁰⁷ See *infra*, notes 272-274 and accompanying text.

¹⁰⁸ See CEDAW Report, *supra* note 103, at para. 18.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

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As regards the differential retirement age, debate continues, though little forward momentum is detectable. In April 2009, one of China's most senior female politicians, Chen Zhili, called on the city of Beijing to take the lead in equalizing the retirement age for cadres.¹¹¹ Noting that Beijing's decision to do so "would have a huge influence on the rest of China," Ms. Chen believed that achieving equality between the sexes would be greatly advanced by leveling the retirement ages.¹¹² The mere fact that a person of Ms. Chen's stature would make such an appeal is significant, and indicates some level of support among Chinese government officials. Still, the fact that this proposal has not moved forward in over a year does not bode well for its implementation.

2A. *Hukou Discrimination*

The household registration, or *hukou*, system helps maintain the physical separation of urban resident from their rural brethren. Instituted in 1958, the system initially permitted the government to distribute resources and benefits more effectively, to control migration between from rural areas to urban settings, and to keep closer tabs on criminal activity.¹¹³ Citizens were categorized according to their place of residence, and then whether they were rural ("agricultural") or urban ("non-agricultural").¹¹⁴ If you had a Beijing *hukou*, for instance, you benefited from the panoply of benefits (insurance, education, social welfare, and even food rations during the PRC's more tumultuous periods) that Beijing provided its residents. If, on the other hand, you lived in Beijing without a Beijing *hukou*, you could not have access to these services.

In recent years, the system has relaxed somewhat.¹¹⁵

¹¹¹ See Zhang Haiyan, *Quanguo Fulian Zhuxi Chen Zhili Huyu: Beijing Shuaixian Shixing "Nannü Tongling Tuixiu [Chairwoman of the All China Women's Federation Chen Zhili Calls on Beijing to Take the Lead in Implementing Equal Retirement Age]*, FAZHIWANG [LEGAL DAILY], Apr. 3, 2009, http://www.legaldaily.com.cn/0801/2009-04/03/content_1064630.htm. Ms. Chen is the President of the All China Women's Federation, and Vice Chairwoman of the Standing Committee of the National People's Congress. *Id.*

¹¹² *Id.*

¹¹³ See Migrant Workers in China, China Labour Bulletin, <http://www.china-labour.org.hk/en/node/100259>.

¹¹⁴ Congressional-Executive Commission on China, *China's Household Registration System: Sustained Reform Needs to Protect China's Rural Migrants*, <http://www.cecc.gov/pages/news/hukou.php>.

¹¹⁵ See Hein Mallee, *Migration, hukou and resistance*, in CHINESE SOCIETY:

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Wealthy or educated rural residents can apply to become local residents of various cities, depending upon criteria set out by the city.¹¹⁶ Currently, the estimated 150 million migrant workers working in Chinese cities offer proof that people are no longer tightly bound to their native village, as they once were in the early days of the PRC. But this does not mean that life has become any easier for today's migrant worker. Typically, they toil at low-wage job without social security, a guaranteed wage, or access to medical care. Equally troubling, their children are often ineligible to attend local schools, recreating another generation of marginalization.

Reinforcing one's *hukou* status is a raft of regulations that further disadvantage migrant workers. National regulations, for instance, instruct local employers—private, public and state organs alike—on how to hire workers who come from outside their locality.¹¹⁷ One regulation from the Ministry of Labor provided that outside workers can be hired only if a) no local person is qualified to fill the position, and b) the local labor and employment agencies have approved the employer's request for an outside hire.¹¹⁸ That is, local people should receive priority in job recruitment, and outsiders can fill positions only when a *local* agency has approved of the placement. While this regulation has since been withdrawn,¹¹⁹ it set a precedent to which many cities have clung, even in the present. Nanjing, for instance, still

CHANGE, CONFLICT & RESISTANCE 83, 99 (Elizabeth J. Perry & Mark Selden eds., 2000) (describing the recent relaxation of the *hukou* system as a product of both state-initiated changes and large-scale labor migration).

¹¹⁶ See *China's Household Registration System*, *supra* note 114. For example, Zhejiang Province allows individuals who have purchased a home of a certain home or size to obtain a local *hukou*. *Id.*

¹¹⁷ See, e.g., Nongcun Laodongli Kuasheng Liudong Jiuye Guanli Zanxing Guiding [Temporary Regulation on the Administration of Cross-Provincial Employment of Rural Workers], promulgated by the Ministry of Labor, Nov. 17, 1994. Article 2 states that the regulations apply to private companies (*qiye*), individual economic organizations and state organs, enterprise organizations and social groups.

¹¹⁸ *Id.*, Art. 5.

¹¹⁹ The regulation was withdrawn in 2005. See Laodong he Shehui Baozhangbu Guanyu Feizhi 'Nongcun Laodongli Kuasheng Liudong Jiuye Guanli Zanxing Guiding' ji Youguan Peitao Wenjiande Tongzhi [Notice on the Abolishment of the Ministry of Labor and Social Security's 'Temporary Regulation on the Administration of Cross-Provincial Employment of Rural Workers' and Related Accompanying Documents], promulgated by the Ministry of Labor and Social Security, Feb. 7, 2005, http://fj.cq.gov.cn/wmfw/news/2008-3/183_713.shtml.

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encourages employers to hire local laborers, guided by the principle of hiring “first urban, then rural; first this city, then other cities; first this province, then other provinces.”¹²⁰ This privileges not only Nanjing residents, but also *any* other urban residents by mandating “first this city, then other cities.” This represents discrimination against rural people in its purest form. It does not merely privilege Nanjing residents, but any city resident, over her rural counterparts.

Other cities restrict migrant labor in less nuanced ways.¹²¹ Some have imposed quotas on the number of outside workers allowed to work in the city, either by enacting a strict numerical target, or setting a percentage of the total work force for outsiders.¹²² Other cities have prohibited, or severely restricted, the use of migrant workers in specific positions. Shanghai, for instance, closed positions such as shop assistants, maintenance staff, and custodial positions to persons without local residency.¹²³ While not high status positions, they would likely appeal to the frequently less educated and privileged migrant class. More expansively, Beijing placed restrictions on various white-collar positions such as administrators in the financial and insurance sectors, accountants, bank tellers and staff at “star-level” hotels.¹²⁴ Such regulations restrict the number of positions available to migrant workers, and steer them towards the most grueling jobs.

Apart from job restrictions and prohibitions, cities have also levied fees on employers that hire outside workers, under the various guises of “registration fees,” “work management fees,” “processing fees,” “administrative service fees” and so on.¹²⁵ The

¹²⁰ Nanjingshi Wailai Laodongli Laodong Guanli Guiding [Nanjing Regulations on Managing Labor of Outside Laborers], promulgated by the Nanjing City People’s Government, July 7, 1999.

¹²¹ Bingqin Li, *Urban Social Exclusion in Transitional China*, LSE Working Paper, 22-23.

¹²² Liu Xin, *Dui Jiuye Qishi Xingzheng Fagui Guizhang Qingli Baogao* [A report on Administrative Rules and Regulations in Employment Discrimination], in *ZHONGGUO JIUYE QISHI XIANZHUANG JI FAN QISHI DUICE* [THE EMPLOYMENT DISCRIMINATION IN CHINA: CURRENT CONDITIONS & ANTI-DISCRIMINATION STRATEGIES] 448, 453, 454 (Cai Dingjian ed., 2007).

¹²³ Li, *supra* note 103, at 22.

¹²⁴ See 1996 nian Benshi Yunxu he Xianzhi Shiyong Waidi Renyuan de Hangye Gongzhong Fanwei [Scope of Jobs and Professions That Permit and Restrict the Usage of Outside Personnel in Beijing, in 1996], promulgated by the Beijing Labor Bureau, Mar. 28, 1996.

¹²⁵ Liu, *supra* note 104, at 454.

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effect is to drive up the cost of hiring outside workers more costly, and to encourage the hiring of local employees.

Finally, cities may require migrant workers to obtain work permits, residency permits, health permits, and other documentation in order to work.¹²⁶ The hassle of obtaining such permits, coupled with the fear that one's status as a non-resident is automatically disqualifying, likely dissuades many migrant workers from applying for this paperwork. In this way, cities can prevent migrant workers from taking up local posts, and greatly restrict the number of eligible candidates. At the same time, such regulations generate revenue for the city from people who, on the whole, can least afford it.¹²⁷

2B. *Efforts to Reform Hukou Discrimination*

The new millennium has witnessed a number of reforms to the *hukou* system. While these had been percolating to some extent in the 1990s,¹²⁸ a wave of dissatisfaction hit the Chinese press in 2000. In December 1999, the Beijing government published 103 additional job categories from which migrant workers would be barred.¹²⁹ After vigorous academic debate, and most likely with the imprimatur of high officials, Chinese newspapers ran editorials and personal pleas from migrant workers that questioned the *hukou* system.¹³⁰ One editorial acknowledged the problem of local protectionism, but asked whether senior officials had considered the national picture.¹³¹ Another noted that China was “treating its precious labor resources as a burden and inhibiting the economic interests, the very livelihoods, of tens of

¹²⁶ *Id.*

¹²⁷ Yu Zhu, Liyue Lin and Bin Wang, *Social protection for rural-urban migrants in an era of increasing population mobility and socioeconomic transformation: China's experience since the late 1970s*, 4, Social Protection in Asia, Working Paper 3, <http://www.socialprotectionasia.org/pdf/CPDR-SPA-WP03.pdf>.

¹²⁸ See FEI-LING WANG, ORGANIZING THROUGH DIVISION AND EXCLUSION: CHINA'S HUKOU SYSTEM 187 (2005) (“These gradual and controlled reforms have relaxed the *hukou*-based regulation of internal migration at the level of small cities and towns yet have kept the quota-based migration restrictions largely intact for large cities.”).

¹²⁹ See Erik Eckholm, *China's Controls on Rural Workers Stir Some Rarely Seen Heated Opposition*, N.Y. TIMES, Mar. 10, 2000, at A10.

¹³⁰ *Id.*

¹³¹ *Id.*

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millions or rural laborers.”¹³² News websites and internet bulletin boards also posted criticism of the system and calls for its reform.¹³³

Over time, even the official state news media took to criticizing the *hukou* system. An article from People’s Daily made a number of strong claims, such as (a) residency and migration were “basic rights” (with the implication that they should not to be violated by state or local policy), (b) the *hukou* system itself was incompatible with China’s current economic development and tarnished its image of reform and openness, (c) the system enabled corruption, as evident in the prevalence of bribes to officials and the auctioning of local residency permits by small cities, and (d) abolishing the current system was “the general trend of history.”¹³⁴ The article ambitiously predicted that the system would one day be a vestige of the planned economy.¹³⁵

As noted, the central government had already initiated modest reform efforts. In 1997, the State Council initiated an experimental program permitting migrant workers to obtain local *hukou* in selected small towns and cities.¹³⁶ Provided that they had lived in the locality for at least two years, with a stable income and permanent residence, migrants could apply for permanent residency.¹³⁷ The program proved to be something of success, as over 540,000 migrants became full residents in 328 cities,¹³⁸ leading the State Council to expand the experiment to cover all small towns and cities.¹³⁹ Nevertheless, given the episodic nature

¹³² *Id.*, citing a letter from The China Youth Daily.

¹³³ See WANG, *supra* note 101 at 181-182.

¹³⁴ See He Jun, *Huji Zhidu Zuizhong Jiang Chengwei Jihua Jingjide Canyu Biaozi* [In the End, the Hukou System Will Become A Vestige of the Planned Economy], RENMIN RIBAO, Aug. 28, 2001, at http://news.china.com/zh_cn/domestic/945/20010828/10090344.html.

¹³⁵ *Id.*

¹³⁶ Guowuyuan Pizhuan Gong’anbu Xiaochengzhen Huji Guanli Zhidu Gaige Shidian Fang’an he Guanyu Wanshan Nongcun Huji Guanli Yijiande Tongzhi [State Council Plan Approving the Public Security Bureau’s Experimental Plan of Reforming the Management System for Residential Permits in Small Towns and Cities and Notice of Opinions on Perfecting the Management System of Rural Residential Permits], June 10, 1997.

¹³⁷ See *id.*, art. 3.

¹³⁸ WANG, *supra* note 101, at 187.

¹³⁹ Guowuyuan Pizhuan Gong’anbu Guanyu Tuijin Xiaochengzhen Huji Guanli Zhidu Gaige Yijiande Tongzhi [State Council Notice Approving the Public Security Bureau’s Opinions on Promoting Reform of the Management System

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of many migrant workers' work assignments (construction, infrastructure) and the seasonal rhythms of their lives (returning home to their native villages during holidays) these requirements still exclude highly transient migrants, arguably the most precariously positioned. And of course, large cities such as Beijing, Shanghai and Shenzhen—each of which employs millions of migrant workers—were exempt from the program.

The State Council continues to issue directives that relax the *hukou* system, and mitigate the discriminatory effects of various local regulations. In 2003, for instance, it issued a *Notice on Successfully Managing Employment and Services for Migrant Workers*.¹⁴⁰ The preface describes the current employment prospects for migrant workers in unusually candid terms. They “still face a number of irrational restrictions in employment; their rights and interests are not effectively protected; they are not paid their due wages; they are charged excessive fees; and other serious phenomena.”¹⁴¹ The Notice then calls on local governments to “abolish irrational restrictions on the employment of migrant workers,” including the abolishment of administrative approvals, professional restrictions excluding migrants, and registration requirements.¹⁴² It also mandates that local governments impose the same technical qualifications and health standards on migrant workers as it did on local residents.¹⁴³ With the *Notice*, the central government took a first step toward peeling away the encrustation of discriminatory provisions that had piled up from the 1990s.

Subsequent regulations in 2004 and 2006 likewise target discriminatory regulations. The 2004 *Notice on Further Improving the Employment Environment for Migrant Workers* praises the “large-scale work” in which various local cities and departments had engaged since the 2003 *Notice*.¹⁴⁴ But it also recognizes the manifold problems facing migrant workers, including inadequate training services and recruitment opportunities, employment fees,

for Residential Permits in Small Towns and Cities], Mar. 20, 2001.

¹⁴⁰ Zuohao Nongmin Jincheng Wugong Jiuye Guanli he Fuwu Gongzuo de Tongzhi [Notice on Successfully Managing Employment and Services for Migrant Workers in Cities], St. Council, Jan. 2003.

¹⁴¹ *Id.*

¹⁴² *Id.*, art. 2.

¹⁴³ *Id.*

¹⁴⁴ Jinyibu Zuohao Gaishan Nongmin Jincheng Jiuye Huanjing Gongzuo de Tongzhi [Notice on Further Improving the Employment Environment for Migrant Workers], St. Council, Dec. 27, 2004.

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numerous procedures, unpaid wages, violations of their rights and interests, and “illegal elements” who defraud migrant workers by charging recruitment fees for non-existent jobs.¹⁴⁵ The 2004 *Notice* repeats, almost word-for-word, the injunctions contained in the 2003 *Notice* to abolish administrative approvals, professional restrictions and registration requirements. But it now calls them “discriminatory regulations and irrational restrictions,” an acknowledgment that these regulations offend both morality and reason.¹⁴⁶

In 2006, the State Council issued *Certain Opinions on Resolving Problems of Migrant Workers*.¹⁴⁷ The *Opinions* acknowledge the “important contributions” that migrant workers have made to the development of China, and articulate a series of programmatic steps to alleviate the burden of this disenfranchised subpopulation:

Migrant workers are a new labor force that has sprung up in the processes of industrialization and urbanization during China’s reform and opening up. Their residency status is rural, but they engage primarily in non-agricultural production. Some go out to do both industrial and agricultural work during the non-agricultural season, and are very mobile. Others have been employed in cities for a long time, and comprise a large proportion of industrial workers. A large number of migrants work in cities and towns, where they have made important contributions to the construction of a modern China.¹⁴⁸

Article 5 of the *Opinions* sets out basic principles, such as “equal treatment.” It calls on cities to “Respect and maintain migrant workers’ legal rights, eliminate discriminatory regulations and

¹⁴⁵ *Id.*, Preamble.

¹⁴⁶ *Id.*, art. 1(1) (emphasis added).

¹⁴⁷ Guowuyuan Guanyu Jiejue Nongmingong Wentide Ruogan Yijian [State Council Opinions on Resolving Problems of Migrant Workers] Mar. 27, 2006. Article 5 lists the “Basic Principles,” the first of which reads “Equal treatment. Respect and protect the legal rights and interests of migrant workers; eliminate discriminatory regulations and systematic obstacles facing migrant workers who work in cities; make them enjoy the same rights and obligations as city residents in the professional fields.” *Id.*, art. 5.

¹⁴⁸ *Id.*, Preamble.

systemic obstacles to their working in cities, permit them to enjoy equal rights and obligations in urban professional employment.”¹⁴⁹ Other provisions address now familiar dilemmas of unpaid wages, labor contracts, employment services and training, and social protections.¹⁵⁰

But the problem, as the title intimates, is that these are merely *opinions*, so many statements of policy. Though legally binding, they do not specify the sanctions a court should impose upon finding a violation, making it unlikely that a court of law would find against a municipality for contravening these regulations. Like so much Chinese law, the *Opinions* propose prohibitions, but not sanctions to enforce those prohibitions.

Despite some changes in the residency requirements, the essential structure of the *hukou* system remains largely intact. By dividing citizens into agricultural and non-agricultural, and then allocating resources unevenly between the city and countryside, the PRC simply continues to reinforce the disenfranchisement of hundreds of millions of citizens. Though recent reform efforts aim to ameliorate some of the discriminatory burdens that cities have attached to migrant workers, the systemic discrimination remains untouched. By permitting greater mobility than it did fifty years ago, China has slightly blurred the division between urbanites and villagers. Yet, as one scholar concluded, “Chinese society by and large can still be divided into an ‘agricultural’ segment and a ‘non-agricultural’ one, and glaring differences remain in entitlements between the two.”¹⁵¹

3A. *Discrimination against Infectious Disease Carriers*

With an estimated 120 million carriers of the hepatitis B virus,¹⁵² 4.5 million known cases of tuberculosis,¹⁵³ and 700,000 carriers of HIV,¹⁵⁴ a sizeable portion of the Chinese populace faces

¹⁴⁹ *Id.*, art. 5.

¹⁵⁰ *Id.*, arts. 6, 8, 11, 16.

¹⁵¹ See Mallee, *supra* note 98, at 99.

¹⁵² See Andrew Jacobs, *China to End Required Testing for Hepatitis B*, N.Y. TIMES, Oct. 12, 2009, <http://www.nytimes.com/2009/10/13/world/asia/13beijing.html>.

¹⁵³ See Tian Ying, *China’s tuberculosis control project benefits millions*, XINHUA, Feb. 21, 2010, http://news.xinhuanet.com/english2010/china/2010-02/21/c_13182336.htm.

¹⁵⁴ See China: Statistics, UNICEF, http://www.unicef.org/infobycountry/china_statistics.html#66.

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the possibility of a different form of discrimination. Quite apart from the public health concerns that such diseases raise, the Chinese government has also had to deal with employment-related issues, such as workplace safety and discrimination.¹⁵⁵ For a long time, the government's thumb was decidedly on the side of public health and safety. Numerous laws and regulations excluded qualified persons who happened to carry the disease from a variety of positions. Recent reform efforts, however, suggest both a growing willingness to entrench the rights of disease carriers, and a clearer awareness of the actual threat that such persons pose to public safety generally, and the workplace in particular. Perhaps more important, citizen activism has played a critical role in promoting reform; the mobilization of public opinion has signaled to the Chinese government that hepatitis B discrimination is palpable, destructive, and in certain instances deadly.

A number of national laws and regulations prevent persons who carry infectious diseases from engaging in certain lines of work. The relevant provisions reflect the comprehensible concern that placing an infectious disease carrier in certain occupations might facilitate the spread of disease. Thus, the Food Safety Law prohibits persons with "dysentery, typhus, viral hepatitis, active pulmonary tuberculosis, or purulent or weeping skin diseases" from "working in direct contact with food for consumption."¹⁵⁶ This provision excludes a narrow range of job possibilities for a narrowly tailored group of disease carriers. Hepatitis A, for instance, can be spread through contaminated food or water,¹⁵⁷ while tuberculosis can be spread aurally when an infected person coughs, sneezes or even speaks.¹⁵⁸ Prohibiting carriers of these diseases from working in food production bears a rational relationship to public safety.

But other regulations seem less defensible. The Administrative Regulations on Public Hygiene, for instance,

¹⁵⁵ See Xin, *supra* note 19, at 82.

¹⁵⁶ See Shipin Anquan Fa [Food Safety Law], promulgated by Standing Comm. Nat'l People's Cong., Feb. 29, 2009, art. 34. Viral hepatitis includes forms A, B and C.

¹⁵⁷ See Center for Disease Control, Hepatitis A Information for Health Professionals: Hepatitis A FAQs for Health Professionals, <http://www.cdc.gov/hepatitis/HAV/HAVfaq.htm#general>. Uncooked contaminated foods have led to outbreaks. See *id.*

¹⁵⁸ See Center for Disease Control, Tuberculosis: General Information, <http://www.cdc.gov/tb/publications factsheets/general/tb.htm>.

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restrict the same carriers of disease listed in the Food Safety Law from a wide range of posts. The regulations target jobs where employees would have direct contact with customers: hotels, restaurants, inns, cafes, bars, teahouses, public baths, barber shops, beauty salons, movie theatres, dance halls, concert halls, gyms, public parks, museums, libraries and more.¹⁵⁹ Without doing a separate epidemiological study for each disease, it seems pretty clear that this regulation sweeps a bit too broadly.

Hepatitis B provides a good example. It can be spread by birth; sex with an infected person; sharing needles, razors, syringes or toothbrushes with an infected person; direct contact with blood or open sores of an infected persons; or exposure to blood from sharp instruments (as used in ear-piercing or tattooing).¹⁶⁰ It seems highly improbable that a person with the hepatitis b virus is likely to spread the disease if working at, say, a movie theatre, museum, or bar, though one can certainly imagine a hypothetical situation where such “contact” may occur. But by restricting carriers of HBV from all manner of public employment, the regulation sends a strong *symbolic* message, both to carriers and a public that is largely uninformed about the transmission of such diseases. Namely, carriers pose a health risk, should not work in public places, and should avoid coming into contact with the general public.

Similarly, the 1989 *Supervisory Regulations on Hygiene in Cosmetic Products* ban some people from working directly in the production of cosmetics. In addition to carriers of the disease listed above (viral hepatitis, tuberculosis, dysentery), persons with eczema, ringworm and other dermatological conditions are also prohibited. This prohibition may be rational for ringworm, which can be spread through indirect contact, i.e., when a person touches an object that a second person then touches. But eczema is not

¹⁵⁹ See Gonggong Changsuo Weisheng Guanli Tiaoli [Administrative Provisions on Public Hygiene], promulgated by the State Council, Apr. 1, 1987. Article 2 lists the public places. Article 7 lists the forbidden diseases. See also Huazhuangpin Weisheng Jiandu Tiaoli [Supervisory Regulations on Hygiene in Cosmetic Products], promulgated by the State Council, Sept. 26, 1989. Article 7 banned the disease carriers mentioned above, plus persons with eczema, ringworm, and other dermatological conditions, from working in the production of cosmetics.

¹⁶⁰ See Center for Disease Control, Hepatitis B Information for the Public: Hepatitis B FAQs for the Public, <http://www.cdc.gov/hepatitis/B/bFAQ.htm#transmission>.

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contagious.¹⁶¹ Prohibiting persons with eczema from working in cosmetic production serves only to discriminate against them. By excluding people in this way, the State Council signals that their skin problem—literally a superficial blemish—renders them unfit for the work of “beautiful people.”

These restrictions entrench discrimination against carriers of diseases, excluding capable workers from jobs based on unfounded fears, and not genuine science. Regulators should instead determine the nexus between the spread of the disease (whether through casual contact, blood, bodily fluid, etc.) and the likelihood of contagion for a particular position. They can then specify which diseases are particularly contagious, and which positions should be off limits for medical reasons. Some comfort can be drawn from the fact that these quite sweeping regulations were issued in the 1980s, whereas more recent laws—like the 2009 Food Safety Law¹⁶² noted above—significantly narrow the scope to a few forbidden posts. But until these regulations are formally withdrawn, they remain valid law in the PRC. And since recent promulgated laws often explicitly carve out job posts proscribed by early regulations and directives passed decades ago, these regulations continue to generate prejudice against people.

3B. *Efforts to Reform Discrimination against Infectious Disease Carriers*

Not long after the Zhang and Zhou incidents, various government bodies set about revising laws and regulations. In 2005, the Ministry of Personnel issued the government’s first responsive regulation, permitting *some* carriers of the hepatitis b virus to work in civil service positions.¹⁶³ Applicants with “chronic or acute hepatitis” were still barred, but “antigen carriers” who had been examined could still work.¹⁶⁴

In 2007, the Ministry of Labor and Social Security promulgated two regulations that entrench the employment rights of HBV carriers. The first, *Opinion on Protecting the Employment Rights of Carriers of the Hepatitis Surface Antigen*, deals

¹⁶¹ JANET ZAND ET AL., SMART MEDICINE FOR HEALTHIER LIVING, 259 (19 99).

¹⁶² See *supra*, note 133, and accompanying text.

¹⁶³ Gongwuyuan Luyong Tijian Tongyong Biaozhun (shixing) [General Standards for Physical Examinations in the Employment of Civil Servants (provisional)], promulgated by Ministry of Personnel, Jan. 17, 2005.

¹⁶⁴ *Id.*, art. 7.

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exclusively with carriers.¹⁶⁵ It provides, in pertinent part, “Apart from those jobs specifically proscribed by national laws, administrative regulations, and regulations from the Ministry of Health due to ease of contagion, employers may neither refuse to hire, nor fire, a carrier of the hepatitis b antigen because he carries the antigen.”¹⁶⁶ The regulation “strictly regulates the employer’s request and use of medical examinations,” permitting them only when there is “actual need”¹⁶⁷ based on the exigencies of the job. Nor may an employer force a job applicant to take a hepatitis b test, except for those jobs prohibited to HBV carriers by national laws or administrative regulations.¹⁶⁸ It also calls on medical institutions to “protect the privacy rights of hepatitis antigen carriers,” suggesting that they too have a responsibility to keep this delicate information in the proper hands.¹⁶⁹ Finally, the regulation calls on local offices of labor ministry, as well as labor arbitration committees, to protect the legal rights and interests of laborers in general, and specifically “to prevent occurrences of the employment discrimination issue” in hiring and employing workers.¹⁷⁰ This regulation represents a targeted response to the problem of discrimination against HBV carriers. By calling on labor arbitration committees, the regulation holds out the promise of implementing antidiscrimination law.

Second, the Ministry of Labor of Social Security promulgated *Regulations on Employment Services and Employment Administration*, which complements the Employment Promotion Law in various ways.¹⁷¹ Chief among them are various

¹⁶⁵ Guanyu Weihu Yigan Biaomian Kangyuan Xiedaizhe Jiuye Quanlide Yijian [Opinion on Protecting the Employment Rights of Carriers of the Hepatitis Surface Antigen], promulgated by the Ministry of Labor & Social Security, May 18, 2007.

¹⁶⁶ *Id.*, art. 2(1).

¹⁶⁷ *Id.*, art. 2(1).

¹⁶⁸ *Id.*, art. 2(2).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Jiuye Fuwu yu Jiuye Guanli Guiding [Regulations on Employment Services & Employment Administration], promulgated by the Ministry of Labor & Social Security, Nov. 5, 2007. Article 1 notes the “regulations were formulated in accordance with the Employment Promotion Law . . . so as to improve employment service . . . foster and perfect an openly structured human resources market . . . and provide services for job-seekers.” *Id.*, Art. 1. As a regulation issued by the labor ministry, the *Regulations* would be subordinate to the Employment Promotion Law if there were a conflict in their provisions. *See*

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prohibitions on discrimination against women, disabled persons, and carriers of infectious diseases.¹⁷² Apropos of HBV, the *Regulations* for the first time prescribe a punishment for employers that discriminate against carriers. If an employer requires an HBV test for a job *not* prohibited to carriers by national law or administrative regulation, the employer faces a fine of up to 1,000 rmb (about \$150).¹⁷³

In this way, the regulation addresses a fairly common type of *indirect* discrimination in China, as analyzed more fully in the following section, on the Employment Promotion Law. Employers may claim that the medical examination (of which the HBV test forms a part) is a neutral policy designed to ensure the health of all applicants, but instead use the results to exclude HBV carriers. While a small sum for many Chinese employers, the *Regulations* are helpful in articulating a sanction, something Chinese labor law has tended to avoid.

In February 2010, the Chinese government fully scrapped HBV testing.¹⁷⁴ Three ministries issued a Notice to prohibit employers and schools from requesting HBV testing in the medical examinations, requesting the results of an applicant's HBV tests, and asking the applicant if he carries the antigen.¹⁷⁵ Medical institutions are likewise banned from giving schools or employers the results of the medical examination.¹⁷⁶ The Notice also recognizes the important privacy rights that attach to this information by making it for the examinee's eyes only.¹⁷⁷ Finally, sanctions are included against employers and schools that request HBV examinations in violation of the Notice.¹⁷⁸

Lifa fa, *supra* note 7, Art. 79.

¹⁷² See *id.*, Art. 16 (women), Art. 18 (disabled persons), Art. 19 (infectious disease carriers).

¹⁷³ *Id.*, Art. 68.

¹⁷⁴ Guanyu Jinyibu Guifan Ruxue he Jiuye Tijian Xiangmu Weihu Yigan Biaomian Kangyuan Xiedaizhe Ruxue he Jiuye Quanlide Tongzhi [Notice Further Regulating the Items on Physical Examinations for Education and Employment to Protect the Educational and Employment Rights of Hepatitis B Surface Antigen Carriers], promulgated by the Ministries of Education, Health, and Labor & Social Security, Feb. 10, 2010.

¹⁷⁵ *Id.*, Art. 1.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*, Art. 2. "The hepatitis b items on the examination report should be sealed, only to be opened by the examinee. No employer or individual may open another person's examination report."

¹⁷⁸ See *id.*, at Art. 3. "If employers violate this Notice, and request an applicant

IV. THE HBV SOCIAL MOVEMENT

The cases of Zhou Yichao and Zhang Xianzhu first raised the profile of HBV discrimination in 2003. The criminal trial that concluded Zhou's deadly outburst, and the administrative trial that followed Zhang's, received national, even international,¹⁷⁹ attention. The trials informed government officials, among others, that employment discrimination against HBV carriers could have deadly consequences, and that this issue required a rapid response. But the cases also set in motion a wider chain of events—a social movement—that has clamored for legal reform. Before examining the various activities and channels by which HBV advocates have fomented for legal change, a rudimentary primer will illuminate the basic concepts of social movements.

Sociologists attend to three facets of social movements to explain their emergence, evolution and success (or failure).¹⁸⁰ First, scholars direct attention to the *political opportunities* and *constraints* that confront a particular group, including changes in institutional structures or informal power relations.¹⁸¹ This analysis may also include the degree of openness of the political system, the stability of elites that support the system, as well as the state's capacity for repression.¹⁸² In other words, one must appreciate the broader political context, and the internal dynamics that permit a movement to gain traction in a particular society.

Second, and inseparable from the issue of context, are the *mobilizing structures* of a movement: the collective vehicles, networks and organizations through which people advocate for change.¹⁸³ For a movement to survive and achieve success, however defined, activists must create organizational structures to

sit for an HBV examination, they should timely terminate the request, correct the mistake, and be punished according to the *Regulations on Employment Services and Employment Administration*.”

¹⁷⁹ The Los Angeles Times and New York Times both covered these stories. See Ching-Ching Ni, *The World Killer Inspires Drive Against Hepatitis Bias*, L.A. TIMES, Jan. 8, 2004, at 5 (describing both Zhou Yichao and Zhang Xianzhu cases); Joseph Khan, *Chinese People's Republic Is Unfair to Its Short People*, N.Y. TIMES, May 21, 2004, at A13.

¹⁸⁰ See Doug McAdam, John D. McCarthy, Mayer N. Zald, *Introduction, in COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS: POLITICAL OPPORTUNITIES, MOBILIZING STRUCTURES & CULTURAL FRAMINGS* 1, 2 (Doug McAdam, John D. McCarthy, Mayer N. Zald eds., 1996).

¹⁸¹ *Id.* at 2-3.

¹⁸² *Id.* at 12.

¹⁸³ *Id.* at 2.

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sustain collective action.¹⁸⁴ The individual accomplishments people like Martin Luther King, Jr. and Susan B. Anthony are impressive, but neither could have succeeded without an organization of supporters, such as the Southern Christian Leadership Conference, or the National Women's Rights Convention. The context of rights-promotion for HBV carriers in China is, of course, vastly different than late nineteenth-century New England, or mid-century Georgia. But the importance of collective action of organizational structures runs throughout all social movements.

Third, a proper analysis must account for the *framing processes*, the shared meanings through which advocates and affected people understand their situation.¹⁸⁵ Social movements are predicated upon the tension between shared anxieties about a particular problem, and optimism that collective action can redress it.¹⁸⁶ The framing process asks, What stories do they tell to explain their particular conditions? How do they interpret events to fit within these dominant narratives? To sum up, one need to account for the sociopolitical context in which a movement emerges, the organizational networks that foster the desired change, and the signification processes through which agents perceive the problem and solutions. There is room, of course, to quibble with the lines between these categories,¹⁸⁷ but they seem to constitute three vital acts of any social movement.

As noted, 2003 was “the year of antidiscrimination”¹⁸⁸ for HBV carriers. Within months of each other, the Zhou and Zhang cases showed how serious and widespread discrimination was, and that the government itself was an agent of discrimination. The incidents provided a useful political opportunity around which

¹⁸⁴ *Id.* at 13.

¹⁸⁵ *Id.* at 2.

¹⁸⁶ *Id.* at 5.

¹⁸⁷ Anthony Oberschall, *Opportunities and framing in the Eastern European revolts of 1989*, in *COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS: POLITICAL OPPORTUNITIES, MOBILIZING STRUCTURES, & CULTURAL FRAMINGS* 93 (Doug McAdam, John D. McCarthy, Mayer N. Zald eds., 1996). Oberschall divides the social movement into four components: discontents and grievances; ideas to frame the important issues; collective action; and political opportunity. *Id.* at 94.

¹⁸⁸ See, e.g., Cheng Gong, *Fan Yigan Qishi Lu Manman [The Road against Hepatitis B Discrimination Is Long]*, *NANFANG ZHOUMO [SOUTHERN WEEKEND]*, Oct. 27, 2005, <http://www.southcn.com/weekend/commend/200510270009.htm>

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antidiscrimination advocates could raise awareness of the problem of employment discrimination, and particularly that against carriers of HBV. Two ambitious and accomplished young men sought to serve their government, the highest calling for aspiring youth in traditional China, from at least the Tang Dynasty to the present.¹⁸⁹ Both passed the “substantive” portions of the challenging civil service examination, yet another proud tradition that ensured only the most qualified entered government service. Yet both were denied positions due to a factor they could not control, and which would imperil neither their ability to work, nor the health of their colleagues.

In recent years, high-profile cases such as Zhou's and Zhang's have catalyzed legal reform efforts, or at the very least symbolized larger problems that litigation aims to address.¹⁹⁰ The criminal trial of Zhou Yichao, and his subsequent execution, aroused little public sympathy, but it did capture the attention of the government. On the other hand, Zhang's decision to channel his disappointment through administrative litigation served more than his own ends, reaching hundreds of millions of people in and outside of China. The court's highly technical decision did not vindicate Zhang,¹⁹¹ but it did spark a debate about the human rights of one of China's largest disadvantaged groups, and the function of courts in entrenching those rights. At the time, Chinese courts manifested little sympathy to plaintiffs suing for discrimination, and generally avoided ascribing any kind of culpability blame to government actors.¹⁹² However routine, even pedestrian, the filing

¹⁸⁹ See IMMANUEL C.Y. HSÜ, *THE RISE OF MODERN CHINA* 75-77 (6th ed., 2000).

¹⁹⁰ The linking of cases or incidents to subsequent legal reform is a ripe topic for study. Important case studies would include Yang Jia case (mental health of criminal defendants), the She Xianglin cases (sentencing and proof), the Deng Yujiao case (murder of government official by woman he tried to rape) or any of the recent murders in detention centers.

¹⁹¹ The court merely found that the hospital that administered the medical examination wrongly concluded that Zhang was unfit to work at the Personnel Bureau. Accordingly, the Bureau's adoption of the hospital's conclusion lacked a factual basis. But the court did not order compensation for Zhang, nor order the Personnel Bureau to hire him. See *Zhang Xianzhu v. Wuhu Personnel Bureau*, (Wuhu Dist. Ct., Dec. 19, 2003), in ZHOU WEI, *ZHONGGUODE LAODONG JIUYE QISHI: FALÜ YU XIANSHI* [EMPLOYMENT DISCRIMINATION IN CHINA: LEGISLATION & REALITY] 348, 355 (2006).

¹⁹² One much discussed case involved Jiang Tao, who sued the Chengdu branch of the People's Bank of China in early 2002. In job advertisements, the Bank required male applicants to be 168 centimeters (5'7”), but Jiang stood 165

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of an employment discrimination action may seem to American readers, Zhang's decision to litigate was by no means automatic. His parents firmly opposed the decision to sue.¹⁹³ At that time, very few people had sued for employment discrimination, and those who did had little to show for it.

In September 2003, Zhang's name appeared on an online discussion board for HBV carriers, called *gandan xiangzhao*.¹⁹⁴ The site's webmaster and various posters encouraged Zhang to take legal action to protect his rights.¹⁹⁵ The site also served to connect Zhang Xianzhu with Professor Zhou Wei, of Sichuan University in Chengdu.¹⁹⁶ Professor Zhou had made headlines in 2002 by litigating one of China's first employment discrimination cases, involving height discrimination.¹⁹⁷ He wanted to expand his work in the field of constitutional litigation, ever hoping to, in his words, "marry theory and practice."¹⁹⁸ He first heard about Zhang's case through *gandan xiangzhao*, and instructed a student to contact Zhang through the website.¹⁹⁹ Professor Zhou wanted "to fight for the basic survival rights of 120 million HBV carriers" and to "protect the basic rights of humanity."²⁰⁰ Even at this early stage, the issue of employment discrimination was framed as a

centimeters (5'6"). With the help of his professor, Zhou Wei, Jiang sued the Bank, which then removed the height requirement from the advertisement. The removal mooted the case. As far as the court was concerned "Plaintiff Jiang Tao's claimed rights infringement has not yet occurred, and is hence not litigable." See ZHOU WEI & LI CHENG, XIANFA PINGDENG, ZIYOU YU FANQISHIDE GONGYI SUSONG – ANLI, GUOCHENG YU PINGLUN [PUBLIC INTEREST LITIGATION IN CONSTITUTIONAL EQUALITY, LIBERTY & ANTIDISCRIMINATION – CASES, PROCESSES & CRITICISMS] 28 (2009).

¹⁹³ See *id.* at 78.

¹⁹⁴ See Zhou Mu, "Yigan Qishi" An Kaiting: Zhou Wei Lüshi Jiешou Jizhe Zhuanfang ["Hepatitis B Discrimination" Case Opens: Lawyer Zhou Wei Accepts Exclusive Interview], CHENGDU WANBAO, Dec. 12, 2003, <http://news.sina.com.cn/c/2003-12-20/03432419602.shtml>. Meaning literally, "the liver and gall bladder illuminate each other," but more figuratively, devotion or sincerity between two people, *gandan xiangzhao* was one of the first fora where Chinese HBV carriers could openly and anonymously discuss their problems.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ See ZHOU WEI, *supra* note 171, at 23.

¹⁹⁸ *Id.* at 1.

¹⁹⁹ See Zhou Mu, *supra* note 176.

²⁰⁰ *Id.*

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basic human right to survival.²⁰¹

With Professor Zhou as his advocate, Zhang Xianzhu sued the Wuhu Personnel Bureau in October, 2003. At the time, there was no law on point, so Professor Zhou fashioned a number of innovative corollaries to press the case. For instance, Zhang's complaint alleged that the Bureau's conclusion not to hire him because of HBV constituted "malicious discrimination," and "did not fulfill the state's legal obligations to respect and protect human rights, and to treat citizens equally under the law."²⁰² It was, in other words, a violation of the right to equality enshrined in Article 33(2) of the Chinese Constitution.²⁰³ In subsequent filings, Professor Zhou analogized that Chinese laws such as the Law on the Prevention of Infectious Diseases and Food Safety Law, and regulations such as the Public Safety Hygiene Regulations Administrative, prohibit HBV carriers from positions in potentially high-risk positions like medical facilities and food production plants.²⁰⁴ But these concerns were inapposite for an office job in a

²⁰¹ In this way, HBV advocates share similarities with rural rights resisters as theorized by O'Brien and Li, who define rightful resistance a "popular form of contention that operates near the boundary of authorized channels, employs the rhetoric and commitments of the powerful to curb the exercise of power, hinges on locating and exploiting divisions within the state, and relies on mobilizing support from the wider public." KEVIN J. O'BRIEN & LIANJIANG LI, *RIGHTFUL RESISTANCE IN RURAL CHINA 2* (2005). HBV advocates use the language of the state – constitutional law, national law, regulations, and so on – to frame their struggle, such as the right to survival. But they are quite keen on using authorized channels to effectuate legal change, as seen in the numerous petitions they have submitted to the National People's Congress. They are also less concerned about exploiting the central-rural divide. For the most part, HBV advocates are comparatively wealthy, well educated, and more internet-savvy than rural resisters. Moreover, rightful resisters occasionally agitate quite demonstrably (tearing up ballots, grabbing microphones to denounce local officials), and repose trust in the central government at the expense of local officials. *Id.*, at 56-7. HBV advocates may demonstrate publicly, but not in a confrontational way. Nor is there an implicit trust in the central government over local governments. *Id.*, at 42-3.

²⁰² See Administrative Complaint, in Zhou, *supra* note 157, at 326, 327.

²⁰³ *Id.* at 327.

²⁰⁴ For instance, the Food Safety Law, Law on Prevention of Infectious Diseases, Administrative Provisions on Public Hygiene, and Implementing Regulations for the Administrative Provisions on Public Hygiene all place various restrictions on HBV carriers in fields such as food production, water provision, child care, and even beauty salons. See Statement of First Instance, *id.* at 329, 333. But the position Zhang applied for involved economic administration in the county affairs office, and was unlikely to involve the kind

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personnel bureau.²⁰⁵

The court ruled that the hospital—not a party to the lawsuit—had erred in concluding Zhang was unfit for the position. Anhui Province’s *Provisional Implementing Regulations for the Physical Examination of National Civil Servants* disqualified actively infected carriers of HBV, but not passive carriers like Zhang.²⁰⁶ Moreover, the hospital exceeded its jurisdiction in ruling on Zhang’s suitability, which properly belonged to the Personnel Bureau. Since the recruitment cycle ended with the second-placed candidate filling the post, the court found it could order no remedy.²⁰⁷ Zhang had won a symbolic victory on a very minute point of law, and his case made headlines all over China.²⁰⁸ But he left the courthouse as unemployed as when he entered it.²⁰⁹

Zhang’s lawsuit was itself an event, an opportunity to call attention to the larger issue of discrimination against HBV carriers. Advocates informed the media about Zhang’s case, ensuring that dozens of journalists attended the hearings, and reported on the announcement of the verdict.²¹⁰ Members of the online support group *gandan xiangzhao* also attended the hearings, both to show support for Zhang, and to increase visibility for their cause. Press reports about a figure as sympathetic as Zhang opened up discussions, and allayed people’s fears about working alongside HBV carriers.²¹¹

of direct human contact that would conceivably make an HBV carrier “undesirable.” *Id.* at 333.

²⁰⁵ See *Administrative Complaint*, *id.* at 355.

²⁰⁶ See *Statement of First Instance*, *Id.* at 333.

²⁰⁷ *Id.*

²⁰⁸ See ZHOU & LI, *supra* note 174, at 76 (listing the newspaper articles covering the case, such as People’s Daily, Xinhua, CCTV, Southern Weekend, and others).

²⁰⁹ Zhang has not had any easy time finding work. He was let go from a job in a Guangzhou factory after his boss recognized him from the lawsuit. He also taught at an elementary school in Guizhou. He has received offers from hospitals and pharmaceutical companies to serve as a spokesperson, but worried that such positions would “be equal to selling my own soul.” See generally Huang Maowang, *Zhang Xianzhu: Yigan Zhidu Qishi Yin Ta Zhibu* [Zhang Xianzhu: Systemic Discrimination against Hepatitis B Stopped Because of Him], FAZHI ZHOUBAO [LEGAL WEEKLY], Aug. 29, 2008, at <http://www.dffy.com/sifashijian/jj/200808/20080829151838.htm>.

²¹⁰ See ZHOU & LI, *supra* note 174, at 78-9 (noting that fifty journalists attended the December 19, 2003 hearing, and over thirty journalists, from all over the country, attended the verdict on April 2, 2004).

²¹¹ See, e.g., Du Wenjuan, *Chuanranbing Fangzhifa: Zhang Xianzhu wei 1.2*

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The *gandan xiangzhao* website quickly gained a large following among HBV carriers and others.²¹² An international domain name since 2001, the site had attracted 85,000 registered members by December 2004,²¹³ where it served as a sounding board for the frustration of carriers and their experiences in education, employment, housing, public services, and other fields. The ability to communicate openly, freely, and honestly about this topic brought together a large community of HBV advocates. They had neither discussed the issue publicly, nor publicly identified themselves as a group in need of legal protection.

The website also functioned as a collective action center. On August 13, 2003, advocates posted a proposal on the site, asking the Standing Committee of National People's Congress (the highest legislative body) to review the constitutionality of the provincial regulations on civil servant examinations.²¹⁴ Over 1,600 Chinese citizens signed the petition before sending it to the Standing Committee in November 2003.²¹⁵ The petition warned of “dozens, even hundreds, of Zhou Yichaos” in the future if the government did not attend to this “serious social problem.”²¹⁶

Yiren Weiquan [*Ways of Curing Infectious Diseases: Zhang Xianzhu Protects the Rights of 120 Million*], RENMIN RIBAO [PEOPLE'S DAILY], Apr. 13, 2005, <http://www.people.com.cn/GB/14576/28320/41246/41339/3316310.html>.

²¹² Some of the plaintiffs analyzed in section V of this article also used the *gandan* site for legal and moral support. Plaintiffs 3 and 21, among others, used the site. See *infra*, Appendix at Sources, 3, 21.

²¹³ See “*In the hepatitis B camp*” Website: Home of hepatitis B carriers in China, <http://www.hbvhbv.com/english>.

²¹⁴ See *Zhanyou Daqianming Faqi* “*Weixian Shenchashu*” [*Droves of Netizens Sign “Review of Constitutionality”*], Jan. 24, 2005, XINLANG DUSHU [NEW WAVE READER], http://vip.book.sina.com.cn/book/chapter_38316_20253.html; “*Gandan Xiangzhao*” *Chong ran Shengming Xiwang* [*“Gandan Xiangzhao” Again Raises Hope for Life*], Sept. 17, 2005, YANGCHENG WANBAO [YANGCHENG EVENING NEWS], http://ycwb.com/gb/content_2005-09/17/content_985681.htm.

²¹⁵ A copy of the petition appears on the *gandan xiangzhao* website. See *1611 wei Gongming Yaoqiu dui Zhongguo 31 sheng Gonwuyuan Luyong Xianzhi Yigan Xiedaizhe Guiding Jinxing Weixian Shengcha he Jiaqiang Yigan Xiedaixhe Lifa Baohude Jianyishu* [A Petition by 1,611 Citizens to Demand Review of the Constitutionality of China's 31 Provinces' Regulations Limiting the Hire of Civil Servants with the Hepatitis B Virus, and to Strengthen the Legal Protection of Hepatitis B Virus Carriers], <http://www.Hbvhbv.com/forum/thread-298433-1-963.html> (hereinafter, “Petition”).

²¹⁶ See *Petition*, *supra* note 196, at II(8).

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Invoking domestic laws and international human rights law,²¹⁷ the petition urged “the Chinese State and Central People’s Government to honor their solemn commitment to the people of the world, and ensure the collective *right to exist* of 120 million people. If we improve the living conditions of 120 million people, this would be China’s contribution to all of humanity.”²¹⁸

The petition contained a number of proposals, some of which have since been adopted. First and foremost, the petition called on the State Council to remove HBV from the list of disqualifying diseases on the civil service examinations,²¹⁹ a task realized gradually by regulations issued in 2007 and 2010.²²⁰ Other proposal included the protection of privacy rights for HBV carriers,²²¹ subsequently crystallized in the 2010 *Notice* discussed above.²²² Perhaps most important, this petition has served as a template for subsequent requests made to government bodies. Lu Jun, one of China’s leading HBV advocates, has called on government bodies to pas various types of protective legislation and regulation.²²³ HBV advocates continue to petition the National People’s Congress, the Supreme People’s Court, and various ministries to enhance the protections of HBV carriers and disadvantaged people more generally.²²⁴

²¹⁷ For instance, the Proposal cites Article 33 of the Chinese Constitution (equal protection clause), and the first and second chapters of the Labor Law (which guarantee *inter alia* equal employment). *Id.*

²¹⁸ *Id.*, at II(11) (italics added).

²¹⁹ See *Proposal*, *supra* note 196, at III(1).

²²⁰ See *supra* notes 144-157 and accompanying text.

²²¹ See *Proposal*, *supra* note 196, at III(3).

²²² See *Notice*, *supra* note 156, at II.

²²³ See Zhao Xiaoqiu, *Tamende Fanyigan Qishizhi Zhan [Their Battle against Hepatitis B Discrimination]*, FALÜ YU SHENGHUO, Apr. 27, 2010 (noting that nine HBV websites collectively drafted a petition to protect the employment, education and privacy rights of HBV carriers, which prominent advocate Lu Jun then personally delivered to the State Council in September 2004, and that Lu Jun delivered similar petitions during the annual meetings of the National People’s Congress and the Political Consultative Committee in 2005, 2006 and 2007), <http://focus.news.163.com/10/0427/18/659VUC2900011SM9.html>.

²²⁴ See Guanyu “*Jiuye Cujin Fa*” *Bufen Tiaokuan Jinxing Sifa Jieshide Jianyi* [Proposal to Create a Judicial Interpretation for Some Provisions in the “Employment Promotion Law”] (on file with author). The petition was sent to the Supreme People’s Court in early 2010. See also *Waidi Canjiren ye Xiang Guangzhoushi Gongjiao Youhui [Non-resident Disabled People Also Enjoy Transportation Benefits from Guangzhou City]*, YANGCHENG WANBAO, May 16, 2010 (noting that 171 disabled people from 25 provinces signed a petition to the

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Upon the success of the *gandan xiangzhao* website, advocates established other websites and organizations to agitate on behalf of HBV carriers. For instance, hbver.com includes a message board, news articles about HBV, information about cirrhosis of the liver, and links to medicines and prevention methods.²²⁵ Another site, ganbaobao.com, has a special section on rights protection, with articles on the prevalence of discrimination, news about various lawsuits, and advice on how to handle rights infringements.²²⁶ Another legally oriented site is fanqishi.com, which links to articles on laws and lawsuits involving various forms of discrimination.²²⁷ These sites continue to play the role of informant and sounding board for HBV carriers, allowing people from all over China (and the world) to partake in the discussion. In addition, specialized organizations have sprung up to raise awareness, educate citizens, litigate cases and petition government bodies to enhance protections. The most successful of these organizations is probably Yirenping, which litigates cases, surveys employer attitudes, publishes a bimonthly newsletter with recent developments and submits petitions to government bodies on behalf of HBV carriers.²²⁸

In society more generally, for the first time, a wider discussion of discrimination took place online, both on hepatitis b websites, and on state-run news agencies, such as CCTV. They debated public safety concerns, legal issues such as the rights to equal employment and privacy, and other matters related to hepatitis b.²²⁹ Until this time, most members of the Chinese public had not even mentioned HBV, much less discussed the problems of those who carried it. HBV had come out of the closet, and onto the tongues and screens of millions of Chinese. Significant media

Guangzhou Transportation Commission requesting preferential services on Guangzhou public transit).

²²⁵ See Zhansheng Yigan (Fighting for Victory), <http://www.hbver.com/Index.html>.

²²⁶ See Ganbaobao (Precious Liver), <http://www.ganbaobao.com.cn>. The section on “rights protection by friends of the liver” (*ganyou weiquan*) appears in the lower right hand section of the front page.

²²⁷ See generally <http://www.fanqishi.com>.

²²⁸ See generally <http://www.yirenping.org>.

²²⁹ See, e.g., *Xiaochu Yigan Qishi [Eliminating Hepatitis Discrimination]*, CCTV, Feb. 18, 2004 (transcribing an interview between a CCTV reporter and Tsinghua University’s Yang Suiyan) <http://www.cctv.com/program/jkzlmz/20040218/100084.shtml>.

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attention helped mobilizing structures keep the issue on the public radar.

Finally, there is the issue of signification processes. How do HBV advocates understand the struggle in which they engage? What language or discourse do they use to frame the debate between carriers and the employers who seek to avoid them? One common encapsulation of the issue is the “right to equal employment” or “the right to survival.” As a socialist country with a long history of state-sponsored employment, China privileges social and economic rights (such as food, education, social welfare, employment), over civil and political ones.²³⁰ In complaints to courts of law, signs brandished during demonstrations, and interviews with journalists and others, the issue is framed in socioeconomic terms. For example, advocates carry signs that state “Eliminate Hepatitis B Discrimination—Construct a Harmonious Society,” or “Eliminate Hepatitis B Discrimination—Promote Equal Employment,” or even “It Is Not Easy to Deprive 120 Million HBV Antigen Carriers of the Right to Survive.”²³¹ By framing the issue in terms used by the government itself – such as “harmonious society” – the movement aligns itself with government interests, and avoids appearing confrontational or oppositional. Instead, they present their cause as one of necessity and equality, of the right to a job. No one is asking for charity, or a politically sensitive privilege such as the right to vote. Instead, advocates insist that HBV carriers simply want to work, to contribute to society, and to live. No official could cavil with such a platform of demands.²³²

By raising public awareness, petitioning for legal reform, and mobilizing media support for their cause, activists have made HBV discrimination one of China’s leading equality issues. Their actions have helped create a legal edifice under which they can assert rights, and perhaps change employer behavior. The success of their assertion of rights is taken up in the final section.

²³⁰ ROBERT WEATHERSLEY, *THE DISCOURSE OF HUMAN RIGHTS IN CHINA* 15 (1999).

²³¹ During demonstrations, activists have carried banners with these and other slogans (on file with author).

²³² Women's rights advocates, by contrast, have framed the discussion in terms of international human rights law. *See generally* Rangita de Silwa de Alwis, *Gender Discrimination in China: Recent Challenges and Developments*, 5 EAST ASIAN L. REV. 198, 207 (2010).

V. EMPLOYMENT PROMOTION LAW

The Employment Promotion Law of 2007 would have helped HBV carriers such as Zhang Xianzhu and Zhou Yichao.²³³ Drafting began in late 2003,²³⁴ perhaps spurred by these incidents and the public outcry. Initially, however, the drafters were mainly focused on irregularities in China's labor market, and sought to rectify them through training programs, regulating employment agencies, and boosting investment in employment services.²³⁵ There was particular concern about the oversaturation of labor in industries like manufacturing, and the lack of technical expertise in others, such as high-tech fields.²³⁶

While these issues were the primary concerns of the National People's Congress ("NPC"), public comment on an early draft brought to light a topic not then on the agenda. The NPC's General Office of Standing Committee posted a draft of the Employment Promotion Law ("EPL") on its website from March 25 to April 25, 2007. During this period, it received over 11,000 opinions from the general public, 7,000 of which concerned discrimination in employment.²³⁷ People recounted their personal experiences with discrimination in many forms, including sex, age, appearance, and disability.²³⁸ Public opposition to discrimination against hepatitis b carriers was particularly acute.²³⁹ Based on this response, the NPC's Legal Affairs Commission introduced an entirely new chapter into the law: chapter 3, "Equal Employment," systematized the smattering of protections interspersed throughout the earlier draft, and expanded protections to five groups of disadvantaged people.²⁴⁰ This represents an important intervention

²³³ Article 30 covers infectious disease carriers. But Jiang Tao would not have been covered, since the law does not cover height discrimination.

²³⁴ See *China Hopes to Promote Justice in Employment by New Law*, XINHUA NEWS AGENCY, Mar. 11, 2007, at <http://www.chinagate.cn/english/social/50373.htm>.

²³⁵ *Id.*

²³⁶ Tian Chengping, *Guanyu "Zhonghua Renmin Gongheguo Jiuye Cujin Fa (Caoan)" de Shuoming* [Explanation of the PRC Employment Promotion Law (Draft)], in Xin, *supra* note 19, at 219, 220.

²³⁷ Liu Bohong, *Jiang Xingbie Pingdeng Naru Lifa Guocheng* [Incorporating Gender Equality into the Process of Making Legislation] (unpublished document, on file with author).

²³⁸ See Xin, *supra* note 19, at 65.

²³⁹ *Id.* at 81.

²⁴⁰ *Quanguo Renda Falü Weiyuanhui Guanyu "Zhonghua Renmin Gongheguo Jiuye Cujin Fa (Caoan)" Xiugai Qingkuangde Huibao* [Report of the NPC Law

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in the drafting of Chinese law. Since 2005, the NPC has posted draft laws on the internet to solicit feedback from concerned citizens and interest groups.²⁴¹ The experience with the EPL shows that public opinion—when directed at the right target and conveyed through the proper channels—can have an enormous impact on the final form the law takes.

Since entering into effect on January 1, 2008, the EPL has generated a large number of lawsuits challenging a few types of employment discrimination. Unlike previous guarantees of equality in employment, found in such laws as the Labor Law or Women’s Law, the EPL grants access to People’s Courts, an invitation that many discrimination victims have taken up.²⁴² After discussing the relevant provisions, we then discuss several representative lawsuit brought under the EPL. Finally, this section offers a number of ways to improve the implementation of this law.

A. Provisions

The third chapter of the EPL guarantees equal employment. It provides the most robust set of protections against employment discrimination, and probably any kind of discrimination, in contemporary Chinese law. Since it grants victims of discrimination access to courts, it overcomes a common critique of Chinese law—that it lacks implementability (*kecaozuoxing*).

The EPL contains a general proscription of employment discrimination, mirroring language found in the Labor Law and Labor Contract Law.²⁴³ More important, it provides specific

Committee on the Situation of Revising the “PRC Employment Promotion Law (Draft)”, in Xin, supra note 22, at 226, 227. An earlier version of the law included age as another prohibited category, but this was apparently excised in subsequent decisions. See Jiuye Cujin Fa Caoan: Jianli Pingdeng Jiuye Jinzhi Xingbie Qishi [Employment Promotion Law Draft: Establishing Equal Employment, Prohibiting Sex Discrimination], CHINA NEWS, Feb. 26, 2007, available at <http://www.chinacourt.org/html/article/200702/26/235907.shtml>.

²⁴¹ See *NPC Invites Public’s Comments on Draft Employment Law*, CHINA DAILY, Mar. 27, 2007 (noting that the NPC publicized the draft Property Law in 2005, and the draft Labor Contract Law in 2006).

²⁴² Article 62 grants victims of discrimination access to court. *Jiuye cujin fa* [Employment Promotion Law], promulgated by Standing Comm. Nat’l People’s Cong., Aug. 30, 2007.

²⁴³ Article 4 echoes Article 12 of the Labor Law, by providing “shall have the right to equal employment and to select their own jobs in accordance with the law. The employment of workers shall not be subject to discrimination on the

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prohibitions against five disadvantaged groups: women, ethnic minorities, disabled persons, people with infectious diseases, and rural workers.²⁴⁴ Unlike U.S. federal law, or China's Labor Law, which simply list bases on which it is illegal to discriminate, the EPL grants differential levels of protection to each group, both to adapt to the existing legal framework, and to address problems unique to each group. This means, in effect, that the law offers different levels of protections to each group.

Three provisions in particular—on women, infectious disease carriers and rural residents—are germane to the present discussion. Article 27 provides

The state ensures that women have labor rights equal to those of men.

When an employer hires personnel, it may not refuse to employ a woman on the basis of her sex, except for jobs or positions that the state has specified as being unsuitable to women, or set standards for the employment of women that are higher than those for men.

When an employer employs a female employee, it may not include provisions in her employment contract that place restrictions on her getting married, having children, etc.²⁴⁵

The first sentence—that the state ensures equal labor rights between men and women—showcases the state's concern for the equal rights of women. The law does not impose a similar symmetry for infectious disease carriers (that they shall be treated equally as non-disease carriers) or rural residents (that they shall be treated equally as urban residents). The rhetorical space given to women remains high, as it has for most of the PRC's history.

Nevertheless, scholars have criticized the Employment Promotion Law for including the exception for jobs deemed “unsuitable to women.” This may encourage employers to classify jobs as “unsuitable” for women based on stereotyped or outdated

basis of such factors as ethnicity, race, sex, religion, etc.” *See* Employment Promotion Law, Art. 4.

²⁴⁴ *See* Employment Promotion Law, Arts. 27-31.

²⁴⁵ Employment Promotion Law, Art. 27.

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notions of women's capacities. This may further segregate the workforce, possibly pushing women into low-paying jobs.²⁴⁶

An additional concern involves the use of the word "hire" in section 2 (zhaoyong) and "employ" (luyong) in section 3. Women face discrimination in various phases and aspects of their jobs, from hiring to retirement, promotion and pregnancy leave, wages and sexual harassment. By using the word "hire," the law limits the scope of the law to the period before she becomes an employee. But many forms of discrimination do not surface until one is on the job. Though the word "employ" in paragraph 3 would seem to dispense with these concerns, that paragraph only covers terms that appear in the "employment contract." An employer is unlikely to indicate that he will sexually harass a female employee in the terms of the employment contract. In short, the law does not protect women in promotion, training, titles, termination, and other phases of employment, as similar laws do in Japan²⁴⁷ and the United States.²⁴⁸

The Employment Promotion Law also safeguards the rights of carriers of infectious disease. Article 30 provides

When hiring personnel, an employer may not refuse to employ someone on the grounds that he or she is a carrier of an infectious disease. However, a certified carrier of an infectious disease may not, until he or she has recovered, or the suspicion of infectiousness has been eliminated, engage in work prohibited by laws, administrative statutes or the State Council's health authority, due to the fact that it would facilitate the spread of the disease.²⁴⁹

Again, one could argue that the specification of prohibited jobs may reinforce the notion that disease carriers should be excluded from the workplace. However, by requiring employers to base their judgments on a certification that the person carries a disease, the role of suspicion and misinformation, which occasionally

²⁴⁶ See Guo Huimin, *Gender-Based Employment Discrimination* (unpublished article on file with author).

²⁴⁷ See Megan L. Starich, Comment, *The 2006 Revisions to Japan's Equal Employment Opportunity Law: A Narrow Approach to a Pervasive Problem*, 16 PAC. RIM L. & POL'Y J. 551, 562 (2007).

²⁴⁸ Title VII of the Civil Rights Act of 1964 covers hiring, promotion, discharge, pay, fringe benefits, job training, classification and other aspects of employment.

²⁴⁹ Employment Promotion Law, Art. 30.

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trump sound medical reasoning, will be minimized.²⁵⁰ As we shall see in Part V, this is the most actively litigated provision of the EPL.

Finally, the EPL protects the rights of migrant workers,²⁵¹ by providing “Rural workers employed in cities shall enjoy labor rights equal to those of urban workers. No discriminatory restrictions may be set against rural workers seeking employment in cities.”²⁵² While this provision addresses a key problem discussed above—the plethora of discriminatory restrictions that cities have imposed against migrant workers—it is not clear how to implement it. First, and unlike the above provisions on women and carriers of infectious diseases, this article says neither “the state protects the rights of rural workers,” nor that “employers may not refuse to employ someone on the grounds of their” rural status. It thus offers a *lower* level of protection to rural residents than it does to women.

Second, if a migrant worker were to bring a lawsuit based, for instance, on a city regulation that favors hiring local residents, against whom would he file the case? The employer who did not hire him could simply point to the municipal agency that promulgated the discriminatory regulation. But the agency did not cause the harm – the employer refused to hire the plaintiff. Just as in the Zhang Xianzhu case, a court could find that the municipal agency exceeded its jurisdictional limits, or the agency’s actions lacked a factual basis, but deem itself powerless to devise a remedy. Nor is a court likely to force an agency to rescind a regulation, as courts lack the power of judicial review. Of course, until a migrant worker brings a lawsuit challenging discrimination

²⁵⁰ Even in mid-2010, after the passage of the Employment Promotion Law and regulations banning the use of HBV tests in hiring, HBV carriers worry that employers are uninformed about the law. *See generally* Jiang Dahong, *Yigan Qishi Hai Meiyou Tingzhi: Chao Liuchengde Ruzhi Tijian Hai Zai Jiancha [Discrimination against Hepatitis B Still Has Not Stopped: Over Sixty Percent of Medical Examinations Still Test For It]*, RENMIN WANG [PEOPLE’S WEB], Mar. 24, 2010, at <http://health.people.com.cn/GB/11212873.html> (noting that, one month after the issuance of the Notice on HBV Examinations, less than one-half of government departments interviewed had implemented the Notice, and less than 20% had received the Notice itself).

²⁵¹ Article 20 also calls on the state “to guide the orderly transition of surplus agricultural labor” to urban areas, and on local people’s governments “in both labor-exporting and labor-importing areas to improve the environment and conditions for cities that employ rural laborers.” *Id.*, Art. 20.

²⁵² *Id.*, Art. 31.

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under the EPL, we will have to wait to see how a court enforces this provision as a practical matter.

B. Cases

Plaintiffs all over China have filed lawsuits under the EPL. The twenty-five lawsuits found and analyzed by this author took place all over China: Beijing and Shanghai, Xinjiang and Guangxi, Zhengzhou and Shenzhen, and many other places.²⁵³ This in itself deserves reflection, suggesting that plaintiffs trust courts to entrust them with the adjudication of cases involving basic human rights.²⁵⁴ The overwhelming majority of suits—22 of the 25—come from HBV carriers, signaling both the strength and limitations of the EPL.²⁵⁵ Of the 19 fully adjudicated cases, 15 involved compensating the plaintiff, while the court ruled for the defendant in 4 cases.²⁵⁶ Many plaintiffs are young and college-educated, and the lawsuit involves their first job.

It is important to note that, to date, no plaintiff has filed a lawsuit under the EPL for discrimination due to gender, disability, ethnicity or rural status. In addition, the foregoing analysis is limited to lawsuits that appeared in the Chinese media, and a small number of verdicts that the author obtained through contacting human rights lawyers in China. Because it is difficult to evaluate a judge's reasoning based on a small sample of media reports, the

²⁵³ A table of the cases, and their sources, can be found in the Appendix.

²⁵⁴ I have discovered one case brought to a labor arbitration committee, but that seems to be the exception. See *Zhongguo Yiyu Zhenghuanzhe Fanqishi Diyian de Qishi* [Notice of China's First Case of Antidiscrimination by Depressive], <http://www.btphr.com/law2008/toview.asp?cid=4&tid=5&id=1408>.

²⁵⁵ The three other cases involved depression, color-blindness and a genetic blood disorder called thalassemia. See "*Zhongguo Yiyuzheng Huanzhe Fanqishi Diyian*" *de Qishi* [Notice on the "First Antidiscrimination Case From a Chinese Person Living with Depression], XINHUA WANG [XINHUA NEWS WEBSITE], Aug. 4, 2008, http://www.bj.xinhuanet.com/bjpd-jdwt/2008-08/04/content_14018937_1.htm (depression); *Zhongguo Semang Jiuye Qishi Diyian Bei Juluzhe Suopei Wuwan Fuweijin* [First Case of Employment Discrimination against the Color-blind in China: Refused Applicant Seeks 50,000 in Damages], Feb. 27, 2009, <http://www.yfzs.gov.cn/gb/info/alxc/ldaj/2009-02/27/1414169613.html> (color-blindness); See "*Jiyin Qishi Diyian*" *Kaiting, Lianxi 1000 Man Guangdongren* [Hearing for "First Case of Genetic Discrimination," Affects 10 Million Guangdongers], YANGCHENG WANBAO [YANGCHENG EVENINGS NEWS], Feb. 2, 2010, http://news.ycwb.com/2010-02/03/content_2421762.htm. (thalassemia)

²⁵⁶ See Appendix.

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analysis is necessarily limited. Still, basic similarities across many cases offer the contours of the typical case.

HBV lawsuits follow a pattern, roughly analogous to Zhang Xianzhu's.²⁵⁷ Plaintiff passes the written and oral examinations of his prospective employer, who then makes a job offer, or a conditional job offer upon passing a medical examination. When the applicant's medical examination reveals he carries HBV, the employer either rejects the application, or rescinds the offer. After an attempt at mediation, the applicant will sue in court (avoiding labor arbitration) for economic damages, emotional distress damages, or breach of contract. He or she may also request an apology.

Chinese courts have some discretion in deciding whether to accept cases. Some courts refuse to accept cases of discrimination in hiring because it is not listed in the Supreme People's Court causes of action.²⁵⁸ Nevertheless, many judges have accepted these cases, interpreting the disputes as implicating the right to health or the right to privacy.²⁵⁹ The first hurdle for many plaintiffs, then, is to find a judge or court willing to hear the case.

Judges also enjoy discretion in assessing damages from emotional distress.²⁶⁰ Based on the limited number of verdicts I

²⁵⁷ See, e.g., *Yigan Qishi Jujue Luren: Danwei Bei Pan Daoqian Jia Peichang [Refusing Applicant Due to Hepatitis B Discrimination: Unit Ordered to Apologize and Compensate]*, XINHUA NEWS, May 23, 2008, http://www.bj.xinhuanet.com/bjpd_sdzx/2008-05/23/content_13349024.htm; *Guangdong Huizhou Yigan Huanzhe Bei Citui Zhuanggao Qiye Suopei Qimanyuan [Guangdong Huizhou: Hepatitis B Suffered Is Fired and Receives 70,000 Yuan in Compensation from the Company]*, GUANGZHOU RIBAO [GUANGZHOU DAILY], Aug. 27, 2008.

²⁵⁸ Interview with Professor Liu Minghui, Professor, China Women's College, Nov. 26, 2008 (on file with author). The Supreme People's Court Regulation on Civil Causes of Action does not specifically list discrimination as a cause of action. See *Minshi Anjian Anyou Guiding [Regulations on Civil Causes of Action]*, promulgated by the Sup. People's Ct., Feb. 4, 2008, effective Apr. 1, 2008.

²⁵⁹ The Regulations cover personality rights in article 1, the right to privacy in article 6, and various labor rights in articles 163-6. See *id.*

²⁶⁰ See *Zuigao Renmin Fayuan Guanyu Queding Minshi Qinquan Jingshen Sunhai Peichangren Ruogan Wentide Jieshi [Supreme People's Court Interpretation of Several Issues in Determining the Duty to Compensate for the Tort of Emotional Distress]*, promulgated Mar. 8, 2001, effective Mar. 10, 2001), Art. 10 (permitting judges to consider the extent of tortfeasor's culpability; specific circumstances of the methods, situation or conduct involved; consequences wrought by the tort; economic capacities of the

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have looked at, emotional distress seems to be main damage for which judges order compensation.²⁶¹ Two cases bear this out. In the first case, Plaintiff passed employer Defendant's oral and written examinations during his final year of college, in December, 2006.²⁶² He then signed an employment agreement (*jiuye xieyi*), and stopped his job search in reliance thereupon.²⁶³ But in June 2007, the employer informed plaintiff he would need to complete a liver examination, which revealed he carried HBV. The employer then refused to hire him because he carried HBV. Indeed, Ms. Yang of the company's human resources department specifically stated this as the reason, during a conversation that Plaintiff actually taped, and produced as evidence.²⁶⁴

Plaintiff sued for both breach of contract and tort, that is, the company's refusal to hire him violated his right to equal employment and caused emotional distress. The court agreed with both theories, but interpreted his suit as a tort claim. It then ordered defendant to pay 10,000 renminbi (of the 50,000 plaintiff requested) in compensation for emotional distress, citing among other things the "the economic capacity of the defendant, and the lost work time of the Plaintiff."²⁶⁵ An appellate court upheld this ruling after Defendant appealed.²⁶⁶

In a second case, brought against the Dazhong News Group in Shandong, Plaintiff passed the written and oral examinations, as well as a second-round test.²⁶⁷ Defendant then sent an email with a job offer, but conditioned it upon passing a medical

tortfeasor; and the average living standards of the area where the case is heard).

²⁶¹ Finding verdicts from Chinese civil litigation is difficult. The existing databases have few cases, unlike LEXIS and Westlaw in the United States. After several requests from Chinese lawyers and NGOs, the author was able to obtain a small sample of five such decisions, two of which are analyzed herein.

²⁶² See *Plaintiff vs. Guangxi Jingui Pulp Co. Ltd.*, (Qinnan Dist. People's Ct., Apr. 29, 2008), Civ. Dec. No. 312, at 1 (on file with author), *aff'd* (Qinzhou Interm. People's Ct., Oct. 23 2008), Civ. Dec. No. 253. To protect the identity of the plaintiff, the name has been changed.

²⁶³ *Id.*

²⁶⁴ *Id.*, at 2.

²⁶⁵ *Id.*, at 4-5. The fact that lost work time was included suggests that this was not simply a decision based on emotional distress, but rather on the economic loss of not having a job.

²⁶⁶ See *Plaintiff v. Guanxi Jingui Pulp Industrial Co. Ltd.*, (Qinzhou Interm. People's Ct.), Oct. 23, 2008, Decision No. 253, at 4.

²⁶⁷ See *Plaintiff v. Dazhong News Group*, (Lixia Dist. People's Ct., Jan. 23, 2009), Civ. Dec. No. 3972, at 4 (on file with author).

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examination.²⁶⁸ The examination results revealed that she carried HBV, but that her liver functioned normally.²⁶⁹ Defendant still refused to sign a contract.²⁷⁰ Plaintiff sued for the breach of her right to equal employment, and appended claims for emotional distress and economic damages, as well as an apology.²⁷¹

The court found defendant's rejection "caused Plaintiff enormous psychological pressure and emotional pain. In light of such factors as the extent of Defendant's culpability, the consequences wrought by the tort, and the economic capacity for which the tortfeasor is responsible, this court comprehensively recognizes Plaintiff's demand for compensation for emotional distress."²⁷² It awarded her 15,000 of the 50,000 renminbi she sought in emotional distress damages.²⁷³ She also requested half a year's wages in economic damages, or 12,894 rmb, to make up for the time lost between Defendant's refusal to hire her, and her filing the lawsuit.²⁷⁴ The court awarded a fraction of the damages sought—1,000 rmb—in light of her "work and life circumstances."²⁷⁵ Finally, the court also ordered Defendant to issue a public apology—to be authorized by the court—within thirty days of the issuance of the judgment.²⁷⁶

The above cases suggest the broad contours of HBV litigation. The key to success in these lawsuits—as in discrimination cases in the United State—is the adduction of proof. Unlike American litigants, Chinese plaintiffs cannot shift the burden of proof to defendants in discrimination cases; they must produce all the necessary documentation themselves. Lucky for carriers of HBV, there is a long paper trail that suggests discrimination, something comparatively rare in discrimination cases. These documents provide the evidentiary basis that judges need to determine that defendant discriminated.²⁷⁷ Plaintiffs may

²⁶⁸ *Id.*, at 1.

²⁶⁹ *Id.*, at 2.

²⁷⁰ *Id.*, at 4.

²⁷¹ *Id.*, at 3.

²⁷² *Id.*, at 7.

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.* Though not a large number, economic damages augmented her recovery, and enlarged the cognizable scope of damages for employment discrimination. From the opinion, it is not clear what plaintiff's life and work conditions were.

²⁷⁶ *Id.*

²⁷⁷ In many verdicts, judges write at length about the quality and reliability of

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produce notices from the employer that they passed the written and oral examinations, copies of job offers (or conditional job offers), and other indicia that they qualified for the position. They may also have the employer's request to sit for a medical examination, as well as the results of that exam: that they carry HBV. Finally, a written rejection, conversation or phone call (sometimes recorded) encapsulates the rejection. Judges have a solid foundation upon which to make a finding of discrimination.

But a long paper trail will not arise under most other kinds of discrimination. Take gender discrimination. Women can be screened out much earlier in the process, often by explicit requirements in the job advertisement. Likewise, a resume may also reveal the applicant's gender, either because of her given name, or the photograph often accompanying the application packet. If there is still doubt, a phone call can ferret out female applicants. And when that fails, one can simply interview the female candidate and turn her down afterward without generating any indicia of discrimination. With the exception of the explicit job advertisement,²⁷⁸ none of these techniques would produce *documentation*, leaving a judge to rule essentially on plaintiff's allegations, suspicions, and interpretations. Even if the defendant made a plainly discriminatory statement during the interview, or injected it obliquely by asking about boyfriends and children, the case would still hinge on hearsay: her statements about what he said out of court, and his statements about what he said out of court. This presents a dilemma for the presiding judge.

So while perhaps disappointing, is not entirely surprising that no woman has filed a lawsuit based on gender discrimination in hiring.²⁷⁹ There are various explanations for this absence,

the evidence presented. *See, e.g., Plaintiff v. Zhongsheng, supra* note 246. The court spends most of the ten-page opinion analyzing the credibility of both parties' evidence. *See generally id.*, at 2-3 (categorizing the evidence into four kinds) and 4-9 (evaluating the evidence).

²⁷⁸ To my knowledge, no woman has sued for the explicit gender divisions in many newspaper and internet advertisement.

²⁷⁹ Women have sued for various aspects of employment discrimination, including sexual harassment, termination due to pregnancy, early retirement, and termination after one's husband is terminated. But these cases all involve conduct *after* plaintiff has been hired. *See generally* FUNÜ QUANYI YU GONGYI SUSONG [WOMEN'S RIGHTS & PUBLIC INTEREST LITIGATION] (Guo Jianmei & Li Ying eds., 2008). This book describes over a dozen lawsuits brought by the Center for Women's Law & Legal Services of Peking University, the leading women's right NGO in China. *See also* Zao Jiuye *Qishi, Weihe Weijian Nüxing*

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including the lack of evidence noted above. Some women just accept the prevalence of sex discrimination, adopting an attitude of anger, resignation, and silence, the latter perceived as the most effective of the “reasonable alternatives.”²⁸⁰ Others are too concerned with finding a job, lacking the time and resources needed to prosecute a lawsuit.²⁸¹ As one interviewee put it, “Even if I won the case, what kind of result would I get? Is the employer going to hire me? If a company didn’t want to hire you, but you get the job [after litigation], they are not going to make it easy for you.”²⁸² Particularly in light of the success of various hepatitis b cases, the absence of sex discrimination lawsuits calls into question the efficacy of the EPL as a tool to combat employment discrimination.

C. *Problems*

For all of its important advances, the Employment Promotion Law omits a few basic things. These gaps could be further elaborated through subsequent legislation, provincial legislation, implementing guidelines, administrative regulations, or judicial interpretations. This section offers some suggestions to heighten the efficacy of China's antidiscrimination laws generally, and the EPL in particular.

First, the EPL does not define discrimination. This may seem a formality, but the concept of discrimination is not widely known in China, including among judges.²⁸³ Consequently, formalities like a clear definition of discrimination can make a big difference to the presiding judge.

Second, it does not cover a wide range of discrimination quite common in contemporary China. Age, appearance, and

Suzhe Falü [After Encountering Discrimination, Why Have We Not Seen Women Appeal to the Law?], XINJINGBAO [NEW CAPITAL NEWS], June 15, 2009 (noting that, as of June 15, 2009, not a single case of gender discrimination in hiring had been filed). I note that recent searches on Google and Baidu revealed no discrimination cases brought by women (last checked May 31, 2010).

²⁸⁰ See Zhao Li, Huiwang Jiuye Cujin Fa Shishi Yinian: Weijuli Jiujing You Duo Qiang [Reflecting on One Year of Implementation of the Employment Promotion Law: How Strong is the Deterrence?], FAZHIWANG [RULE OF LAW WEBSITE], Mar. 11, 2009, http://www.procedurallaw.cn/fzrd/200903/t20090311_191813.html.

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ Interview with Li Cheng, antidiscrimination lawyer and PhD candidate at Shanghai Jiaotong University, Mar. 15, 2009.

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height are routine bases for refusing to hire someone, though they have almost no bearing on the ability to perform. To be sure, it is unreasonable to expect antidiscrimination law to respond perfectly to contemporary conditions *ab initio*, particularly given the slow and gradual approach of Chinese legal reform, where minor and incremental change is preferred to cataclysms. Moreover, as experience in other countries show, protected classes tend to proliferate over time; in a few years, it is likely that a new group, currently unrecognized, may clamor for their rights more loudly or persuasively.²⁸⁴ For example, during the drafting of the EPL, a number of public commentators pointed out the prevalence of age discrimination.²⁸⁵ The decision not to include age discrimination may be tied to the prevalence of the differential retirement age for men and women, which has been a heated source of debate in recent years.²⁸⁶

Third, the protections offered are not as robust as they could be. We have already seen the widespread discrimination in job advertisements. The same could be said for job interviews, where asking women personal questions about marriage and childbirth plans are routine. Indeed, some employers still require women to forego marriage and pregnancy as a condition of their employment, placing such stipulations in their job contracts. A legal prohibition on gender restrictions in print and online advertisements would be a good first step, followed by the proscription of personal questions (marital status, boyfriends, children) in the interview.

Fourth, the law does not address the evidentiary issues that

²⁸⁴ The United States first protected race, sex and national origin in the 1964 Civil Rights Act, age in the 1967 Age Discrimination in Employment Act, disability in the 1990 Americans with Disability Act. Congress is presently debating the Employment Non-Discrimination Act, to cover sexual orientation.

²⁸⁵ See Xin, *supra* note 19, at 65.

²⁸⁶ See, e.g., Chen Zhili urges gender equality in retirement age, XINHUA, Apr. 6, 2009, http://www.npc.gov.cn/englishnpc/news/Events/2009-04/06/content_1496720.htm (noting that Ms. Chen, a senior legislator in the NPC Standing Committee, expressed support for Beijing to change the law on retirement ages, calling the current system “a terrible waste of human resources, particularly for those who have doctorates or master’s degrees”); *Nüganbu Wantui Tiaokuan Bei Cechu [Provision on Later Retirement for Female Candidates Removed]*, BEIJING NEWS, May 5, 2005, <http://news.cctv.com/society/20090505/107566.shtml> (noting that the Beijing government decided to withdraw the issue of changing the age from further discussion).

typically emerge in employment discrimination lawsuits. In the U.S., plaintiffs frequently struggle to adduce evidence of discrimination, which is almost exclusively within the defendant's possession. The Supreme Court responded to this lacuna by articulating the *McDonnell-Douglas* burden-shifting mechanism: after plaintiff makes a prima facie showing of employment discrimination, the burden shifts to the defendant to articulate a nondiscriminatory reason for its decision; if defendant meets that burden, the burden shifts back to plaintiff to prove why the defendant's proffered reason is pretextual.²⁸⁷ To be sure, burden-shifting has attracted its own set of critics.²⁸⁸ But it has leveled the evidentiary playing field between defendants, who are loath to turn over information behind their employment decisions, and plaintiffs, who must rely on stray comments or other circumstantial evidence to prove their case.

Fifth, the law does not address the question of legal liability, and remedies in particular, with sufficient specificity.²⁸⁹ Suppose the plaintiff proves that her job application was turned down for a discriminatory reason. What should her redress be? Does she get the job? The next available one? Should she receive another form of injunctive relief? And what about the employer? What remedial or punitive measures should courts levy against discriminating employers? Some scholars have suggested, for instance, that employers should have to withdraw discriminatory advertisements, or else lose the ability to advertise altogether.²⁹⁰

²⁸⁷ *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973).

²⁸⁸ See Denny Chin & Jodi Golinsky, *Employment Discrimination: Moving Beyond McDonnell Douglas: A Simplified Method for Assessing Evidence in Discrimination Cases*, 64 BROOKLYN L. REV. 659 (1998). The authors suggest that burden-shifting distracts judges from focusing on the "ultimate question," namely, whether it is more likely than not that the employer engaged in discrimination. They propose instead that judges at the summary judgment stage first weigh plaintiff's evidence, second weigh defendant's evidence that it did not discriminate, and third view the evidence holistically, drawing all reasonable inferences in plaintiff's favor. If it passes these three stages, the case is ready for a jury trial. See *id.* at 677-678.

²⁸⁹ Zhou Huyong, *Jiuye Qishi Susong Jiuji Tixi de Goujian* [Components of a Redress System for Employment Discrimination Litigation], 23 BEIJINGSHI GONGHUI GANBU XUEYUAN XUEBAO 42, 42 [JOURNAL OF BEIJING FEDERATION OF TRADE UNIONS CADRE COLLEGE] (2008).

²⁹⁰ Zhang Huagui & Guo Yiyi, *Lun Jiuye Xingbie Qishide Falü Guizhi: Jianping "Jiuye Cujin Fa" zhi Xiangguan Guiding* [On Legal Regulations of Sex Discrimination in Employment: A Critique of the Relevant Provisions in the

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As for punitive measures, these scholars recommend a basket of sanctions including (1) civil liability, to cover economic losses and emotional distress damages to plaintiff; (2) administrative liability, such as a fine from the employer to the relevant enforcement agency (once established); and even (3) criminal liability.²⁹¹ These alternative forms of liability could take the form of implementing legislation by the Ministry of Labor and Social Services, or a judicial interpretation by the Supreme People's Court.

The EPL could have taken a page from the 2007 Labor Contract Law,²⁹² section VII of which lays out various situations a judge may face in presiding over a case. A judge thus knows what to do if, for example, an employer fails to set out mandatory clauses in the labor contract,²⁹³ retains the employee's ID card or seizes his property,²⁹⁴ does not certify the termination of a labor contract,²⁹⁵ and so on. Since the EPL does not speak at this level of granularity, additional regulations by other government organs are needed.

Sixth, a problem as widespread as employment discrimination requires the coordinated efforts of courts, labor bureaus, local people's congresses, and other official actors. The EPL tasks certain government organs with eliminating discrimination, but only in vague terms. For instance, Article 25 provides "People's Governments at every level shall create a fair employment environment, eliminate discrimination in

"*Employment Promotion Law*"], 167 FAZHI YU JINGJI 33, 34 [LAW & ECONOMICS] (2008). The authors suggest that discriminating employers should bear both remedial (*buchangxing*) responsibility and punitive (*zhengfaxing*) responsibility. The former would permit the appropriate government agency to make employers withdraw discriminatory requirements, such as "men only" or "men preferred." The latter could consist of civil, administrative or criminal punishments to be used when the remedial responsibility could not make a plaintiff whole. *See id.* at 34.

²⁹¹ *Id.* at 34. Criminal liability, which would require revision of the criminal code, is unlikely. Though countries like France have criminalized some forms of racial discrimination. *See generally* Julie C. Suk, *Equal by Comparison: Unsettling Assumptions about Discrimination Law*, 55 AM. J. COMP. L. 302-303, 309-311 (2006) (describing French criminal sanctions for discrimination, and the history of sanctions on discriminatory speech in particular).

²⁹² Laodong Hetong Fa [Labor Contract Law] promulgated by the Standing Comm. Nat'l People's Cong., June 29, 2007, effective Jan. 1, 2008.

²⁹³ *Id.*, Art. 81.

²⁹⁴ *Id.*, Art. 84.

²⁹⁵ *Id.*, Art. 89.

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employment, formulate policies and take measures to support and assist the hard-to-employ.”²⁹⁶ But local governments are busy entities, more concerned with creating jobs than assisting those who have been refused. Given their mandate to increase GDP and economic growth, local governments may hesitate to formulate such a policy, particularly if it might antagonize employers who practice employment discrimination.

Likewise, article 60 provides “Labor administration authorities shall supervise and inspect the implementation of this Law, establish a reporting system, accept reports of violations of this Law and promptly verify and handle the same.” This is more specific, but to date no labor bureau has set up the reporting system noted herein. Such a body is certainly necessary, however, and could handle cases, monitor job advertisements, and investigate employers against whom charges have been directed – similar to the Equal Employment Opportunity Commission in the United States. As it stands now, many forms of employment discrimination go unpunished, while job advertisements help to segregate workspaces based on age, gender, and physical appearance.

CONCLUSION

Employment discrimination is now firmly imprinted in the national psyche of the PRC. Famous cases have captured headlines and public attention. NGOs dedicated to various causes have been formed, raising awareness, bringing cases, conducting research, and even training employers about the problems of discrimination. Consensus has formed that discrimination—though widespread—is wrong. The national government has taken its strongest stance toward ensuring equal employment through the passage of the Employment Promotion Law in 2007. Plaintiffs have won a handful of well-publicized cases, suggesting that courts have taken a favorable view of the law, the media has the government’s blessing to report such events, and the long-discussed implementation deficit of Chinese law is shrinking, slightly.

If the Chinese government continues to push forward these reforms, it will first have to revise or annul a bevy of discriminatory legislation. This could be piecemeal, continuing the

²⁹⁶ Employment Promotion Law, Art. 25.

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recent trend of revising such laws and regulations, or through an all-encompassing law, such as an Anti-Discrimination Law. But it will also have to chart new grounds, further elaborating evidentiary issues that the Employment Promotion Law does not address, reviewing the publication of discriminatory advertisements, explaining what kinds of remedies are available to successful plaintiffs, and perhaps even establishing a body to monitor employment discrimination, such as the Equal Employment Opportunity Commission. This short history of employment discrimination in China shows that, like dozens of other countries that have devoted government and judicial resources to preventing discrimination, the process of proscription is always a work in progress. China has taken the first steps down the righteous path, or up the slippery slope, of prohibiting discrimination. Presumably, popular support for such initiatives will continue.

Finally, this paper clarifies that Chinese citizens, with the assistance of civil society groups and online technologies, can effectuate legal change in a gradual, small-scale way, on a discrete legal issue. How well this lesson can be applied to other potential areas of legal reform remains to be seen. But the energies and activism of a small committed group of people can change the law, even given the democratic deficit of contemporary China.

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APPENDIX – HBV Litigation (unless otherwise noted)

#	Verdict	Plaintiff's status	Defendant	Dist. Ct., Place	Remedy: <i>unknown</i>
1	10/4/07	CHEN Long	Chang Shuo Tech Co.	Nanhui, Shanghai	D voluntarily offered 5k
2	10/14/07	LI Sheng	Nokia	Dongguan, GD	P couldn't verify voice
3	1/4/08	LI Fei	Dongguan Wei Yi Da	Dongguan, GD	24k ec; D promised not to discrim
4	3/25/08	ZHANG Lihong	Beijing Duoqi Qiye Consulting Co	Chaoyang, BJ	<i>Sought 50k</i>
5	5/24/08	GAO Jun	Bide Telecom Co.	Chaoyang, BJ	17k ec, 2k emo, apology
6	7/19/08	YUAN Ye , cg	Jabil Electronics	??	<i>Undisclosed settlement</i>
7	8/5/08	YUAN Yipeng (depression)	IBM Shanghai	Pudong LAC, SH	Reinstated labor K, 57k in lost wages
8	8/27/08	WANG An	Hongku Electronics	Huizhou, GD	5k emo, apology
9	10/25/08	XU Jianguo , cg	Guangxi Jingui Pulp Ltd.	Qinnan, Qinzhou	1 st : 10k emo, 2 nd : 10k emo
10	11/3/08	A Gang	Unnamed Co.	Nanning	<i>Sought 30k in ec</i>
11	12/9/08	WANG Xiaoguo, cg	Mai Ke Wei Er Air Con	Longgang, Shenzhen	<i>Sought 65k in ec & emo, apology</i>
12	12/10/08	TAO Ming	Jiangxi Prov. Chil's Hosp.	Nanchang, Jiangxi	Annulled D's rejection
13	12/18/08	LIANG Qi , 25	Dushi Zhongsheng Advs/.	Wuhan, Hubei	5k emo, apology
14	1/23/09	ZHANG Yun , 21	Dazhong Daily News	Lixia, Jinan	15K emo, 1k ec, apology
15	2/27/09	ZENG Lei 25 cg (colorblind)	Henan Prov. Rural Credit Union	Jinshui, Zhengzhou	<i>Sought 3k ec, 50k emo, apology, job</i>
16	5/4/09	LI Wen , 23, cg	Unnamed Tech. Co.	Luogang Guangzhou	20k settlement
17	5/29/09	WANG Zhuo, 24, MS	Unnamed Eng. SOE	Chengguan, Lanzhou	15k settlement
18	6/15/09	GONG Ping , cg	Unnamed Cable Co.	Urumqi, Xinjiang	1 st : 0, 2 nd : 18k settlement
19	7/9/09	YU Lihua , cg	Shenzhen Development Bank	Luohu, Shenzhen	3k ec, 325 for tests, 30 for transport costs
20	10/9/09	GUO Lin , 25, cg	Fushikang Group Elec.	Jiangan, Hangzhou	5k settlement priv'y viol
21	1/8/10	XIAO Qi	Provincial Testing Ctr.	Yunyan, Guiyang	1 st : 0, 2 nd : 0
22	1/14/10	TANG, XIE, ZHOU	Foshan Dep't of H R	Chancheng, Foshan	1 st : 0, 2 nd : ongoing
23	1/25/10	DU Lan	Changsha Min'y Health	Yuelu, Changsha	1 st : 0
24	3/5/10	CHEN Ling	Dechang Electronics	Baoan, Shenzhen	1 st : 0, 2 nd : 3k in emo
25	3/11/10	WANG Li	Taipingyang Prop. Ins.	Tianhe, Guangzhou	8k emo

Prevailing party in **bold** (plaintiff in bold if the case settled because he or she receives compensation)

Abbreviations: CG: *college graduate*; ec: *economic damages*; emo: *emotional distress damages*; apology: court ordered defendant to publish written apology

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