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Analysing the Employment Discrimination
Phenomena in China From an International
Human Rights Perspective—Focusing on
Hepatitis B-Based Discrimination

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Contents

SUMMARY	1
ACKNOWLEDGEMENTS:	3
PREFACE	4
ABBREVIATIONS	5
1 INTRODUCTION	7
1.1 Objectives and Aims	7
1.2 Delimiting the Problem	8
1.3 Direct and Indirect Discrimination	10
1.3.1 <i>Direct Discrimination</i>	10
1.3.2 <i>Indirect Discrimination</i>	11
1.4 Non-discriminatory Differential Treatment	14
1.5 The Significance of China's Ratifying and Acceding to the C111	15
2 DISCRIMINATION IN EMPLOYMENT AND OCCUPATION OF CHINA: WHAT WORK SITUATIONS ARE COVERED?	19
2.1 Introduction	19
2.2 Discrimination on the Grounds of Social Origin— <i>Hukou</i> System	19
2.3 Sex based Discrimination	23
2.4 Age as a Determinant of Discrimination in the Labour Market	27
2.4.1 <i>Discrimination Against Elderly</i>	27
2.4.2 <i>Discrimination Against the Younger People</i>	30
2.5 Discrimination Based on Disability	31
2.6 Health-based Discrimination	34
3 FOCUSING ON HEPATITIS B-BASED DISCRIMINATION	39
3.1 Introduction	39
3.2 The Manifestation of HBV-Based Discrimination at Workplace	39
3.2.1 <i>What is Hepatitis B</i>	39
3.2.2 <i>Discrimination Starts at the Initial Stage of Recruitment</i>	41
3.2.3 <i>The Public Attitude Towards HBV Carriers</i>	42
3.2.4 <i>The Action Taken by the HBV Carriers</i>	44
3.3 The Cause of HBV-Based Discrimination	45
3.3.1 <i>The Weakness of Law</i>	45

3.3.2	<i>The Lack of Basic Knowledge of HBV</i>	48
3.3.3	<i>Social Traditional Fear and Prejudice towards HBV</i>	49
3.3.4	<i>Institutional Weakness</i>	50
3.4	The influence of HBV-Based Discrimination	51
3.4.1	<i>HBV-Based Discrimination Impairs Human Dignity</i>	51
3.4.2	<i>HBV-Based Discrimination impairs Social Justice and Equality</i>	52
3.4.3	<i>HBV-Based Discrimination Causes a Waste of Human Talent and Resources</i>	53
3.4.4	<i>HBV-Based Discrimination Influences the Personal Future and Development</i>	54
3.4.5	<i>HBV-Based Discrimination Threatens Social Cohesion, Political Stability</i>	55
3.5	Addressing the HBV-Based Discrimination	56
3.5.1	<i>Legislation: An Indispensable First Step</i>	56
3.5.2	<i>Enforcement, Monitoring and Promotion are Crucial for Sustained Change</i>	57
3.5.3	<i>Affirmative Action Towards the Hepatitis B-Based Discrimination</i>	58
3.5.4	<i>Public Awareness-Raising</i>	59
3.5.5	<i>Corporate Social Responsibility for FIEs in Addressing HBV-Based Discrimination in Employment and Occupation</i>	60
4	CASE STUDY OF HBV-BASED DISCRIMINATION	63
4.1	<i>China's First Hepatitis B Discrimination Administrative Lawsuit: Zhang Xianzhu v. Wuhu Personnel Bureau</i>	63
4.2	<i>Zhou Yichao Homicide Case</i>	65
4.3	<i>Deng Hua v. Hunan Revenue Bureau</i>	67
4.4	<i>Mr Li v. Nokia in China</i>	68
5	CONCLUSION	70
5.1	Legislation	70
5.1.1	<i>Making Fundamental Law on Anti-discrimination</i>	70
5.1.1.1	Clarify Concept of Discrimination and the Range of Anti-discrimination	70
5.1.1.2	Special Institution for Anti-discrimination	72
5.1.1.3	Mechanism for Dealing with Disputes	73
5.1.2	<i>Enact Specific Anti—discrimination Law Based on Different Grounds</i>	73
5.1.3	<i>Revising Civil Procedure and Administrative Procedure Law</i>	74
5.2	Public Education	74
5.3	Advocacy and Awareness-Raising	75
	SUPPLEMENT	77

Summary

As stated in Article 26 of ICCPR, “all persons are equal before the law and are entitled without any discrimination to the equal protection of the law.” The pursuit of equality and non-discrimination has been widely accepted not only as a formal principle but also binding substantive human rights. In 2003, the first Global Report by ILO on discrimination, *Time for equality at work*, stressed that the workplace—“be it a factory, an office, a farm or the street—was a strategic entry point to free society from discrimination.”¹

China had implemented an equal economic policy since 1949, however, in the field of employment and occupation, people from different social origins did not equally enjoy the same opportunity due to the *Hukou* registration system. Since introducing market economy reforms in 1979, the employment discrimination has even deteriorated. “Trade, financial liberalization and fiscal policies that were meant to create a more level playing field for healthy market competition, have not always resulted in more equal social outcomes or greater solidarity among individuals and groups of workers.”² The reason is that it has been aggravated by the rapid economic growth, coupled with lack of established mechanisms to deal with it, plus the surplus labour force of China due to large population.

The purpose of this thesis is therefore to scrutinise the phenomenon of employment discrimination in China from the perspective of international human rights law, and focus on one of the most serious kinds of discrimination: Hepatitis B-Based discrimination. The following issues need to be addressed. First, what is discrimination? What are the international

¹ ILO: “*Time for equality at work*”, Global Report under the follow-up to the ILO Declaration on Fundamental principles and Rights at work, Report I (B), International Labour Conference, 91st Session, Geneva, 2003, para.11.

² ILO: “*Equality at work: Tackling the challenge*”, Global Report under the follow-up to the ILO Declaration on Fundamental principles and Rights at work, International Labour Conference, 96th Session, Geneva, 2007, p2, para 13.

standards on discrimination at workplace? And what is direct and indirect discrimination, what does not constitute discrimination? Why is it important to eliminate discrimination at the workplace in China? What is the influence after China's ratification and accession to the ILO Convention concerning Discrimination in respect of Employment and Occupation in 2006? Next the paper proceeds to an overview of employment discrimination in China and analyses five types of main employment discriminations.

Third, the paper wants to focus on the discrimination based on Hepatitis B, which is considered the most serious one in all types of employment discrimination in China. More than 120 million Chinese, about 10% of the population, carry the Hepatitis B virus.³ “Even the 2004 Law on the Prevention and Treatment of Infectious Diseases—seen as a significant step forward by prohibiting discrimination on the basis of infectious diseases—did not specifically mention Hepatitis B, nor is its anti-discrimination provision echoed in the Labour Law.”⁴ Therefore, this chapter states its manifestation, negative influence, the reason it persists, and the way to address it.

Fourth, the paper does case study analysing on *Zhang Xianzhu v Wuhu Personnel Bureau*—the first litigation on Hepatitis B and three other Hepatitis B-Based Discrimination cases in China.

Finally, the paper draws conclusions on what should to be done after examination of the Chinese situation comparing with the international standard, what is the significance of addressing employment discrimination in China and in what lies in the future for addressing employment discrimination in China?

³ World Health Organization (WHO) 2006, “*Country Cooperation of Strategy at a Glance*” , http://www.wpro.who.int/NR/rdonlyres/E8BE4438-924F-4193-89F3-B81822AC408C/0/ccsbrief_en.pdf.

⁴ Bonny Ling and Wing Lam, “*Hepatitis B: A Catalyst For Anti-Discrimination Reforms?*” http://hrichina.org/public/PDFs/CRF.2.2007/CRF-2007-2_Hepatitis.pdf

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Preface

“Despite its universal formal condemnation, discrimination remains a persistent global phenomenon, with new, concealed and subtler forms emerging.”⁵ It scrutinises the employment discrimination phenomenon from an international human rights perspective with focus on China. Employment discrimination in China, because of its “pervasiveness, institutional dimensions, cultural and political underpinnings, will not vanish by itself.”⁶ Only after researching, making comparison and interacting with the UN and the ILO standards, it is of use to explore a specific way for China to address it in the workplace.

⁵ International Labour Review, Vol.142 (2003), No.4, Introduction..

⁶ Manuela Tomei, *Discrimination and Equality at Work: A Review of the Concepts*, International Labour Review, Vol. 142, 2003

Abbreviations

ACFTU	All China Federation of Trade Union
ACWF	All-China Women's Federation
ACYF	All-China Youth Federation
ADA	Americans with Disabilities Act
C100	ILO the Equal Remuneration Convention, 1951, No.100
C111	ILO Discrimination (Employment and Occupation) Convention, 1958, No.111
CEDAW	The Convention on the Elimination of All Forms of Discrimination against Women
CRC	The Convention on the Rights of the Child
CSR	Cooperate Social Responsibility
EC	European Community
EEOC	The American Equal Employment Opportunity Commission
EPL	The Employment Promotion Law of the People's Republic of China
EU	The Europe Union
FIE	Foreign Investment Enterprises
HBV	Hepatitis B Virus
ICESCR	The International Covenant on Economic, Social and Cultural Rights
ICCPR	The International Covenant on Civil and Political Rights
ICRMW	The International Convention on the Protection of the Rights of All Migrant Workers and Member of Their Families
ILO	The International Labour Organization

ILC	The International Labour Conference
ILSS	The Institute of Labor and Social Security of China
LPWRI	The Law for the Protection of Women's Rights and Interests of China
MOLSS	The Ministry of Labour and Social Security of China
NGO	Non-Governmental Organization
NPC	The National People's Congress of China
PRC	The People's Republic of China
SARS	Severe Acute Respiratory Syndrome
UDHR	The Universal Declaration of Human Rights
UN	The United Nations
USA	The United States of America
UK	The United Kingdom of Great Britain
VDRL	Venereal Disease Research Laboratory
WHO	The World Health Organization

1 Introduction

1.1 Objectives and Aims

“Despite the universal formal condemnation, discrimination remains a persistent global phenomena, which is entrenched both in human nature and in the way institutions operate”.⁷ As stated in UN documents, “Discrimination based on work and descent is a form of discrimination prohibited by international human rights law... “⁸ And “is a human rights problem deeply rooted in societies and cultures in many parts of the world.”⁹ Outlawing discrimination at work would bring about a series of problems, which not only leads to a waste of human talent and resources but also threatens social cohesion, political stability, poverty reduction and economic growth.”¹⁰

Anti-discrimination is a duty of ILO member States by virtue of the Constitution and the 1998 ILO Declaration on Fundamental Principles and Rights at Work. Also by the end of Oct. 2007, nine out of ten ILO member States had ratified the two core Conventions on discrimination – the Equal Remuneration Convention, 1951 (No.100) and the Discrimination (Employment and occupation) Convention, 1958(No.111).¹¹.

China is a developing country that should focus on economic development; however, the development should be a human-rights-based one – on the

⁷ ILO: *Equality at work: Tackling the challenges*, Global Report under the follow-up to the ILO Declaration on Fundamental principles and Rights at work, International Labour Conference, 96th Session, Geneva, 2007, p2, para.9.

⁸ Prevention of Discrimination, E/CN.4/Sub.2/2004/31, p19.

⁹ Ibid.

¹⁰ International Labour Review, Vol.142 (2003), No.4, p397.

¹¹ Until October 20, 2007, 164 member states of ILO have ratified C100, and 166 member states have ratified C111. Marshall Islands became the seventh member on July 3, 2007. the ratification of Convention, for C100: <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C100>, for C111: <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C111>.

The ILO now has 181 member states. Checked in ILO website, <http://www.ilo.org/public/english/region/asro/suva/membercountries.htm>

basis of decent work, full and effective protection of human rights, respect of human being.

The purpose of this thesis is therefore to scrutinise the phenomenon of employment discrimination in China from the perspective of international human rights law, and focus on one of the most serious discrimination-Hepatitis B-Based one. After analysing them, the paper makes a conclusion about what measures should be taken by China in the future.

1.2 Delimiting the Problem

“Non-discrimination as a fundamental principal runs like a red thread through international human rights treaties.”¹² It is the first step to clear up the concept of discrimination to address it.

Article one of the ILO C111 Discrimination (Employment and Occupation) Convention defines discrimination as “any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation”.

C111 does not mention whether it should refer to its member states directly, though it is possible for them to be covered under Art. 1 (b), and increasing numbers of States are extending coverage through laws and practices, after consultation by the governments concerned with employers’ and workers’ organizations. In practice, governments submitted reports to the ILO under Article 22 of the Constitution and Article 19, on which the follow-up to the Declaration is based, refer, among other things, to case of discrimination in employment and occupation based on disability, marital status, state of

¹² Timo Makkonen, *The Principle of Non-discrimination in International Human Rights Law*, http://iom.fi/elearning/files/international_law/essential_reading/Principle_of_Non_Discrimination.pdf.

health, including HIV/AIDS, sexual orientation and trade union membership, which are not mentioned in C111.¹³

Anti-discrimination in employment and occupation also states in the most fundamental UN human rights convention.

Article 7(a)(i) and (c) of ICESCR states that,

“The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with: (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work... (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence...”

Besides the above definition, many other international human rights treaties, such as CEDAW¹⁴, and ICRMW¹⁵, also define the key concept of discrimination in the field of employment.

13 ILO: Equality in employment and occupation, Report III (4B), International Labour Conference, 75th and 83rd Sessions (Geneva, 1988 and 1996) and Governing Body docs. GB.277/3/1, GB.280/3/1 and GB.283/3/1.

14 See Article 11 of CEDAW, UN website, <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm#article11>.

15 Article 1, “The present Convention is applicable, except as otherwise provided hereafter, to all migrant workers and members of their families without distinction of any kind such as sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.”

1.3 Direct and Indirect Discrimination

It should be noted that the important concepts of direct and indirect discrimination are also included in the above delimiting. Discrimination in employment can be direct or indirect.

1.3.1 Direct Discrimination

In a typical direct discrimination case the court or enforcement agency is concerned with the following three questions:¹⁶

- (1) Whether the complainant has been treated less favourably than others who are in comparable circumstances as the complainant?
- (2) Whether there is a causal connection between that less favourable treatment and a statutorily protected characteristic (for example, sex, ethnicity, disability etc.)?
- (3) Whether there is an exception or justification, which permits the less favourable treatment?

For the field of employment, Professor *Cai Dingjian*, who is a prestigious Chinese Constitutionalism and human rights scholar of China University of Political Science and Law, explained that, it constitutes direct discrimination in employment and occupation where three situations exist simultaneously: firstly, some certain work applicants are excluded or given preference under the same background; secondly, the exclusion is made because of they belong to a particular group which has no relation with recruitment standards but race, colour, social origin, gender, age, disability and so on; thirdly, the preference are not made unintentionally.¹⁷

An example of direct discrimination is that, Singapore government made a policy against foreign female workers that they must have routine medical examination test every six months. This examination includes an HIV and

¹⁶ Ronald Craig, *Systemic Discrimination in Employment and the Promotion of Ethnic Equality*, Martunus Nijhoff Publishers, 2007,p33.

¹⁷ Cai Dingjian, *the Overview of Anti-discrimination Law in Employment and Occupation of China*, p13.

VDRL (venereal disease research laboratory) test, and a pregnancy test. If this examination shows the foreign domestic worker to be pregnant, she must return to her original country immediately, and it is a duty of the employer to undertake this repatriation.¹⁸ Obviously, pregnancy is not an inherent requirement of the jobs concerned. In contrast, there is no similar pregnancy test for local Singapore workers. Meanwhile, in the United Kingdom, for example, a recent report by the Equal Opportunities Commission states that thirty thousand (30,000) women each year lose their jobs because of their pregnancy.¹⁹ It is a direct discrimination against pregnant women.

1.3.2 Indirect Discrimination

“Discrimination is indirect when apparently neutral norms and practices have a disproportionate effect on one or more identifiable groups, without justification.”²⁰ A classic illustration is a requirement that all police officers be of a certain height or weight (based on an average for men), thus indirectly discriminates against women (who are not as tall and as heavy as the average man).²¹ It demonstrates that even the same treatment could cause serious discrimination. This kind of discrimination is usually justifiable by the regulations; due to it looks like being equal, however, how to eradicate this hidden prejudice has a long way to go.

The modern concept of indirect discrimination originates from the US case *Griggs v Duke Power*²², which was highly influential in the development of

¹⁸ Yasuko Kobayashi, *Lowest of the low: Foreign domestic workers (FDWs) in Singapore*, p4.

¹⁹ Equal Opportunities Commission: “*Pregnancy discrimination: EOC investigation*”, at www.eoc.org.uk.

²⁰ See Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at work, 2007, “*Equality at work: Tackling the challenges*”, p 9.

²¹ Rosemary Hunter, *Indirect Discrimination in the Workplace* (Sydney: The Federation Press, 1992),xxii.

²² 401 US 424 (1971). For an argument that Griggs was wrongly decided, see M.Gold, “Griggs” folly: An essay on the theory, problems and origin of the adverse impact definition of employment discrimination and a recommendation for reform.” 7 *Indus Rel L J* 429 (1985).

indirect discrimination law. Duke Power's Station in North Carolina was divided into five departments: Labour, Coal Handling, Operations, Maintenance, and Laboratory and Test. Work in the Labour Department was the dirtiest and lowest paid. A high school diploma and/or the passing of an intelligence test was necessary to gain employment in, or promotion to any of the four other Departments. Duke Power employed ninety-five (95) workers at the station, fourteen (14) of whom were black; these 14 were employed in the Labour Department. They sued Duke Power under the Civil Rights Act 1964, Title VII, which prohibited, inter alia, classifying an employee in any way which would adversely affect his status as an employee, because of his race, colour, religion, sex, or national origin. Statistics revealed that thirty-four (34) percent of whites completed high school, in contrast to twelve (12) percent of blacks. Research showed that fifty-eight (58) percent of whites, in contrast to 6 percent of blacks, passed the Intelligence Tests used by Duke Power. Duke Power showed they had not intended that the requirements would discriminate, but failed to show that the requirements were related to job performance. A unanimous Supreme Court ruling found Duke Power liable, based on the following reasoning, given in the famous speech of Burger, C.J., who invokes Aesop's fable of the stork and the fox:

“Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the job seekers be taken into account. It has to resort again to the fable provided that the vessel in which the milk is proffered be one all seekers can use.”

This speech established that indirect discrimination is based upon two broad limbs: the prima facie case and justification.²³ First, the claimant must show that an apparently neutral practice has led to an adverse impact on a protected group, for example, where a high school diploma is a condition of

²³ See Michael Connolly, *Discrimination Law*, Hart Publishing, Oxford and Portland, p129.

employment and a larger proportion of whites than blacks complete high school. Second, the burden shifts to the defendant to justify the practice by showing it was necessary to achieve the (non-discriminatory) aim, for instance, by showing that a high school diploma was necessary to perform the job. Indirect discrimination is also known as disparate impact, adverse impact, and adverse effect.²⁴

The advantage of identifying the existence of indirect discrimination and recognizing it legally is that it permits a critical re-examination of the established practices and rules that produce different results for different groups.²⁵ Such indirect discrimination may also continue where there is widespread agreement, but the practices in question have not been re-examined in the light of a relatively new social consensus. It could address laws, legislations and policies which tend to be fair and look fair, but actually not, especially for a particular group of people, when applied to everyone of the society. Sometimes it is hard to determine whether the situation amounts to indirect discrimination. Ina Sjerps explains this whittling away of the acceptance of the fairness of prevailing norms:

“Indirect discrimination cases are generally cases where there is not yet any widespread agreement in society, as to whether unequal treatment is acceptable or not, where a group of people no longer accept unequal treatment, but many others find it acceptable. Those are the cases where the legal battle is being fought most fervently, in accordance with the social and political fight.”²⁶

It should be noted that the lack of widespread agreement mentioned above would cause the concept of indirect discrimination difficult to be applied.

²⁴.Ibid.

²⁵, Ibid, p131.

²⁶ Ina Sjerps, “Effects and Justifications: Or How to Establish a Prima Facie Case of Indirect Sex Discrimination” in *Non-discrimination Law: Comparative Perspectives*, edited by Titia Loenen and Peter Rodrigues (The Hague: Kluwer Law International, 1999),240-241.

1.4 Non-discriminatory Differential Treatment

There are basically four situations that could be called non-discriminatory differential treatment and not constituting discrimination at workplace.

First, under Article 1, paragraph 2 of C111, “any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination”. Although sometimes, “it is difficult to draw the line between bona fide requirements for a job and the use of certain criteria to exclude certain categories of workers”²⁷, differential treatment based on this way is reasonable and legal. Common examples concern the performing arts or tasks involving particular physical ability.²⁸ Department for female physical examination may be reasonable to recruit more female doctors regarding the privacy and inherent requirements of the respect of women dignity Similarly, female policemen should be enrolled to charge and take care of the women prisoners.

Second, distinctions based on individual merit do not count as discrimination in employment and occupation.²⁹ The concept of merit or ability refers to a relationship between a person’s talents, knowledge and skills and those required for performance of a particular job.³⁰ If a person has better skills, knowledge and experience for a job, she or he should be considered for the application with priority.

Third, Article 4 of C111 states that, “Any measures affecting an individual who is justifiably suspected of, or engaged in, activities prejudicial to the security of the State shall not be deemed to be discrimination, provided that the individual concerned shall have the right to appeal to a competent body

²⁷ Equality in Employment and Occupation, International Labour Conference, 83rd Session, 1996, Chapter 3, III4B/281-11C.E95/v.3, para.118.

²⁸ See Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at work, 2003, “Time for equality at work”, p21.

²⁹ Ibid, p22.

³⁰ Ibid, p22.

established in accordance with national practice.” Measures to protect the security of the State exist in almost all countries; they may refer to situations such as martial law or a state of emergency, which are governed by provisions directly affecting employment of occupational issues.³¹ For example, in China, if a person was found guilty of committing crimes against China social security, he or she is banned by law on holding of public work or being elected a public officer.

Fourth, Article 5, paragraph 1 of C111 provides that the “special measure of protection or assistance provided for in other Conventions or Recommendations adopted by the International Labour Conference shall not be deemed to be discrimination.” No discrimination is involved when special measures are adopted with the aim of ensuring equality of treatment and opportunity in practice for individuals with particular requirements or for groups that are disadvantaged as a consequence of past or current discrimination in the labour market.³² Minority, tribal peoples, indigenous people, the elderly, the homeless are a group of people vulnerable to be discriminated against, and special measures or affirmative action should be provided without any delay to them. “Maternity is also a condition that requires differential treatment to ensure genuine equality between men and women in the world of work.” “Such treatment is necessary, particularly in view of the fact that the benefits of maternity protection go beyond women workers and work, and extend to society as a whole.”³³

1.5 The Significance of China’s Ratifying and Acceding to the C111

On the 28th of August 2005, the Seventeenth meeting of the Standing Committee of the Tenth NPC approved C111. It is one of the eight

³¹ Equality in Employment and Occupation, International Labour Conference, 83rd Session, 1996, Chapter 3, III4B/281-11C.E95/v.3, para.126.

³² See Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at work, 2003, “*Time for equality at work*”, p22.

³³ Ibid.

fundamental conventions of ILO, which was adopted by the ILO 42nd Session General Conference on the 25th of June 1958.³⁴ On the 12th of January 2006, Chinese government formally submit the ratification draft to Juan Somavia, ILO Director-General and registered as a party to this Convention, before which China ratified the C100 Equal Remuneration Convention as early as 1990. These two conventions lay down the basic principle that elimination of discrimination in respect of employment and occupation-- to be implemented by ratifying countries.³⁵ And until October 12, 2007, of all 181-member states of ILO, 166 have ratified the C111, and 164 have ratified the C100.³⁶ The above ambit indicates the Government of China committed to assume the responsibility for the international rights and obligations that place on a party to the Convention.

Elimination of discrimination in respect of employment and occupation is not only an important human right but also one of the four fundamental principles and rights at work laid down in the eight core labour conventions of ILO.³⁷

When people are discriminated, and cannot enjoy these basic rights or these rights are violated, the State must do something to protect their civil rights. Article 2 of C111 detailed the obligation that, “Each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.”

³⁴ Checked in the ILO website, <http://www.ilo.org/ilolex/english/newcountryframeE.htm>

³⁵ <http://www.ilo.org/public/english/standards/norm/introduction/what.htm>

³⁶ Checked in the ILO website, the ratification of Convention, for C100: <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C100>, for C111: <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C111>.

³⁷ The other three are: freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour
<http://www.ilo.org/public/english/standards/norm/introduction/why.htm>

It means China undertakes to enact corresponding anti-discrimination laws or national policies in respect of employment and occupation in order to bring the principle of C111 into local legislation. The establishment and promotion of anti-discrimination law concerning discrimination in employment, and the equal opportunity and treatment system is urgent, and obligated.

It should be noted that, ratifying C111 has already played a crucial role in China, and one of its significance is that the Employment Promotion Law was enacted on the 30th of August 2007, in the Twenty-ninth meeting of the Standing Committee of the Tenth NPC, after discussion, consideration, and collecting public opinions for a long time.³⁸ The law will come into force on the first of January 2008. Article 5 of the Employment Promotion law states that, “Every one should enjoy the equal right in respect of employment and occupation. Any distinction, exclusion or preference made on the basis of nationality, race, sex, religion and so on should be forbidden.”

For the issue of promotion of equal employment and anti-discrimination, the law stresses that the role of the Chinese government is to create an impartial recruitment environment, and adopt special policies, measures and assistances to help people influenced by discriminations. The recruitment union and employment agency should provide applicants with equal opportunities and standards. Any kind of distinction has the effect of nullifying or impairing equality of opportunity or treatment in employment should be forbidden. For example, no excuse or standard based on gender should be acceptable when recruiting, except for the posts not suitable for female which be legally stated in the national law; and the recruitment contract should not make any restriction on the marriage or pregnancy of women. Special measures of protection or assistance should be provided to minority people. Discrimination based on disability must be eradicated. Infectious disease carriers should enjoy the same right when recruiting. It

³⁸ The detail news of the Employment Promotion Law of the People’s Republic of China (EPL) , could be available on <http://www.mallesons.com/publications/2007/Sep/9123337w.htm>

should be highlighted that Article 27 of the law states that people from the countryside enjoy the same right to work as those in the city, and that no discriminatory restriction could be made towards rural migrant people.

Under the supervision of C111, China has made a great progress in enacting corresponding national legislation to address discrimination in respect of employment and occupation. The ratification of C111's has played a significant role in China.

2 Discrimination in Employment and Occupation of China: What Work Situations are Covered?

2.1 Introduction

“Discrimination in the labour market and in the workplace can be found in different work situations and forms of employment in all economic sectors, regardless of whether the work takes place in the formal or the informal economy.”³⁹ Social origin, gender, age, disability, health status, marital status and appearance, are the main discriminative categories in the labour market of China nowadays.

Besides, there is some discrimination related with the level of education of people, which sounds ridiculous. For example, *Beijing Morning Post* reported, Beijing resident Zhang Meng, who had more than 10 years' driving experience, failed to get a job because his prospective employers considered his name "unlucky". "Meng", they said, literally means "rush" in Chinese, which made him more accident prone than others.⁴⁰

In the subsequent part, I shall analyse the main five discrimination factors from an international human rights law perspective.

2.2 Discrimination on the Grounds of Social Origin—*Hukou* System

The *Hukou* system was implemented initially in Chinese cities in 1951 with the purpose of maintaining social peace and order, safeguarding the people's

³⁹ See Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at work, 2003, “Time for equality at work”, p18.

⁴⁰ <http://www.liaoning-gateway.com/74591976929886208/20070108/2121095.shtml>

security, and protecting their freedom of residence and movement stated officially in the regulations. Under the system, people were allowed to travel or even choose their residence relatively freely. However, in response to the huge influx of farmers into the cities, the government issued a directive in 1955 establishing a comprehensive *Hukou* system that encompasses not only urban cities but also rural areas.⁴¹ This Directive marked the shift in emphasis from the use of the *Hukou* system for registration purposes to explicit government policies to prevent unplanned migration and introduce formal administrative control over the rural influx to the cities and over intrarural and intra-urban population movement. Thereafter, official approval was required for any change of residence. From the government's perspective then, running an economy according to a strict central plan requires the ability to allocate human resources not only at the enterprise and sectoral levels but also across geographic locations. Therefore, the *Hukou* system was considered to be a necessary component of the centrally planned economy.⁴²

The *Hukou* system requires every resident in China to be registered with the local Public Security Bureau. In many localities this permit is necessary in order to work, to rent housing, to open a bank account, to enter public buildings (such as libraries), to receive registered mail, and for other personal identification purposes. Employment, housing, and social benefits are commonly linked to *Hukou* identification. Rural migrants to urban areas are often unable to obtain equal access to public services such as health care and education.⁴³

When people who hold the rural *Hukou* instead of city *Hukou* want to find a job in the city, they face different kinds of restriction and therefore the cost

41 The Directive Concerning Establishment of a Permanent System of Household Registration was issued by the State Council in June 1955. With the promulgation of *hukou* legislation by the National People's Congress in 1958, China established a full-fledged *hukou* system.

42 Liu Zhiqiang, "*Institution and inequality: the hukou system in China*", *Journal of Comparative Economics* 33 (2005) 133–157

43 <http://www.cecc.gov/pages/roundtables/090205/index.php>

of employing them for the employers is much higher than that of employing local ones. Since the economic reforms were started in 1978 by pragmatists within China, more and more laid-off city workers appeared. The case of these people endangers social stability; some local governments enacted a series of policies and rules to restrict the people who registered with rural *Hukou* getting a job in the city. This partly makes discrimination in employment against rural people to be justified. For example, according to the local legislation of Beijing in 1995, the top three ones of the 206 kinds of occupations that people without Beijing *Hukou* could be recruited are: cosmetic surgery worker for the body, cremation worker and gatekeeper of cemetery.⁴⁴ It is clear that all these occupations are ones that local Beijing citizens would not like to take. And the top three ones that these people were not allowed to get in are: accountant, cashier, and all kinds of work related with finance and insurance.⁴⁵ This situation has not been changed and has even deteriorated. As in the year 2000, the emendatory local policy states added up to eight fields of occupation could not be for the job seekers who are not residents of Beijing. These eight fields are: finance, insurance, post-office, real estate, advertising, information consultation, Internet application and travel agency.⁴⁶ At last in March of 2005, this discriminatory local government policy was abolished after being condemned by jurists, experts, moralists and people from all levels of society for years.

Article 7 of ICRMW states that, “States Parties undertake, in accordance with the international instruments concerning human rights, to respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the present Convention without distinction of any kind such as to sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status,

⁴⁴ Article 2, “Policy on Occupation Scope of Local Migrant Workers in Beijing”. enacted by Beijing Labour and Social Security Bureau, 1995.

⁴⁵ Article 3, Ibid.

⁴⁶ Ibid.

birth or other status.” Although it could not be directly relevant if ratified, because it concentrates on international immigrant, it still could be used by analogy to Chinese local immigrant workers.

Further, Article 8 of ICRMW states that, “Migrant workers and members of their families shall be free to leave any State, including their State of origin. This right shall not be subject to any restrictions except those that are provided by law, are necessary to protect national security, public order (order public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present part of the Convention.” And ILO Convention concerning Migration for Employment (C97) and C143 Migrant Workers (Supplementary Provisions) Convention also gives a fully illustration and detailed statement of protection of migrant workers’ rights.

Even though China has not ratified this Convention, and according to Article 34 of Vienna Convention On The Law, “Treaties does not create either obligations or rights for a third State”, as a member of UN, China has the obligation to respect, protect and promote the basic migrant worker’s rights laid down in the Convention even not being a party of ICRMW. Gong Renren, a scholar at Peking University argues that, “Today, although we do not necessarily base human rights on the assumption of the ‘natural state’, most jurists, (whether international or domestic lawyers), philosophers and moralists recognize that each person should enjoy some fundamental rights at least morally.”⁴⁷

The *Hukou* system not only restricts the free movement of migrant workers, but also impairs the fundamental human dignity. Freedom of movement is a basic and universal human right, which should be respected and protected properly in China. Special policies and affirmative action should be

⁴⁷ Gong Renren, *International Human Rights Law and Comparative Constitutionalism*, in *International Human Rights-Chinese and Canadian Perspectives*, Bai Guimei. Law Press, 1998,p.82.

considered in the aim of fully realizing the rights of local migrant workers from the rural place. Especially for China nowadays, although the existence of this system has made a role to control the social order, it should be eradicated as soon as possible as the violation of principle laid in the Convention. Meanwhile, China should try to adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the ICRMW.

2.3 Sex based Discrimination

China had enacted several laws during the late 1980s and the 1990s in an attempt to establish and protect women's rights. In terms of fighting gender discrimination in employment, the 1993 Constitution of the People's Republic of China Amendment (Constitution), the Women Workers and Employees' Labour Protection Regulations (Labour Protection Regulations), the Labour Law, the Law for the Protection of Women's Rights and Interests (LPWRI), and many other legislations provide foundations to eradicate and restrict the discriminatory actions of employers.

The recently-promulgated Labour Law points out that, "It shall not be allowed, in the recruitment in employing staff and workers to use sex as a pretext for excluding females from employment or to raise recruitment standards for the females, except for the types of work or posts that are not suitable for females as stipulated by the State."⁴⁸ And the Law on the Protection of the Rights and Interests of Women points out, "No unit may dismiss woman staff and worker or unilaterally terminate labour contracts with them by reason of marriage, pregnancy, maternity leave or baby-nursing."⁴⁹

⁴⁸ Article 13 of promulgated Labour Law, adopted at the Eighth Meeting of the Standing Committee of the Eighth National People's Congress of the People's Republic of China on July 5, 1994

⁴⁹ Article 26 of Law of the People's Republic of China on the Protection of Rights and Interests of Women, Adopted at the Fifth Session of the Seventh National People's Congress on April 3, 1992.

However in practice, according to China Labour Statistical Yearbook 2004, the female employment situation is not going well. The proportion of female employment in urban units is 37.9%, the proportion in public management and social organization is 26.3%, and the proportion of female leader in organs of the Central Government of the State and Chinese Communist Party Central Committee is only 15%, the proportion in professional technique services is 31.4%, but the one in accommodation and restaurants is 55.2%.⁵⁰ Meanwhile, the female-male wage ratio declines from 77.5% in 1990 to 70.1% in 2000.⁵¹

Although the statistic indicates that female students account for 44% in the university and college, the employment opportunities for them is much lower than for male students. In 2002, *Xiamen* University conducted a survey on the employment situation of graduate students. The result showed that, with regards to the same standard, opportunity for female students is only 87 per cent of male students⁵². *Zhangxue*, the leader of Capital Normal University mentioned the employment issue in an interview saying that 70 per cent of graduate students who could not get a position are female. Female students who got jobs experienced a much tougher time than the male ones, and they were forced to level down their expectance of jobs. According to a recent survey conducted by Shanghai branch of All-China Women's Federation, well-educated female students also suffered a difficult experience to attain a position, and their successful percentage is 10% lower than males'. Among the group which members are twenties, the female graduates' success rate is 14.4% lower than males'.⁵³ There are 58.8% of the female graduates who felt that they were discriminated on the base of their gender.

⁵⁰ CHINA LABOUR STATISTICAL YEARBOOK, 2004, Compiled By Department of Population and Employment statistics, National Bureau of Statistics, Department of Planning and Finance and Ministry of Labour and Social Security, P.R.C, pp 18—21.

⁵¹ Wang Xinyu, "the research report in female employment discrimination in China", p 6.

⁵² Ibid.

⁵³ Shi Hong, "Female 'appearance value' and 'pretty girl economic'." , <http://www.bass.gov.cn/>.

Discrimination towards women is sometimes hideous, which is a gray zone that law and legislation could not yet refer to now. In 2006, *Zhaopin.com* and *CCTV.com*, which are two of most influential websites in China, jointly conducted a survey on employment discrimination. One of their questions was, “If the company rules out an applicant for gender or age, will the company tell him or her?” Seventy-five percent of the companies answered “no.”⁵⁴ But many enterprises do not write in the recruiting advertisement that they would prefer a man. “To avoid legal liability in future discrimination claims, the recruitment agency would advise its corporate clients not to mention in internal documents that a candidate was rejected on the basis of HBV status.”⁵⁵ Therefore, when a man and a woman are qualified for a position and compete for it, the enterprises will definitely pick the man without telling the woman the true reason why she did not get the job---her gender, and they will talk about other reasons to evade the regulations against discrimination.

That is a common phenomenon in the recruitment field that men are preferred to be employed, while women are vulnerable to layoff; men are preferred to be given important social positions, and women are preferred to do the household chores. In 1997, report from the Ministry of Labour said that, women accounting for only 39 percent of China’s work force made up almost 61 percent of its laid-off (i.e. redundant state sector) workers. While the continued large-scale laid-offers since 1997 aims at “reducing staff for greater efficiency” may have rendered a more even gender balance, this is hardly to be welcomed and does not alter the fact that women workers were targeted first. Moreover the average salary for women is only 70 percent of that for men 1999, which is 13 percent less than the figure in 1990.⁵⁶

⁵⁴ <http://www.womenofchina.cn/focus/employment/14032.jsp>.

⁵⁵ Bonny Ling and Wing Lam, “Hepatitis B: A Catalyst For Anti-Discrimination Reforms?” http://hrichina.org/public/PDFs/CRF.2.2007/CRF-2007-2_Hepatitis.pdf

⁵⁶ See *discrimination in the People’s Republic of China*, <http://www.amrc.org.hk/5305.htm>.

On November 4th of 1980 China ratified the CEDAW⁵⁷, which is often described as an international bill of rights for women and adopted by the UN General Assembly. Article 11 of it imposes the member state obligation to “take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights”. It reaffirms that “the right to work was an inalienable right of all human beings; the right to the same employment opportunities, including the application of the same criteria for selection in matters of employment should never be discriminated”; and “the right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training must be respected, protected and implemented.”

Countries that have ratified or acceded to the Convention are legally bound to put its provisions into practice. China has conscientiously carried out its commitment to incorporate gender perspective into the state policies, plans and programmes. Reinforced efforts has been made to establish a mechanism for women’s advancement, and further China improved laws and regulations on the protection of women’s rights and interests by means of legislation and introduced practical and strong measures to ensure the execution of policies, plans and laws.⁵⁸ But gender-based discrimination is still a serious problem and a widely accepted phenomenon in society, there is a way to address it.

57 China signed and ratified the CEDAW Convention in 1980. The Convention contains several articles that relate women's work rights. China submitted its initial periodic report in 1985; its second report, submitted in 1989, was considered in 1992.

⁵⁸ See CEDAW Website, <http://www.un.org/womenwatch/daw/followup/responses/China.pdf>

2.4 Age as a Determinant of Discrimination in the Labour Market

Age discrimination affects both ends of the age spectrum in China. Anti-discrimination in employment has been set as a principle in China, as states in Article 33 of the Constitution of the P.R.C, “All citizens of the People's Republic of China are equal before the law.” Article 42, “Citizens of the People's Republic of China have the right as well as the duty to work.” However, there is no corresponding clause in labour law on anti-age discrimination. And from the statement of Article 12 of Labour law, “Labourers shall not be discriminated in employment due to their nationality, race, sex, or religious belief.” it seemed that the equal remuneration principle does not include and be referred to the age discrimination even the Constitution has set it as a principle.

2.4.1 Discrimination Against Elderly

“Oldness” is a relative concept and its perception changes over time and across cultures. “Statutory retirement age varies between countries. Within the same country, it may differ according to the branch of activity, and, with the same industry, it may differ according to sex. Everywhere, however, older workers face discrimination, although the reasons vary.”⁵⁹ Age is becoming an increasingly important determinant of people’s occupational attainments and returns to work all round the nation.

China’s population is ageing faster than most of the industrialized countries. According to the statistics of UN World Population Prospects in 2006, people aged sixty (60) plus will be 17.1 per cent by the year of 2020, and 31.1 per cent in 2050.⁶⁰ Meanwhile, in cities there exist a large number of laid-off people who are over 40 years old and are difficult to be recruited

⁵⁹ See Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at work, 2003, “Time for equality at work”, p35.

⁶⁰ Population Division of the Department of Economic and Social Affairs of the United Nations Secretariat, *World Population Prospects: The 2006 Revision and World Urbanization Prospects: The 2005 Revision*, <http://esa.un.org/unpp>, Friday, November 09, 2007; 1:36:56 PM.

again. In the countryside, before the 1979 when adopting open-market policy, China had been in a isolated situation for a long time. In order to achieve industrialization, educated urban youth were encouraged to go and work in the countryside or mountain areas (*Shang Shan Xia Xiang*), therefore much surplus workforce accumulated in the rural place. ⁶¹Now these people are over fifty years, it would be a big problem for them to go to the city, competing with the younger generations to get a job again. High unemployment ratio has intensified competition degree for more and more jobless people in cities, and as a result older people are easily marginalized from most of job opportunities.

An additional obstacle to the recruitment of older workers may be the perceived higher cost of employing them and their declining productivity because of the deterioration of their physical and mental capacities. In China, when recruiting a civil servant in the government, the discrimination against older workers is serious. 42.0% posts required applicants under 30 years old (including 30), while 58.0% posts would not accept those over 35. ⁶² According to the statistics published by the *Beijing Statistics Bureau*, 38% of 3,840,000 unemployed in *Beijing* in the year of 2000 were between the ages of 35 and 44, which is the single largest age group among the unemployed in *Beijing*. ⁶³

Following is the survey on age discrimination conducted by China University of Political Science and Law in the year of 2006.

Table One: the Age Standard of Civil Servant Recruitment

The name of Province or City	Quota of People	Age Standard
Hu Nan Province,	140	For people with Bachelor degree, not

⁶¹ Li Dun, "Evaluation on Discrimination in Employment and Occupation in China", consigned by ILO, Beijing Office, pp 4-5.

⁶² "The survey report of employment discrimination in 10 important cites of China", made by China Political Science and Law, Constitutional Institute.

⁶³ ⁶³ Li Dun, "Evaluation on Discrimination in Employment and Occupation in China", consigned by ILO, Beijing Office.

Revenue System		more than 28 years; for people with master degree, not more than 30 years.
Hu Nan Province, Chang Sha City	257	18-35
Shanghai	Not clear	18-35
Tian Jing	1154	18-35

To regulate different age limits for retirement is an issue relating with both gender based-discrimination and age-based discrimination simultaneously. It originates from the Labour Security Law, which was enacted by the State Council in 1951. Article 15 states that, the retirement age for man is 60, while for woman is 50.⁶⁴ In 1958, China State Council published the Provisional Rules Concerning the Retirement Age of Officials and Workers. It identified the retirement age between female officials and blue-collar workers; for the former it was 55, and for the latter it was only 50.⁶⁵ In 1978, the Standing Committee of NPC approved the Provisional Rule and stated that the retirement age for men and women is respectively 60 and 50, which should be applicable to all State-owned enterprises, unions, state organs and collective groups.⁶⁶

At first, the aim of setting different retiring ages for men and women was to protect the interests of women for they were subject to more strain of bearing and rearing children. But with the social development and improvement of education degree of women, more females have developed their own careers in their 50s, which is “their prime earning years and their salary are increasing the most”.⁶⁷ They do not want to retire at this period, while the law forced them out. “The difference in retirement age sometimes holds women back from enjoying equal rights”, said Wang Shuxian, former ACWF (All-China Women's Federation) vice president.⁶⁸

⁶⁴ http://cnki.shsmu.edu.cn/yywsg14/Product4/Law/18_work/18_work1278.htm

⁶⁵ <http://www.law-lib.com/lawhtm/1949-1979/1374.htm>

⁶⁶ <http://www.chinalawinfo.com/newlaw2002>

⁶⁷ http://english.peopledaily.com.cn/200308/25/eng20030825_123043.shtml

⁶⁸ Ibid.54.

Similarly women aged over 50 in governments could not be considered for promotion instead of pushing them to leave their job and retire. These regulations have not only impaired their right to attend civil, political, public and social decision, but also seriously blocked the promotion of female leaders, and they do constitute obvious discrimination.

2.4.2 Discrimination Against the Younger People

“Young women and men are the world’s greatest asset for the present and future, but they also represent a group with serious vulnerabilities.”⁶⁹ Younger people in China are now facing a great challenge when applying for a job, especially for the new colleague graduates. According to statistic, 0.3 million people among them in 2000 could not attain a position, 0.345 million in 2001 failed to be recruited, and 0.637 million did not land a job in 2003.⁷⁰ “An inability to find employment creates a sense of vulnerability, uselessness and idleness among young people and can heighten the attraction of engaging in illegal activities.”⁷¹, as state in the ILO Global Employment Trends for Youth, many young people in China including me have to suffer a lot for a position.

Unemployment rates are still considered as “the most visible and obvious indicator of a youth employment challenge”⁷², and it can be got in the report of the first survey on Chinese youth employment, which was released in 2005. The All-China Youth Federation (ACYF) and the Institute of Labour and Social Security (ILSS) of the Ministry of Labour and Social Security (MOLSS) conducted the survey jointly. It sampled 7,000 youths and 220 enterprises. The targets were young people between the ages of 15 and 29 and their employers in China. This survey shows that the unemployment rate of China's youth between 15 and 29 is 9%, higher than the 6.1%

69Global Employment Trends For Youth, International Labour Office, Geneva, p1.
<http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/kd00085.pdf>

⁷⁰ Xue Xiaojian, “Age discrimination of employment in China”, p26.

⁷¹ Ibid 56.p3.

⁷² Ibid 56,p7.

average unemployment rate for Chinese society. Most unemployed youth had been jobless for a long while.⁷³

Most young people are considered as the spoiled new generation, which means that they have no responsibility sense and no work experience. Also they are perceived as “high mark, but low capability”, not only in the occupation areas but also in social life. There is a popular expression that it is a winter season for the younger people who want to find a job. Also they are paid much less than the elder workers who have work experience although they do the same job. As the survey above also shows that 60% of employed youth receive monthly salaries between only from 600 to 1500 RMB (US Dollars to 181).⁷⁴

Even though younger people lack experience but on the other hand they might be “more motivated and offer new ideas or insights”. “Ignoring this potential signifies an economic waste.”⁷⁵ China should enact specific law and policy targeting on the addressing employment discrimination against youth people as soon as possible.

2.5 Discrimination Based on Disability

On April 1st of 2006, China started up the Second National population census on disabled person, and on December 1st, 2006, the spot check statistics indicates that there are 829.6 million people with disability in mainland China, which accounts 6.34% of the national population of China.⁷⁶ The employment discrimination against these people is serious in practice; even the

⁷³ <http://www.chinanews.cn/news/2004/2005-05-25/4900.shtml>

⁷⁴ Ibid 69. China per capita GDP in 2006 was approximately US \$2,000, http://www.ceicdata.com/google/CEIC2.htm?gclid=CLzk5NG20o8CFR0SEgod9U2F_A.

⁷⁵ Ibid 56, p21.

⁷⁶ <http://www.china.com.cn/txt/2006-12/01/content-7443375.htm>

most well educated ones are suffering from the exclusion from the society due to their disable status.

In June 2007, one of China's most influential newspaper "People's Daily" reported that a female PHD student of Peking University failed to find a job because of her disability. *Guo Hui*, born in *Hebei* Province, became paraplegic when she was 12 years old after a misdiagnosis. She quitted her primary education due to being discriminated, and then taught by herself. After getting her Master's degree from *Shandong* University, *Guo* applied for a job as a teacher, but was rejected because she was disabled. Then she continued her doctoral study in *Peking* University. She was fluent in English and French and was the recipient of several state level scholarships. In the last year of her PHD program, she sent out more than 100 job applications to employers in *Beijing*, *Tianjin* and *Shanghai*, but did not receive any reply. "Not because I was unqualified, but because I was physically disabled". *Guo* said.⁷⁷

The Law of the People's Republic of China on the Protection of Disabled Persons clearly prescribes that, "No discrimination shall be practised against disabled persons in employment, engagement, status regularization, promotion, determining technical or professional titles, payment for labour, welfare, labour insurance or in other aspects."⁷⁸

There are some shortcomings of it. Firstly it does not stipulate what is the definition of discrimination against disabled person, what situation constitutes the discrimination. Secondly there is no regulation and due process about the responsibility, legal duty and compensation of the unit or

⁷⁷ It did not include Hong Kong and Macao Special Administrative Regions. http://www.chinalawblog.com/2007/06/take_advantage_of_chinas_rampa.html

⁷⁸ Law of the People's Republic of China on the Protection of Disabled Persons, Article 34, provision 2. http://www.gov.cn/banshi/2005-2008/04/content_20235.htm

individual who violates the law. Meanwhile, the law only states that discrimination against disabled persons should be eradicated, but does not mention discrimination based on disable. They are two different concepts. For example, if a person was discriminated at work because one of her or his family member is a disabled one or if a person is discriminated because of his or her disabled history, there is no law or regulation could be cited to redress it.⁸⁰ Lastly, from the definition of Chinese law on the Protection of Disabled Persons, the scope of the concept about disable person and application is comparatively narrow, which only was concerned employment, engagement, status regularization, promotion, determining technical or professional titles, payment for labour, welfare, but did not include the indirect discrimination and harassment.⁸¹

Article 2 of the UN Convention on the Rights of Persons with Disability supplies with clear interpretation of the concept, “Discrimination on the basis of disability means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”⁸²

ILO Convention (No. 159) concerning Vocational Rehabilitation and Employment not only detailed the concept of “disabled persons”⁸³, but also illustrates the principle of protection and the action or state obligation. Article 4 of it states, “Equality of opportunity and treatment for disabled men and women workers shall be respected. Special positive measures aimed at effective equality of opportunity and treatment between disabled workers and other workers shall not be regarded as discriminating against other workers.” And Article 7 states, “The competent authorities shall take

⁷⁹ Ma Yu E “ The research report on disable discrimination in employment of China”, p3

⁸⁰ Ibid.

⁸¹ Law of the People's Republic of China on the Protection of Disabled Persons, Article 2, . http://www.gov.cn/banshi/2005-2008/04/content_20235.htm

⁸² http://untreaty.un.org/English/notpubl/IV_15_english.pdf

⁸³ Article One of C159, <http://www.ilo.org/ilolex/english/convdisp1.htm>

measures with a view to providing and evaluating vocational guidance, vocational training, placement, employment and other related services to enable disabled persons to secure, retain and advance in employment; existing services for workers generally shall, wherever possible and appropriate, be used with necessary adaptations.”⁸⁴

On the base of C159, the UN Convention on the Rights of Persons with Disability acclaimed States Parties to recognize the right of persons with disabilities to work, on an equal basis. This includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. It claims that the States Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation.⁸⁵

As a member of the UN and ILO, China undertakes to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities, and try best to make sure they are employed without any discrimination based on their disability. Also China should modify the existing Law on the Protection of Disabled Persons, which has obvious shortcoming in protecting disabled people. And “special positive measures aimed at effective equality of opportunity and treatment between disabled workers and other workers” should be adopted at once according to the guide of ILO. For the custom part, more education programs should be promoted to public that disabled people should be treated equally as a nature human right.

2.6 Health-based Discrimination

In April 2003, a university graduate named *Zhou Yichao*, attacked two officials in charge of government recruitment in *Jiaying City, Zhejiang*

⁸⁴ <http://www.netzwerk-artikel-3.de/un-konv/doku/ilo159.pdf>

⁸⁵ UN Convention on the Rights of Persons with Disability, Article 27, <http://www.un.org/esa/socdev/enable/rights/convtexte.htm>.

Province, with a result of one killed and one injured.⁸⁶ *Zhou* had passed all the local civil service qualification exams before he failed to pass the physical examination because he is a HBV carrier. This refusal caused *Zhou* to go temporarily insane and commit a crime at the cost of his own life; he was sentenced to death five months later.⁸⁷ The homicide case caused by HBV-Based discrimination was listed as one of the “Ten most influential cases of 2003” in China.⁸⁸ This case aroused wide social attention towards health-based discrimination. Many media houses held the view that, although *Zhou Yichao’s* action should be seriously punished, the regulation banning HBV carriers from being recruited as civil servants was not fair. Obviously it was a kind of serious employment discrimination and was one of the main causes of that tragedy.

According to WHO statistics of China, there are around 130million HBV carriers by the end of 2006,⁸⁹ 0.65million HIV/AIDS carriers by the end of 2005⁹⁰, while other different kinds of virus carriers are a great large group. They suffered serious prejudice and discrimination in employment and occupation not only because of the public traditional prejudice but also the social system weakness. The Ministry of Health conducted a survey in 2006, and the result showed that nearly 60 per cent of urban residents would be nervous and afraid to contact with HIV positive people in public, which underlined the fear and ignorance surrounding the disease.⁹¹

“Health is a fundamental human right indispensable for the exercise of other human rights.”⁹² The right to health could be found in Article 25 of the

⁸⁶ <http://www.chinadevelopmentbrief.com/node/472>.

⁸⁷ Ibid.

⁸⁸ Liu Yang, “Health-Based Discrimination in Employment and Occupation in China”, p1.

⁸⁹ *Country Cooperation of Strategy at a Glance* by World Health Organization (WHO) 2006, http://www.wpro.who.int/NR/rdonlyres/E8BE4438-924F-4193-89F3-B81822AC408C/0/ccsbrief_en.pdf

⁹⁰ See UNAIDS website,

http://data.unaids.org/pub/InformationNote/2006/20060730_Project_page_China_en.pdf

⁹¹ <http://www.news-medical.net/?id=10942>

⁹² Committee on Economic, Social and Culture Rights, General Comment on the “right to the highest attainable standard of health”, E/C.12/2000/4, [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/40d009901358b0e2c1256915005090be?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/40d009901358b0e2c1256915005090be?Opendocument)

UDHR, which affirms, “Everyone has the right to a standard of living adequate for the health of himself and of his family, including food, clothing, housing and medical care and necessary social services.” The ICESCR in 1966 “provides the most comprehensive article on the right to health in international human rights law.”⁹³ In accordance with article 12.1 of the Covenant, States parties recognize "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health", while article 12.2 enumerates, by way of illustration, a number of "steps to be taken by the States parties ... to achieve the full realization of this right".⁹⁴ Also the right to health was embedded in article 12 of CEDAW (the Convention on the Elimination of All Forms of Discrimination against Women)⁹⁵, and article 24 of CRC (the Convention on the Rights of the Child)⁹⁶.

“Inspiration for the core content of the right to health can be derived from the Health For All and Primary Health Care strategies of the World Health Organization (WHO).”⁹⁷ The Constitution of the WHO of 1948 declares that, “the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being”.⁹⁸ It defines health as “a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity” and prohibits “discrimination in its enjoyment.”⁹⁹ According to this definition of health, the health-based discrimination could be defined as, “any distinction, exclusion or preference made on the basis of physical, mental and social well-being, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ The United Nations website, <http://www.un.org/womenwatch/daw/cedaw/>

⁹⁶ The United Nations Children's Fund website, <http://www.unicef.org/magic/briefing/uncorc.html>

⁹⁷ World Health Organisation, Primary Health Care: Report of the International Conference on Primary Health Care, Alma-Ata, USSR, 6-12 September 1978, Health For All Series No.1, 1978, Chapter 3,p50.

⁹⁸ The second paragraph of Preliminary of WHO Constitution, http://www.who.int/governance/eb/who_constitution_en.pdf.

⁹⁹ The first paragraph in respect of employment and occupation of Preliminary of WHO Constitution, http://www.who.int/governance/eb/who_constitution_en.pdf.

From above stating, obligations to respect the right to health are justiciable by a considerable number of international human rights treaties. So to discriminate virus victims such as *Zhou Yichao*, in occupation and employment seriously violates the obligation to fulfil the right to health. As a member of UN, ILO and WHO, and a state party of the ICESCR, CEDAW and CRC, China should put the right to health firmly on the agenda, with strong political commitment at the highest level to strengthening public health in the world's most populous nation. Addressing health-based discrimination is correspondingly important. Sufficient efforts should be made to provide these people with not only health service but also affirmative action in order to eradicate and reduce the employment discrimination.

And as a first step, to take legislative measures to protect and assure that who have equal access to being recruited is necessary. As a correspondence, in 2004, China revised the law on the Prevention and Treatment of Infectious Diseases to try and ensure victims of infectious disease such as AIDS or SARS (Severe Acute Respiratory Syndrome) not be discriminated against any more¹⁰⁰. Following, some local governments such as the Hunan provincial government and the Fuzhou municipal government revised their regulations for the recruitment of civil servants in 2007 and opened their doors to HBV carriers. But it is still a truth that the health standards for the recruitment of public servants not been standardized in mainland.

For HIV/AIDS issue, the “ILO Code of Practice on HIV/AIDS and the World of Work”, adopted in 2001, applies to all workers in the public and private sectors and in the formal and informal economies. It provides guidance on the elimination of stigma and discrimination of the impact of HIV/AIDS status, management and mitigation of the impact of HIV/AIDS,

¹⁰⁰ For more detailed information, see website <http://www.atypon-link.com/GPI/doi/pdf/10.1521/aeap.16.3.5.7.35521?cookieSet=1>

care and support of workers living with HIV/AIDS or affected by it, and prevention of HIV/AIDS.¹⁰¹

“In 2001 Heads of State and Government Representatives of 189 nations gathered at the first-ever Special Session of the United Nations General Assembly on HIV/AIDS.”¹⁰² And in that meeting, the Declaration of Commitment on HIV/AIDS was unanimously adopted. Following, UNAIDS, the Joint United Nations Programme on HIV/AIDS, was founded to bring together the efforts and resources of ten UN system organizations to the global AIDS response¹⁰³ The common action of the UN system on AIDS has also begun to extend to malaria and tuberculosis¹⁰⁴ – adding credence to the idea that the highly-developed work on this subject should be applied by analogy to other diseases – e.g., hepatitis.

In the following Chapter, it proceeds on scrutinising the Hepatitis B-Based discrimination at workplace of China.

¹⁰¹See ILO website,

http://www.ilo.org/public/english/protection/trav/aids/code/languages/hiv_a4_e.pdf

¹⁰² <http://www.unaids.org/en/Goals/default.asp>

¹⁰³ <http://www.unaids.org/en/AboutUNAIDS/default.asp>, Cosponsors include UNHCR, UNICEF, WFP, UNDP, UNFPA, UNODC, ILO, UNESCO, WHO and the World Bank.

¹⁰⁴ <http://www.unaids.org/en/Coordination/default.asp>

3 Focusing on Hepatitis B-Based Discrimination

3.1 Introduction

Among the above different kinds of employment discriminations in China, one of the most common types of discrimination is that based on Hepatitis B. In a 2005 survey on individuals with HBV conducted jointly by the Chinese Medical Association's Society of Herpetology and Society of Infectious Diseases, half of the respondent said they became estranged from friends who learned they were infected with HBV, and 68 per cent said that the infection had adversely affected family relations.¹⁰⁵

3.2 The Manifestation of HBV-Based Discrimination at Workplace

From August to September of 2005, China University of Political Science and Law conducted a survey on Hepatitis B- Based employment discrimination of mainland China.

3.2.1 What is Hepatitis B

Hepatitis means inflammation of the liver, and the most common cause is infection with one of 5 viruses, called hepatitis "A, B, C, D", and "E". All of these viruses can cause an acute disease with symptoms lasting several weeks including yellowing of the skin and eyes (jaundice); dark urine; extreme fatigue; nausea; vomiting and abdominal pain.¹⁰⁶

"Hepatitis B is one of the major diseases of mankind and is a serious global public health problem."¹⁰⁷ Out of the 2 billion people who have been infected with the hepatitis B virus, more than 350 million have chronic

¹⁰⁵ Research Report on Societal Perceptions of People with Hepatitis B, jituo.net, May 16,2005, [http:// www.jituo.net/baojian/13/488009.shtml](http://www.jituo.net/baojian/13/488009.shtml).

¹⁰⁶ WHO Website, <http://www.who.int/mediacentre/factsheets/fs204/en>.

¹⁰⁷WHO,Website, <http://www.who.int/mediacentre/factsheets/fs204/en/>

(lifelong) infections.¹⁰⁸ These chronically infected persons are at high risk¹⁰⁹ of death from cirrhosis of the liver and liver cancer, diseases that kill about one million persons each year¹¹⁰.

Hepatitis B virus is transmitted by contact with blood or body fluids of an infected person in the same way as human immunodeficiency virus (HIV), the virus that causes AIDS. The main ways of getting infected with HBV are: prenatal (from mother to baby at childbirth), children-to-children transmission, unsafe injections and transfusions, sexual contact. Hepatitis B virus is not spread by contaminated food or water, and cannot be spread casually in the workplace¹¹¹.

China is recognized by the WHO as high endemic area of hepatitis B which means 8-20% of the population is HBV carriers¹¹². China introduced the hepatitis B vaccine pilot in 1985 and extended the coverage nationally in 2003, but WHO has estimated that there are still around 4 million infants not receiving full hepatitis B immunization every year in China¹¹³. Since the contagiousness of HBV is quite minor, especially to adults¹¹⁴, and effective vaccine¹¹⁵ is available, it is clear that the prevention of HBV carrier from entering the workforce is nothing but outright discrimination.

¹⁰⁸ Ibid 105.

¹⁰⁹ Death from chronic infection occurs in 15%-25% of chronically infected persons.

Source: CDC of the US <http://www.cdc.gov/Ncidod/diseases/hepatitis/b/fact.htm>.

¹¹⁰ WHO, <http://www.who.int/mediacentre/factsheets/fs204/en/>.

¹¹¹ WHO, <http://www.who.int/mediacentre/factsheets/fs204/en/>.

¹¹² WHO, *Hepatitis B*, page 8, available at

http://www.who.int/csr/disease/hepatitis/HepatitisB_who.cdscr.lyo2002_2.pdf.

¹¹³ WHO, *Hepatitis B in the Western Pacific Region*, page 4-5, available at

http://www.wpro.who.int/NR/ronlyres/B7B3CAFF-EE7D-4FD7-B51B-79E2367F714D/0/HepB_WPRNextSteps.pdf.

¹¹⁴ According to Centers for Disease Control and Prevention (CDC) of the US, when not vaccinated, chronic infection of hepatitis b occurs in: 90% of infants infected at birth, 30% of children infected at age 1-5 years, 6% of persons infected after age 5 years.

<http://www.cdc.gov/ncidod/diseases/hepatitis/b/fact.htm>.

¹¹⁵ The vaccine is 95% effective in preventing chronic infections from developing according to World Health Organization:

<http://www.who.int/mediacentre/factsheets/fs204/en/>.

3.2.2 Discrimination Starts at the Initial Stage of Recruitment

In October 2006, a Beijing-based recruitment agency revealed that it would routinely arrange compulsory medical exams for candidates to fill positions in foreign-owned corporations, and that applications would not be processed for candidates testing positive for HBV.¹¹⁶

On Sep.6th of 2005, *Beijing Mobile Co. Ltd* consigned *Beijing Tuan Xing employment and social security service Co. Ltd* to public a recruit advertisement in Internet. It said that, “all the candidates should be healthy, without any problem of HBV...”.¹¹⁷

On August 1st of 2005, the advertisement for postman of Shanghai Post Office said that, “the candidate should not have any chronic disease, hepatitis “A, B, C, D”, and E is not acceptable.”¹¹⁸ And a 28-year-old man surnamed *Liao* had won a company award for food performance at an electronics company near Shanghai, but was later told that he was unfit for the position after a company physical examination because he was an HBV carrier.¹¹⁹

On June 1st of 2006, *Xiamen City Collage* published a recruitment advertisement for the teaching and management post. The pre-employment health exam standards covered: HBV, Blood Pressure, Cardiograph and so on, and applicant would not be acceptable if the HBV status is not normal.¹²⁰

¹¹⁶ Liu Yang, “Health-Based Discrimination in Employment and Occupation in China”, p9.

¹¹⁷ Ibid.

¹¹⁸ See, www.sfbys.com/jyxw/show_jyxw.asp?newsid=126.

¹¹⁹ Survey shows half of Chinese Discriminate Against People with HIV/AIDS and Hepatitis B, Voice of America, May 14,2007,<http://www.voanews.com/chinese/w2007-05-14-voa52.cfm>.

¹²⁰ See Xiamen City Collage Website, www.xmccu.cn/employ/Updates_pdf/2.1, 2007-10-11 visited.

3.2.3 The Public Attitude Towards HBV Carriers

Even though HBV cannot be transmitted through day- to-day contact, and many chronic Hepatitis B individuals lead healthy and normal lives, simply being an HBV carrier can result in expulsion from school, loss of employment and alienation from friends and community. Numerous cases have come to light in which employees have been forced to resign or were dismissed on unrelated grounds after compulsory medical exams that included a test for HBV.¹²¹ About 52 percent of the 425 Chinese hepatitis B patients in a survey conducted by Britain's Synovate Healthcare said they once lost a job or educational chance because of their disease. Some 47 percent worry their employers might lay them off if they discover they have HBV. The survey was conducted in Shanghai, Beijing, Guangzhou, Chengdu, Wuhan and Shenyang.¹²²

Following is the survey result conducted by China University of Political Science and Law on this issue.

Table Two. Public attitude towards HBV carriers participating in the public activity and employment

¹²¹ Bonny Ling and Wing Lam, "Hepatitis B: A Catalyst For Anti-Discrimination Reforms?" http://hrichina.org/public/PDFs/CRF.2.2007/CRF-2007-2_Hepatitis.pdf

¹²² <http://www.china.org.cn/english/2005/Jan/118401.htm>

SURVEY OBJECTS		Work together with HBV carriers		Attitude towards the equal treatment of the HBV carriers		
		No problem	Unclear or no	Yes	Unclear	No
Civil Servants 200	Ministry of Sanitary 50	45	5	43	1	6
	Other government 150	83	67	78	5	67
Employers 200	State Enterpriser 100	43	54	39	5	56
	Private Enterpriser 50	20	30	19	2	29
	Foreign Enterpriser 50	35	15	31	2	17
Others 600	Peasant 200	46	154	38	35	127
	University Student 120	70	50	68	1	51
	Intellectual 80	59	21	56	0	24
	Normal Worker 200	67	133	66	23	111
Totalized Proportion		468 46.8%	532 53.2%	438 43.8%	74 7.4%	488 48.8%

The survey indicated that: with regard to the issue about HBV carriers participating in the public activity and employment, only 43.8% of respondents supported HBV carriers should be entitled the same opportunity when finding a job, and nearly half of the people, 48.8% thought they should not be allowed to be treated equally, and 7.4% didn't want to make a comment on this issue. When concerned the issue that whether they would like to work together with HBV carriers, 46.8% people chose no, only less than half about 48.0% said they would like to get along with HBV carriers normally at workplace.

It should be noted that many enterpriser clearly expressed their point of view that they don't want to recruit any HBV carrier. Among the total 200 enterprisiers, only 79 (39.5%) said they support the equal treatment towards HBV carriers, while 112 (56.0%) totally disagreed with the idea. This

discrimination against HBV carriers features most prominently in employment, and can start at the initial stage of recruitment.

3.2.4 The Action Taken by the HBV Carriers

HBV-Based discrimination in employment and occupation deprived many carriers' right to pursue a dignity life. And the struggle of them is also an inflection of the discrimination and prejudice against them.

A website entitled "*Gandan Xiangzhao*", which literally translates as "liver and gall are close together" and "treat each other with sincerity", has been established to advocate equal treatment for HBV carriers- the name they have given themselves.¹²³ It is an online forum, (<http://bbs.hbvhbv.com>), which was founded in 2002 by HBV carriers and rapidly developed an informal network of more than 180,000 members across China. The website collected not only detailed knowledge and information about HBV, such as HBV gene research, cure methods, marriage issue, but also anti-discrimination in employment and occupation legislation researching concerned with HBV carriers in the world. And it should be emphasized that a special forum for anti-discrimination against HBV carriers in employment was set up. This forum supplies legal assistance and free consultation to victims who suffered employment discrimination base of HBV status.

Meanwhile, in November of 2003, core members of "*Gandan Xiangzhao*" submitted to the Standing Committee of the NPC, the national legislative and administrative organ, a proposal signed by 1,611 citizens calling for a review of the provisions on public civil servant recruitment that bar HBV carriers in 31 provinces and cities.

¹²³ <http://www.china.org.cn/english/China/89774.htm>

3.3 The Cause of HBV-Based Discrimination

3.3.1 The Weakness of Law

The Law on the Prevention and Treatment of Infectious Diseases of China, which came into force on September 1st 1989, classifies infectious diseases into three categories. A-Class infectious diseases include only two diseases, namely plague and cholera, B-Class infectious diseases include 25 diseases such as hepatitis B, diarrhoea, syphilis and gonorrhoea, C-Class infectious diseases include ten diseases such as influenza.¹²⁴ Art. 16 of the Infectious Disease Law regulates that patients, suspect patients and pathogen carriers of class b infectious disease will not to be allowed to engage in certain jobs in order to avoid the spread of the disease.

From 3.1.1, the basic knowledge of HBV, it could be found out that Hepatitis B virus is not spread by contaminated food or water, and cannot be spread casually in the workplace¹²⁵. But the 1989 Law on the Prevention and Treatment of Infectious Diseases of China simply classifies Hepatitis B as class B infectious disease. After its enacting publicly by the Central Government, which is the most powerful authority in China, all society held a prejudice towards HBV patient and HBV carriers, and they thought HBV and HBVER were a quite dangerous group to them. Also due to the lack of basic knowledge of HBV, it was commonly received that the Hepatitis virus would be spread by daily contact.

In accordance with this law, 28 local governments enacted their policy on recruiting public civil servants with provisions that bar HBV carriers¹²⁶. Justified by the State legislation, the discrimination against HBV carriers at workplace was rampant, and publicly accepted.

¹²⁴ Article 2 of “the Law on the Prevention and Treatment of Infectious Diseases of China”.

¹²⁵ WHO, <http://www.who.int/mediacentre/factsheets/fs204/en/>.

¹²⁶ Li Zhong, “*the Constitutionalism perspective review of HBV discrimination Cases*”, p3.

The Food and Sanitation Law¹²⁷, which was enacted at the 16th session of the 8th Standing Committee of NPC in 1995, and came into force on October 30th 1995, did not stipulate the difference between Hepatitis A, E and Hepatitis B,C. Article 26 states all Hepatitis and Hepatitis carriers could not be recruited in any work related with food and sanitation. It is a kind of direct discrimination against HBV and HBV carriers; even they are impossible to spread the virus via normal work.

With increasing attention to this problem, China revised the 1989 Law on the Prevention and Treatment of Infectious Diseases at the 11th session of the 10th Standing Committee of NPC in 2004.¹²⁸ And Article 16 states “all society should care and help people carrying the pathogen of a contagious disease and people who are suspected of having a contagious disease. Make sure they are cured on time. Any unit, employer or individual could not discriminate them.” It is the first time that discrimination against contagious disease carriers is banned in law. And to achieve better protection, article 12 states “sanitary and anti-epidemic institutions and other medical treatment institution should respect the patient’s privacy.”

But from the above provisions, we will find out that the law does not specifically mention Hepatitis B, and actually the statement is more like a kind of right declaration but not a law aims achieving substantial rights. It states the Principe, but does not define the concept, the scope of Hepatitis B-Based discrimination, also it does not stipulate the legal duty when the right is violated. It does not provide effective system of appeal and legal remedies for Hepatitis B-Based discrimination in employment. That is why after its coming into force for 3 years; no judge has ever cited this law.¹²⁹ And the

¹²⁷ It is available in Chinese vision, at the website
<http://e.thec.cn/hbsxcdc/images/falu/shipinweishengfa/shipinweishengfa.doc>

¹²⁸ The law is available in Chinese vision, at the website
<http://www.hbsxcdc.cn/images/peixun/wendang/chuanranbingfangzhifa.doc>

¹²⁹ From searching in hbv.hbv.com, at least in more than one hundred cases after the law coming into force, people filed a sue on the base of it did not get the confirm by the court. They were neither failed nor denied to be accepted.

worse is the Article 2 of this revised law still classifies virus Hepatitis, which include Hepatitis B as class B infectious disease.

In January 2005, The Health Qualification for Hiring Civil Servants (provisional) enacted by the China's Ministry of Personnel and Ministry of Health came into force. This regulation prescribes that HBV carriers shall not be discriminated. Thereafter, some of the public and private employers accept a specific kind of HBV carriers. Clinically the HBV carriers are classified into two groups: Dasanyang and Xiaosanyang¹³⁰.

In February 2007, the Operation Manual for Physical Examination for Hiring Civil Servants released. The Manual clarifies that both Dasanyang and Xiaosanyang HBV carriers are qualified for employment as civil servants.

Further on May 18th 2007 the Ministry of Labour and Social Security and the Ministry of Health enacted the Opinions on Safeguarding HBV Carriers' Employment Rights. The Opinion states that HBV carriers shall not be discriminated, and except special occupations no hepatitis b virus serum test shall be incorporated into the employment physical examination

It seems a great progress being achieved, however, it is clear that, the application scope of them is only for recruiting public civil servant. Actually besides public posts, there are much more people who work in the private sectors. The law concerning with this part is empty.

In addition the hierarchy of the Opinions on Safeguarding HBV Carriers' and the Operation Manual for Physical Examination for Hiring Civil Servants is quite low in the whole law system. They were not enacted by the NPC (The National People's Congress of China), but by certain departments

¹³⁰ A standard hepatitis b serum or blood test in China includes five items: HBsAg, HBeAg, anti-HBc IGM, anti-HBe, anti-HBs. A person is Xiaosanyang if HBsAg, anti-HBe and anti-HBc IGM are positive, and Dasanyang if HBsAg, anti-HBs and anti-HBc IGM are positive.

of Central Government. So they are named “Opinions and Provisional Qualification” instead of law and in the legal practice of China, department regulations could only be used as references but not provisions with enforcement power.¹³¹ The judge could decide whether it be cited when dealing with administrative case. It means the implementation of them is of uncertainty.¹³²

3.3.2 The Lack of Basic Knowledge of HBV

The survey statistic conducted by China University of Political Science and Law indicates that for the possible transmit way, only 49.7% respondents could know well, while 50.3% misunderstood it or knew nothing about it; for the fitness of the HBV carriers, 68.8% of people could have a good attitude towards them, recognising them as healthy basically, while 27.6% thought they were of big difference from the normal people who are without HBV infecting, and 4.6% did not want to make a comment towards this question.¹³³

The public discrimination against HBV carriers is largely caused by the lack of basic knowledge about HBV, especially the misunderstanding of the transmission way. Well-educated people have comparatively higher learning about HBV, and in contrast less equated discriminate the HBV carriers. According to table two in the page of 41 of this paper, among all respondents, workers in the health field knew the most about the disease and only 5 people misunderstood the transmission way- the ratio is 10%. They were much more tolerant of getting along with HBV carriers in the work place (the percentage of evasive and not acceptable is only 10% and 12%). In contrast, for the less educated people, such as peasant, migrant workers from rural place, many of them felt panic to HBV patients. The correct percentage of answering the questions about what it the transit way

¹³¹ Zhang Yan, “the reflection of anti-discrimination on the ground of Hepatitis B”, *Social Science Review*, Vol.22 No.5, May, 2007.

¹³² *Ibid.*

¹³³ All the statistic is from the *Survey Report on Employment Discrimination in Main 10 Cities of China*, Conducted by the Constructional Institute of China University of Political Science and Law.

and symptom are only respectively 24.0% and 47.5%. While regarding to the issue whether they would like to get along HBV carriers normally at work place, the percentage is only 23.3%.

Table Three: on the basic knowledge about HBV

SURVEY OBJECTS		Knowledge on Transmit Way		Attitude towards the fitness of the HBV carriers		
		Know well	Misunderstanding	Healthy	Unclear	Poor
Civil Servants 200	Ministry of Sanitary 50	45	5	47	0	3
	Other government 150	89	61	126	2	22
Employers 200	State Enterpriser 100	51	49	72	5	23
	Private Enterpriser 50	23	27	31	3	16
	Foreign Enterpriser 50	35	15	39	1	10
Others 600	Peasant 200	48	152	95	21	84
	University Student 120	72	48	86	3	31
	Intellectual 80	60	20	70	0	10
	Normal Worker 200	74	126	122	11	67
Totalized Proportion		497 49.7%	503 50.3%	688 68.8%	46 4.6%	266 26.6%

3.3.3 Social Traditional Fear and Prejudice towards HBV

The public discrimination against HBV has lasted about twenty years, which is not a new phenomenon. Especially from the late eighties (1980s) to nineties (1990s), even the medicine academic researchers have no clear idea about what the transmit way of HBV is, so the misconception that the virus

spread by daily contact was very popular in China.¹³⁴ In the beginning of January 1989, a lot of people had had attacks of diarrhoea in Shanghai, and only 2 weeks later, a disaster came. From 20th of January to 1st of February, 292301 people were infected with Hepatitis A, and 11 died.¹³⁵ Due to the poor medical condition then, the work against the spread of virus did not get a good performance. As a result, Hepatitis became a horrible word to most of the people in China. Since then people with chronic HBV infection suffered more unfair treatments.

Although the Healthy Ministry and other institutes had made a big effort to address this misunderstanding and prejudice, there is a long way to eradicate the idea entrenched in many people's subconscious. The common perception that HBV can easily be transmitted by air or through day-to-day contact reinforces a social stigma that people wrongfully labels HBV carriers as the source of the spread of the disease. That is also the historical reason why it is impossible to address the HBV-Based discrimination today.

3.3.4 Institutional Weakness

Because the popularization of medical treatment knowledge is a kind of difficult task for the large population of China, all levels of respondents have more or less misunderstanding about HBV, even the well-educated group. But the poor knowledge about HBV is not the only reason to cause the public discrimination against HBV patients, and another reason is institutional weakness, such as lack of anti-discrimination law and system, lack of dispute settlement mechanism and equal opportunity commission.

As stated in 3.2.1, China's Ministry of Personnel and Ministry of Health eventually introduced new national standards for health examination on public servants in 2005, lifting the ban on recruitment of HBV positive people. However, this standard could only be generally applied in health

¹³⁴ Liu Yang, "Health-Based Discrimination in Employment and Occupation in China", p13

¹³⁵ <http://www.wit-int.com/xszm/a12.htm>

checking. In practice, it is regarded as a minimum standard for implementation. And local governments have the right to enact specific policies and rules according to the local situation.¹³⁶ It does give the local authorities a lot of freedom and space, and sometimes causes arbitrary and weak implementation of the provisions. Therefore even this kind of discrimination has been declared illegal at the national level, it has not been followed by all government units, and still exists in practice.

According to a document in “*Gandan Xiangzhao*”, the online forum for HBV and HBVER, many local courts denied to deal with the case which Hepatitis B infectors sue local government.¹³⁷ It is disappointing judges did not cite the 2005 Health Qualification for Hiring Civil Servants as a legal basis. One of the reasons that the local courts did so is that the budget of them is supported and controlled by the local governments. Without the economic independence, the local courts and the judges will be influenced more or less in dealing with administrative lawsuits. So many of them had to decide to reject the complaints¹³⁸.

3.4 The influence of HBV-Based Discrimination

3.4.1 HBV-Based Discrimination Impairs Human Dignity¹³⁹

Article one of the UDHR states that, “all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”¹⁴⁰ However, HBV-Based discrimination seriously impairs the human dignity and the right to personality. Eradication of discrimination is to consolidate human dignity and protect the right to personality.

¹³⁶ Zhang Yan, “the reflection of anti-discrimination on the ground of Hepatitis B”, *Social Science Review*, Vol.22 No.5, May, 2007.

¹³⁷ Check with the legal action part of the website, <http://www.hbvhbv.com>.

¹³⁸ *Ibid* 134.

¹³⁹ This part is inspired by Cai Dingjian, “the influence of employment discrimination.”

¹⁴⁰ See UN Website, <http://www.un.org/Overview/rights.html>

The right to personality means every one should be respected by others, and could never be sullied, humiliated, and treated on an unfair basis. Equal treatment is the key issue in achieving human dignity. When the factor, which has nothing related with a person's competence but a disease influences his or her future, it is impossible for him or her to feel fair and acceptable.¹⁴¹ No-respect for human dignity will not only brings people a shame feeling, but also psychological and spiritual damage. The HBV-Based discrimination in the filed of employment and promotion will negate a person's capacity and the potential to achieve his or her social value, sequentially restrict the personal value and human dignity realizing. It is a gross violation of human dignity.

3.4.2 HBV-Based Discrimination impairs Social Justice and Equality

HBV-Based Discrimination is concerned with the social justice and equality, and to address it is helpful to protect, promote and implement the fundamental social justice.¹⁴² Social justice and equality could only be realized on the basis of equal opportunity or substantial fair standards. HBV-Based discrimination denies supplying victims the possibility to attend in public affairs, access to the social life and be treated equally.¹⁴³ If a person could not get the opportunity to receive higher education, or to be recruited as a civil servant only because of a virus whose infectious ability is so weak that common daily contacts would pose no risk, which will not harm any other people in daily life at all, he or she would never feel equal and reasonable.

For HBV carriers, it is clear that one of the excuses of being prevented from entering the workforce and school is justified by referring to the protection of the non-HBV people. Practically, most of HBV carriers who are deprived

¹⁴¹ Cai Dingjian, "the influence of employment discrimination".

¹⁴² Cai Dingjian, "*the overview of anti-discrimination in employment and occupation in China.*", p25.

¹⁴³ Ibid.

of the opportunities are as much capable as the healthy people. And from the *Zhou Yichao* Case, we could find that he had qualified the requirement of the position, but was forced out without giving a reasonable excuse. Obviously according to his performance in the exams he would be more competitive than those healthy people following him, and more suitable for that specific post. In this case, the action of the Jia Xing government did mean an “act or conduct which denies to individuals equality of treatment with other individuals because they belong to particular groups in society”.¹⁴⁴ So Exclusion HBV-carriers from workplace definitely constitutes a discrimination that obstructs the creating and maintaining of an equitable society.

3.4.3 HBV-Based Discrimination Causes a Waste of Human Talent and Resources

HBV-Based discrimination will influence the fully achieving of human potential and cause a huge waste of human talent and resources.¹⁴⁵ Because of the unreasonable differential treatment and restriction, many outstanding HBV carriers were forbidden to access to employment and promotion. A lot of cases showed that many people ranking the top of civil servant recruitment examination,¹⁴⁶ but only because of the discriminatory standards, they were forced to quit and did not get chances to serve for governments with their knowledge, though they were excellent capability for the positions. That means they had to choose other positions, which they will not be good at. In this sense, the prevalence of HBV-Based discrimination may bring about the waste of human resources among the 130 million carriers in China.

If all the governments, companies, enterprises and other institutes, when they hire their employees, base on the standard in which capability and

¹⁴⁴ McKean, W. *Equality and Discrimination under International Law* (Oxford: Clarendon Press, 1993) p11.

¹⁴⁵ Cai Dingjian, “*the overview of anti-discrimination in employment and occupation in China*”, p26.

¹⁴⁶ Ibid.

performance are the only element in stead of any distinction which may constitute certain discrimination, we will get the goal that every talent finds his/ her proper position in workplace.

3.4.4 HBV-Based Discrimination Influences the Personal Future and Development

Article 7 of UDHR states that, “all are equal before the law and are entitled without any discrimination to equal protection of the law.” Every one is born equal and should enjoy the same right to pursue a happy living. The lack of equal opportunity makes this dream hard to come true.

There is one example that a HBV carrier was deprived of the chance to pursue her dream. One student wrote to Professor *Cai Dingjian*, who is a prestigious professor of China University of Political Science and Law, and in the letter she said she had suffered a lot after being excluded in the teacher recruitment competition of *Jin Ling Middle School, Nanjing, Jiangsu Province*. She is a HBV carrier and tried her best to find a job, which would give her a brighter future. After being denied many times, she became desperate for the job and suffered insomnia and neurasthenic, whenever she was awake or asleep, full of her mind was to be a teacher of *Jin Ling Middle School*. She did not give up her struggle and kept on studying, in the dream of better life. She also described her beautiful dream to Professor *Cai*, that one day she could become a famous teacher of *Jin Ling Middle School*, and then her parents pay a visit on her in *Nanjing City* and be proud with her.¹⁴⁷

Her dream did not come true only because of her HBV status. The HBV-Based discrimination has destroyed many carriers' career dreams in China. Many people felt hopeless and depressive after suffering discrimination for a long time. It is the reason that they were deprived the right to pursue happy and peaceful life.

¹⁴⁷ Cai Dingjian, “*the overview of anti-discrimination in employment and occupation in China.*”, p27.

3.4.5 HBV-Based Discrimination Threatens Social Cohesion, Political Stability¹⁴⁸

HBV-Based discrimination would make a negative role in the establishing of harmonious society in China and weaken the social stabilization. The case of *Zhou Yichao*, who killed the recruitment officer after being forced out on the basis of his HBV status, is a case in point. The number of crimes caused by unfair social differential treatment is so large that should not be ignored any longer. Also the case of *Ma Jiajue*, who killed 5 roommates in *Yunan University*, which shocked everyone in China, was the demonstration of a result after him being discriminated for a long time.¹⁴⁹

The struggle and fighting such as *Zhang Xianzhu* filed the China's first Hepatitis B discrimination administrative lawsuit, 100 thousand HBV carriers created a special website against HBV discrimination, actually indicate that the HBV carriers as a minority group in the society want to get equal treatment in workplace and other fields without any discrimination. The discrimination not only impairs human dignity, but also violates the equal competition principle. Millions of HBV carriers lost the equal opportunities to develop their basic rights, and most of them would take a negative attitude towards the society. Chinese President *Hu Jintao* has instructed the country's leading officials and Party cadres to place "building a harmonious society" at the top of agenda. To build a harmonious society should on the basis of equal treatment and respect of human being. The HBV-Based discrimination apparently constitutes a violation to this purpose.

¹⁴⁸ This sentence is inspired by the International Labour Review, Vol.142 (2003), No.4, p397

¹⁴⁹ Ibid 141.

3.5 Addressing the HBV-Based Discrimination

3.5.1 Legislation: An Indispensable First Step

“There is a clear need for more implementation fostering practical and useful knowledge of international human rights principles and standards.”¹⁵⁰ For instance, in their reviews on China’s implementation progress, UN human rights treaty bodies have long recommended that the Chinese Government set out the scope of legislation targeting discrimination.¹⁵¹ It indicates a considerable gap between domestic and international jurisprudence, and underscores the need for China’s international human right reviews to be publicized more at the domestic level.¹⁵² Specific law targeting this part should be enacted as soon as possible.

As stated in 3.3.1, there is no local law, legislation or policy providing clear scope and definition of Hepatitis B-Based discrimination, the enacting fundamental law to stipulate this issue should be timely and firmly on the agenda. The lack of a clear legal definition on discrimination would be a bafflement to “advance claims of Hepatitis B discrimination, given that at present, most such cases are lost, or are simply not accepted by the court.”¹⁵³

Legislation clause concerning with the field of recruiting civil servants, and no legal documents could be found in other sectors. The Hepatitis B-Based employment discrimination in private enterprises, foreign-capital enterprises, and foreign investment enterprises is publicly performing.¹⁵⁴

¹⁵⁰ Bonney Ling and Wing Lam, hepatitis B: *A Catalyst for Anti-discrimination reform*, <http://hrichina.org/public/PDFs/CRF.2.2007>.

¹⁵¹ *An HRIC Brief: China’s Growing Prominence in Multilateral Human Rights System*, China Rights Forum 1 (2007): 25.

¹⁵² Bonney Ling and Wing Lam, hepatitis B: *A Catalyst for Anti-discrimination reform*, <http://hrichina.org/public/PDFs/CRF.2.2007>.

¹⁵³ “Fanyigan qishi lumanman”, [The Long Journey to Curb Hepatitis B Discrimination], *Nanfang Weekend*, October 27, 2005, <http://www.nanfangdaily.com.cn/southnews/zmzg/200510270877.asp>.

¹⁵⁴ See the examples setting in 3.2.3.

The enactment of anti-discrimination law in the field of private sector is also of significant importance. Most of people do not work for governments; the legislation would provide these people a basic legal protection.

Concerning with the situation that many local courts are reluctant to deal with Hepatitis B-Based employment discrimination lawsuit, “the number of Hepatitis B discrimination cases appearing before the courts today very likely represents only a very small part of the overall cases, compared with the statistical results that 10 percent of the population is believed to have chronic HBV infection.”¹⁵⁵, the anti-discrimination litigation should be added into the Civil Procedure Law, Administrative Procedure Law and Labour Arbitration Law.¹⁵⁶ It would guarantee that the judge is obligated to deal with cases concerning with HBV discrimination and have very clear and comprehensive legal basis.

Final, to make a more comprehensive legal system to provide protection to Hepatitis B infectors, the privacy law and law on voluntarily people should be considered to enact. Because health status is a privacy of a person, the obligatory physical examination does not respect the right to privacy well. These two laws would help Hepatitis B victims to live without social pressure and prejudice.

3.5.2 Enforcement, Monitoring and Promotion are Crucial for Sustained Change

The enforcement, monitoring and promotion of law also play a crucial role in redressing HBV-Based discrimination, without the strict enforcement, monitoring system; HBV and HBV carriers could never enjoy the equal status in workplace. Concerning the specific situation in China, the enforcement and monitoring system are still quite weak, as states in one human watch article, “Labour laws are arbitrarily enforced amidst

¹⁵⁵ Ibid.147

¹⁵⁶ this part is inspired by the record of Prof.Cai Dingjian, “Chinese Current Situation of Employment Discrimination and the Legislation on Anti-discrimination.”

allegations that even the statutory labour inspectors monitoring compliance can be bribed to overlook violations.”¹⁵⁷ Penal sanctions could be considered to establish. Actually many other countries had practiced it. For example, in France, “a refusal to recruit based on discriminatory reasons is punishable by a fine and imprisonment”¹⁵⁸. And in the Netherlands, “anyone participating in acts of discrimination on grounds of race, religion or conviction, sex or sexual orientation is punishable by imprisonment of up to three months or a fine.”¹⁵⁹ They are significant examples for China, without a strict enforcement and monitoring system, Hepatitis B-Based discrimination will never vanish by itself, and HBV and HBVER would never fully enjoy the equal rights in regards of employment and occupation.

Further, concerning that many claims of Hepatitis B-Based employment discrimination are simply not accepted by the local court, specific institution should be establish to address this situation. It is a necessary to “recognize the importance of safeguarding the right of access to independent body that can afford a fair hearing to claimants who assert an arguable claim that their rights have been infringed.”¹⁶⁰ Therefore, this specific institution in China should be of quasi-jurisdictional functions, and it could investigate and have the decision-making power when dealing with Hepatitis B-Based employment discrimination cases.

Many individuals with chronic HBV infection lead normal and healthy lives and do not develop any symptoms. A strong framework of enforcement and monitoring would address and eradicate the employment discrimination towards them.

3.5.3 Affirmative Action Towards the Hepatitis

¹⁵⁷ Ibid.147

¹⁵⁸ International Labour Conference, 83re Session, 1996, “Equality in Employment and Occupation”, para211, p82.

¹⁵⁹ Ibid.

¹⁶⁰ Dinah Shelton, “Remedies in International Human Rights Law”, Oxford University Press, Second Edition, p8.

B-Based Discrimination

Appropriate affirmative action programmes aim for addressing the discrimination towards HBV patient should be given priority. Special fund could be established to support people who suffered HBV-Based discrimination at the workplace, and establish some physiology consultation centre for them. Free legal aid and associated services for HBV patient should be supplied to facilitate their practical access to justice. But the scope and type of this affirmative action measures need to be carefully examined and agreed upon in a participatory manner.¹⁶¹

3.5.4 Public Awareness-Raising

As stated in Recommendation concerning Discrimination in Respect of Employment and Occupation (R111),

“Appropriate agencies, to be assisted where practicable by advisory committees composed of representatives of employers' and workers' organisations, where such exist, and of other interested bodies, should be established for the purpose of promoting application of the policy in all fields of public and private employment, and in particular--

(a) To take all practicable measures to foster public understanding and acceptance of the principles of non-discrimination;”

China should adopt deliberate policy measures aimed at changing public fears, prejudice and discrimination against HBV and HBVER. They should support the maintenance and development of some specific on line forum concerning with the HBV issues, such as “*Gandan Xiangzhao*”¹⁶² They should also advocate the mass media to give more caring and focusing on HBV related cases. Such as the *Zhou Yichao* Case, due to the effort of mass

¹⁶¹ ILO: “*Time for equality at work*”, Global Report under the follow- up to the ILO Declaration on Fundamental principles and Rights at work, Report I (B), International Labour Conference, 91st Session, Geneva, 2003, para.188,p62.

¹⁶² Available at the website, <http://www.hbvhbv.com>.

media all round the China, this case arouse great public sympathy and to some extend mobilize the change of public attitude towards them.

Also, because of the public discrimination against HBV carriers is largely caused by the lack of basic knowledge about HBV, especially the misunderstanding of the transmission way. China should popularize the knowledge by all levels of advocate agency of government that the main ways of getting infected with HBV are: prenatal (from mother to baby at childbirth), children-to-children transmission, unsafe injections and transfusions, sexual contact. Hepatitis B virus is not spread by contaminated food or water, and cannot be spread casually in the workplace¹⁶³.

Public education on HBV is a crucial way to ending the ignorance and fear surrounding this medical condition and the stigma attached to people with chronic HBV infection.

3.5.5 Corporate Social Responsibility for FIEs¹⁶⁴ in Adressing HBV-Based Discrimination in Employment and Occupation

FIEs (Foreign Investment Enterprises) are an important part of the Chinese Hepatitis B Discrimination. Up to 2005 the urban economy employed 273.3 million people. 12.5 million of these people were employed by FIEs along¹⁶⁵. Although not a very significant portion, the FIE positions are noticeable because they often, though not always, mean better pay and better work conditions, and so attract the best talents. The FIEs are the most active players in the economy, where practice often becomes the standard¹⁶⁶.

¹⁶³ see WHO website, <http://www.who.int/mediacentre/factsheets/fs204/en/>.

¹⁶⁴ FIE means Foreign Investment Enterprises, this part got help from my classmate Jingli Liu, his exam paper for “Business and Human Rights” was concerning this issue. Thanks for his help!

¹⁶⁵ 2006 China Statistic Yearbook

¹⁶⁶ Ying Zhu, *Globalization, Foreign Direct Investment and Their Impacts on Labor Relations and Regulation: the Case of China*, The International Journal of Comparative Labor Law and Industrial Relations, Volume 16/1, 5-24, 2000, Kluwer Law International

The highly unusual *Li v Nokia* lawsuit in 2007¹⁶⁷ underscores moves by HBV carriers' rights activist to use legal channels to challenge FIEs' employment policy. There are few FIEs, which do not discriminate HBV carriers in some way. Normally the FIEs routinely discriminate HBV carriers, as it shows in the *Li v Nokia* case. This practice forms a strong contrast considering how unpopular this conduct will be in their home country, North America, Europe, Japan, Taiwan, Hong Kong, South Korea among others. For instance in Hong Kong 8%¹⁶⁸ of the population is HBV carriers, and there is no hepatitis b-based discrimination at all. It is a spectacular scene to have the worlds most important companies practicing the barbaric conduct in the same place at the same time.

The cases against companies could produce better results than government¹⁶⁹. The companies are more willing to reach a settlement¹⁷⁰. When it comes to FIEs, especially big multinational companies, they might be less willing to win considering the public image at stake. With the legal obstacles removed, to sue the FIEs can be a breakthrough point for the campaign against the discrimination. The FIEs can play a unique role in this campaign.

The participation of FIEs in this discrimination is very important for the maintaining of the discrimination. First of all the discrimination should stay unchallenged in order to keep its status as justly and forcefully. FIEs are the most likely source of such a challenge, but have not yet issued and challenge. The FIEs normally enjoy a moral superiority over the Chinese employers, so their endorsement to the discrimination increases its

¹⁶⁷ This case would be illustrated in the Fourth Chapter, Case Study.

¹⁶⁸ Department of Health, Hong Kong Special Administrative Region, http://www.info.gov.hk/hepatitis/english/hep_b_set.htm

¹⁶⁹ As stated before, many administrative cases involved with HBV discrimination issue are not accepted by local court.

¹⁷⁰ For instance, the Wuxinren (it is a fictive name) against China Railway Electrification Survey Design & Research Institute case in Tianjin ended up settlement that the plaintiff got the compensation he was seeking for in Oct. 2006. <http://www.hbvhbv.com/forum/dispbbs.asp?boardid=1004&replyid=898645&id=561887&page=1&skin=0&Star=1> (Chinese)

legitimacy. Many of the FIEs are well aware of the Corporate Social Responsibility (CSR) in which non-discrimination is one of the core values. Therefore the conducts of the FIEs in China despite their CSR duties frustrate the HBV carriers.

The same reasons can also make the FIEs role in the discrimination positive if they change their position on this issue. With their moral superiority The FIEs' challenging this practice would seriously compromise the legitimacy of this discrimination. The FIEs' Chinese competitors would have to follow the FIEs to compete with them and to maintain a humane image. As the governments are stubborn on this issue, the FIEs can be a breakpoint for this discrimination.

There would be more and more pressure from domestic and international community to force the FIEs in China change their altitude towards HBV carriers. Due to their importance in the job market, the FIEs can set a new standard and help change the whole situation in China.

4 Case Study of HBV-Based Discrimination

“While many HBV carriers might have simply accepted unjust discrimination by their employers in the past, now an increasing number of supporter networks are encouraging them to break their silence.”¹⁷¹ In the past few years, many significant and large influential cases appeared in China, and HBV-Based Discrimination is becoming a hot topic of mass media and public discussion.

4.1 China’s First Hepatitis B Discrimination Administrative Lawsuit: *Zhang Xianzhu v. Wuhu Personnel Bureau*¹⁷²

Zhang Xianzhu was a 25-year-old college graduate from *Anhui* Province. He attended the *Wuhu* City civil servant examination on June the 30th of 2003, and ranked number one both on the admission test and the employment interview. But he was forced out when tested positive as a Hepatitis B carrier on the required pre-employment health checking.

In November 2003, *Zhang* filed the China’s first Hepatitis B discrimination administrative lawsuit against the personnel bureau of the city at the People’s Court in *Xinwu* District, *Wuhu* City, *Anhui* Province, alleging that the ban against HBV carriers was discriminatory and violated his constitutional rights of equality and political participation.¹⁷³

¹⁷¹ Bonny Ling and Wing Lam, “Hepatitis B : A Catalyst for Anti-discrimination Reform?”, p68. http://hrichina.org/public/PDFs/CRF.2.2007/CRF-2007-2_Hepatitis.pdf

¹⁷² the detail content of this case consults with, Court Confirms Rights of Hepatitis B carriers, available in <http://www.china.org.cn/english/2004/Apr/92050.htm>

¹⁷³ Voices Against Discrimination: Chinese Citizens Challenge Discriminatory Regulations and Practices, *China Law and Governance Review*, no.2 (June 2004), <http://www.chinareview.info/issue2/pages/main1.htm>

“In backing his claim, the People's Court of *Xinwu* District of *Wuhu* said the report from a local hospital, entrusted by *Wuhu* government to conduct health examinations, which says *Zhang* was not qualified to be a civil servant, violates provincial standards. HBV carriers can be separated into several kinds of groups based on the specific virus and its potential spread. *Zhang* does not belong to the seven groups mentioned in *Anhui's* provincial health standards not qualified for public service.”

From this it could be found that, until then (2003), there is no clear and specific national law, legislation or standard concerning with addressing Hepatitis B-Based discrimination in public civil servant recruitment. And the People’s Court of *Xinwu* District of *Wuhu* judges this case on the base of a provincial standard. It lacked effective national system of appeal and other remedies for HBV patients at that time.

“Therefore, the court said, the *Wuhu* government could not deny *Zhang's* application based on the report but should have obeyed provincial standards. The decision to stop *Zhang's* application for the public service lacked merit, the court concluded. It asked the authorities to withdraw the decision.”

It seems a victory achieved, and Mr. *Zhang* won this lawsuit.

However, “while *Zhang* said he is satisfied with the verdict, it is unlikely he will start work any time soon. The *Wuhu* government finished hiring in 2003 and the position *Zhang* had applied for has been filled.”

Further, “the court backed *Zhang's* discrimination claim but did not support a second lawsuit to order the government to find him a job. At the same time, the government plans to appeal the decision.”

It showed that although Mr. *Zhang* namely won this land marked Hepatitis B-Based employment discrimination case; in fact he did not get any

substantial remedy and compensation. He did not obtain his work back and even the government plans to appeal the decision.

In April 2004 the court affirmed the validity of the government regulation excluding him from employment. In *Zhang's* favour, however, the court ruled that the employer's decision was not based on adequate evidence. Nevertheless his remedy request - an order to be reconsidered for employment - was refused by the court, which sided with the employer's argument that the civil service recruitment period had closed.

“Despite its failure to provide *Zhang* with a practical remedy, the case generated nation-wide media coverage and debate. The provincial authority revised its regulations. The State Council ordered the Ministry of Personnel to review existing hiring requirements for civil servants. The eventual result was that national standards were issued preventing the automatic disqualification of Hepatitis B carriers. Instructions were even issued to train Public Security Bureau members in the limited scientific dangers of employing Hep B carriers.”¹⁷⁴

4.2 Zhou Yichao Homicide Case

Zhou Yichao was 22-year-old senior student of *Zhejiang* University, and he took the public civil servant recruitment examination of government of *Xiuzhou, Jiaxing City, Zhejiang* Province, in January of 2003. In the written exam, he ranked the third, and after oral exam, he ranked the fifth, which among the top scores.

On April 3rd, he went to Human Resource and Social Security Office of *Xiuzhou* District to ask why he still does not get any information about recruitment. Then he was informed that his application for that post had been rejected because he had tested positive for HBV. “Driven by anger and

¹⁷⁴ Lisa Stearns, “Individualization of Rights in China: New Rights and New Strategies for New Times”, pp3-4.

despair, *Zhou Yichao* broke into the office, stabbing one official to death and seriously wounding the other. He was subsequently sentenced to death by *Jiaxing* local court and executed in March 2004.”¹⁷⁵

After the tragedy, unlike others convicts of homicide, *Zhou Yichao* inspired a great deal of pity for his misfortune and dissatisfaction with the discriminatory hiring practices and for the lack of legal redress.¹⁷⁶ 429 classmates and teachers of Zhou sighed an appeal to the local court in the hope to supply him a chance to survive. 121 *Jiaxing* citizens wrote to the local court to ask for mercy to him, and 208 citizens, who were from the same district-Ping Shan District-wrote for not sentencing him to death. Even after the first judgement that he was sentenced to death¹⁷⁷, 1611 citizen of China were organised by ‘*Gandan Xiangzhao*’ forum sighed a proposal calling for a review to the Standing Committee of the NPC, the Ministry of Health and the State Council¹⁷⁸. They appealed these state organs to t review the provisions of public civil servant recruitment that bar HBV carriers in 31 provinces and cities, local government anti-Constitution hiring practice and calling for legal protection of HBV carriers.

Zhou Yichao Homicide Case was chose as one of the “ Ten Most Influential Cases of 2003”. Also the year of 2003 was named ‘the year of anti-HBV-Based discrimination’ by Chinese mass media. The case has a sensational effect, as the public generally sympathized with *Yichao*¹⁷⁹. The situation of HBV carriers came into the public light and it had opened a space for public concern and debate on HBV-Based discrimination. It provoked serious discussions on labour rights. As a result, in January 2005, The General Standards on Physical Examinations relating to the Employment of Civil Servants (provisional) came into force.

¹⁷⁵ “Dismantling Discrimination,” *China Daily*, March 9, 2004, <http://www.china.org.cn/english/China/89774.htm>.

¹⁷⁶ Los Angeles Times, *China: Killer Inspires Drive Against Hepatitis Bias*, Jan. 08 2004.

¹⁷⁷ Liu Yang, “Health-Based Discrimination in Employment and Occupation in China”, p12.

¹⁷⁸ <http://www.chinareview.info/issue2/pages/main1.htm>.

¹⁷⁹ Los Angeles Times, *China: Killer Inspires Drive Against Hepatitis Bias*, Jan. 08 2004

This regulation¹⁸⁰ prescribes that HBV carriers shall not be discriminated. Thereafter, some of the public and private employers accept a specific kind of HBV carriers. Clinically the HBV carriers are classified into two groups: Dasanyang and Xiaosanyang¹⁸¹. The public holds a view that Dasanyang are more infectious than Xiaosanyang, which has no medical ground. Some employers arrange an additional HBV-DNA¹⁸² test for Xiaosanyang, and if it's negative they employ this person. But HBV carriers other than Xiaosanyang plus HBV-DNA negative are still rejected.

4.3 *Deng Hua v. Hunan Revenue Bureau*

In November of 2004, *Deng Hua* (this is a fictive name) signed up for the public civil servant examination of Revenue Bureau, *Hunan* province. After written and oral exam, his score 64.28 ranked the first for the post he applied. On March 21st, 2005, Hunan Revenue Bureau organised a physical examination, and Deng was found positive for HBV and was Dasanyang. Then the government arranged an HBV-DNA test for all seven applicants found HBV positive in the physical examination. Four were found HBV-DNA negative and accepted. Three were HBV-DNA positive, including Hua, and were thus rejected.

Deng Hua tried to negotiate with the human resource office of Revenue Bureau, but he was clearly informed that it was impossible to recruit him due to the HBV status. According to Health Qualification for Hiring Civil Servants (provisional), which was promulgated by Ministry of Personnel and Ministry of Health in 2005, HBV carrier should not be discriminated.

¹⁸⁰ Article 7 of Hiring Civil Servant (provisional) states HBV carriers should not be discriminated.

¹⁸¹ A standard hepatitis b serum or blood test in China includes five items: HBsAg, HBeAg, anti-HBC IGM, anti-HBe, anti-HBs. A person is Xiaosanyang if HBsAg, anti-HBe and anti-HBC IGM are positive, and Dasanyang if HBsAg, anti-HBs and anti-HBC IGM are positive.

¹⁸² The HBV-DNA test directly measures the hepatitis B viral load often expressed as copies per millilitre of blood. A significant drop or loss of HBV DNA levels is a good measure of treatment response. Source, Stanford University, http://liver.stanford.edu/Edu/Edu_blood.php

Deng contended that because the medical results established conclusively that he was a HBV carrier and not infected, he should not therefore have been disqualified. *Deng Hua* sued the Revenue Bureau for employment discrimination based on HBV. In August 2005, the trial court ruled against the plaintiff, stating that the recruitment process as it related to the plaintiff did not show any discrimination. In December 2005, the *Changsha* Municipality Intermediate Court upheld the lower court's decision, further confirming the legality of the defendant's action.¹⁸³

It showed that the court did not judge the suit according to the newly enacted Health Qualification for Hiring Civil Servants (provisional) and made the decision without giving any legal reasonable illustration. From this case, we could see not only the weakness of law and legislation but also the weakness of the legal system.

4.4 Mr Li v. Nokia in China

On 13th March 2007, Mr *Li* filed a lawsuit against *Nokia in China*, claiming that Nokia's subsidiary¹⁸⁴ in *Dongguan City, Guangdong* Province, turned him away after discovering that he was a HBV carrier.¹⁸⁵ He is claiming compensation for "mental suffering" of CNY 500,000, which is roughly equal to EUR 50,000. *Li*, said he had been surprised when the Nokia unit in China's southern city of *Dongguan* cancelled plans to hire him after a company-ordered medical examination.

¹⁸³ China Law and Governance Review: *Hepatitis B Virus Status*, available at <http://www.chinareview.info/pages/case.htm>.

¹⁸⁴ There are three legislations on foreign direct investment: Chinese-Foreign Contractual Joint Venture Law, Chinese-Foreign Equity Joint Venture Law and Foreign-Capital Enterprises Law. Foreign investment enterprises here mean all the three forms of foreign direct investment

¹⁸⁵ http://www.business-humanrights.org/Links/Repository/593748/link_page_view , 2007-10-11 visited.

“I thought that as a big company, *Nokia* would have a better understanding of this issue,” Mr *Li* said. “But they still said that because I was a Hepatitis B carrier, they had to reject me.”¹⁸⁶

This is reported to be the first case in China in which a multinational company has been accused of discriminating against a HBV carrier. This landmark case is one of the first to challenge the legality of the employment policy of FIEs. As more FIEs are sued¹⁸⁷, these companies are expected to become more involved in the campaign against the HBV-Based discrimination in China.

¹⁸⁶ <http://www.recruitinginchina.com.cn/content/view/37/1>, 2007-10-11 visited.

¹⁸⁷ For instance, Cal-Comp Electronics, a Thailand based company which produces products for Hewlett-Packard, fired 22 HBV carrier works. Some workers sued Cal-Comp for discrimination later on May 17, 2007. Source: The Washington Post, *Among Chinese, Fear and Prejudice about Hepatitis B* on Feb. 13, 2007.

5 Conclusion

After examining the main employment discrimination in China, especially the analysis of Hepatitis B-Based one, the last Chapter of this thesis makes a conclusion. What action could be adopted further considering the specific situation of China? The following are some of recommendations tailored with the level of development, the influence of traditional ideology and all the factors, which still play a significant role in China society today.

5.1 Legislation

From the researching in Chapter two, it is obviously to see, there are a lot serious discrimination in employment and occupation which violate the basic human right, such as social origin based-discrimination (*Hukou* registration system), health status based-discrimination (Hepatitis B-Based discrimination), and age-based discrimination. The local Chinese law regarding these fields is empty. That is why these outlaw discrimination could persist, ignored and even publicly performing. “A regulatory framework needs to be established to define discrimination, thus contributing to recognition of it when it occurs, and to establish guidelines to ensure it is eliminated.”¹⁸⁸

5.1.1 Making Fundamental Law on Anti-discrimination

5.1.1.1 Clarify Concept of Discrimination and the Range of Anti-discrimination

There is one fundamental principle and four principles on Equal Rights prescribed in Constitution of the PRC¹⁸⁹, three provisions prohibiting

¹⁸⁸ ILO: “*Time for equality at work*”, Global Report under the follow- up to the ILO Declaration on Fundamental principles and Rights at work, Report I (B), International Labour Conference, 91st Session, Geneva, 2003,para 364, p117.

¹⁸⁹ Article 34—equal political rights, Article 4—non-racial discrimination, Article 36, non-religious discrimination, Article 48—non-gender based discrimination.

employment discrimination in Labour Law,¹⁹⁰ five equal rights prescribed in Law on the Protection of Rights and Interests of Women,¹⁹¹ and three active measures in Disabled Persons Protection Law.¹⁹²

But after carefully researching the relative provisions concerned with equal employment in this legal framework, it could be found that no specific law provides the definition of discrimination. Meanwhile, the range of employment discrimination prohibited in existing legislation is quite narrow.

The scope of employment discrimination is much wider in EU due to the implementation of national social welfare policy. Under Article 13 of the EC Treaty the Community can combat discrimination on the basis of sex, racial and ethnic origin, religion and belief, disability, age and sexual orientation¹⁹³. “Two Directives have been adopted: Directive 2000/78/EC prohibiting discrimination in employment on grounds of religion and belief, disability, age and sexual orientation (“Employment Directive”), and directive 2000/43/EC prohibiting racial and ethnic discrimination in employment, education, social security and healthcare, access to goods and services and housing (“Race Directive”).”¹⁹⁴

While in the USA, there is no clear scope of employment discrimination, all victims could file sue to court, and the judge with decide whether it constitutes discrimination.¹⁹⁵ There is one valuable experience of the western countries that it should tail to local social situation and any serious unfair differential treatment should be banned by law. Since 1960s, western

¹⁹⁰ Article 12 of the Labour Law of China states, “Labourers shall not be discriminated against in employment due to their nationality, race, sex, or religious belief.” The scope of application according to it would only be four fields. And Article 13 in concerned with gender discrimination, Article 46 is concerned with equal rumination.

¹⁹¹ Article 2 of the Law on the Protection of Rights and Interests of Women of China.

¹⁹² Article 3 of the Disabled Persons Protection Law of China.

¹⁹³ Available on the website,

<http://eurlex.europa.eu/LexUriServ/site/en/oj/2006/ce321/ce32120061229en00010331.pdf>

¹⁹⁴ European Union Anti-discrimination Legislation and AGE’s work on Age Discrimination

http://www.age-platform.org/EN/IMG/Disrimi_Briefing-2.pdf

¹⁹⁵ Cai Dingjian, “the Overview of Anti-discrimination in Employment of China”,p66.

countries enacted a series of laws, regulations and policies to address discrimination in employment and occupation and promote equality. China should learn these good lessons and enact corresponding anti-discrimination law.

China should enact specific law and legislation targeting employment discrimination and clarify the definition of discrimination, such as “what is discrimination and what is not discrimination?” The lack of a clear legal definition on discrimination would be a baffle to advance claims of all kinds grounds based discrimination. Concerning with the specific situation, discrimination on the basis of social origin, race, gender, religion and belief, disability, age, health (especially HBV) and appearance should be clearly forbidden in this law. Meanwhile, the definition of “Employment” should be contained too in regarding of many discrimination occurs at the initial stage of recruitment. The scope of it should not only applies to “service performed for wages under a contract of hire, written or oral, expressed or implied”, but also to the initial stage such as posting an advertisement. As stated in the R111, “the terms employment and occupation include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment.”¹⁹⁶

5.1.1.2 Special Instituion for Anti-discrimination

Due to the weakness of monitoring and enforcement system in China, which stated in 3.3.4. The anti-discrimination law should provide specific provision about the special institution for anti-discrimination. According to European countries and USA experience, equal employment opportunity commission is a common type. China should consider establish a similar agency of this function. Therefore, it must be stated in anti-discrimination law that how this institution is consisted. The establishment, constitute, function and status should be clarified. And the way or procedure that it

¹⁹⁶ Recommendation concerning Discrimination in Respect of Employment and Occupation Recommendation: R111, available at <http://www.ilo.org/ilolex/english/recdisp1.htm>

could deal with claims on the basis of employment discrimination is also crucial.

5.1.1.3 Mechanism for Dealing with Disputes

Concerning lacking effective system of appeal and other legal remedies in China when the equal employment rights is violated, the law should provide provision that state specific mechanism for dealing with disputes. The process to make a claim and the burden of proof should be stated clearly in the law.

5.1.2 Enact Specific Anti—discrimination Law Based on Different Grounds

Beside the fundamental anti-discrimination Law, there should be specific anti-discrimination law to make the protection more comprehensive. According to European experience, there are three levels of legislation: Fundamental Law on Anti—discrimination, Laws specialized on Prohibiting Employment Discrimination and Anti—discrimination provisions prescribed in Labour Law, Civil Law, Criminal Law and Civil Servant Law.¹⁹⁷

For the second level, on the one hand, China should revise the existing Labour Law, the Law on the Protection of Rights and Interests of Women and the Disabled Persons Protection Law, focusing on broadening the scope of application in regards of employment discrimination. On the other hand, china should enact Prohibiting Social Status Discrimination Law and Prohibiting Age Discrimination Law etc.

¹⁹⁷ Cai Dingjian, “*Chinese Current Situation of Employment Discrimination and Legislation on Anti—discrimination*”.

5.1.3 Revising Civil Procedure and Administrative Procedure Law

From the statement in 3.3.4, many local People's Court refused to accept HBV-Based discrimination lawsuit. The underlying reason is that anti-discrimination litigation does not clearly stated in Law. Also there is only some Government Opinion or Manual concern with the public civil servant recruitment, no law refers to private sector. Therefore, anti-discrimination litigation should be added both into the Civil Procedure Law, Administrative Procedure Law and Labour Arbitration. For the public sector, the Administrative Procedure Law could be applied, and for the private sector, the Civil Procedure Law could be referred to.

5.2 Public Education

As Stated in Chapter Three, many people in China are afraid to contact with Hepatitis B patient and have a strong prejudice against HBV and HBVER due to lack of knowledge of the virus. Therefore, "building, expanding, updating and disseminating the knowledge base on discrimination and equality of opportunity is a major area of work"¹⁹⁸ for Chinese Government.

All levels of government should spear no effort to "provide people with enough information so that they can recognise the potential for discrimination and harassment" in their workplace; government should "promote an understanding and acceptance of, and compliance with the law, legislation or local policies including the principles of equal opportunity";¹⁹⁹ and government should provide enough fund to all types of training programme or public activity in the aims of promoting non-discrimination principle in regards of workplace and occupation.

¹⁹⁸ Ibid. 187, para355, p116.

¹⁹⁹ See the website of Northern Territory of Austria Anti- Discrimination Committee, <http://www.nt.gov.au/justice/adc/html/annreport/2001/publiced.html>

And all the training and information should be available on the website, ensure that people from all around of China could enjoy these resource. Take a good example of the Northern Territory of Austria Anti-discrimination Committee, their training program is produced biannually and circulated throughout the Territory. Their main focus is to provide an introduction to Equal Opportunity or Anti-Discrimination laws. Courses are widely available to everyone and participants range from senior executives of large government agencies or private enterprise to year 7 students, to interpreters and aborigines from remote communities, to owners and managers of private sector business to people with disabilities.²⁰⁰

5.3 Advocacy and Awareness-Raising

“A coherent and sustained information and awareness-raising policy is needed to counter the negative images and suffering of groups who are discriminated against. Countervailing, positive images and solutions need to be disseminated.”²⁰¹ The Mass Media in China should play a crucial role in this campaign. For newspaper, it could establish some special column for protection, respecting and promoting and rights of victims who are discriminated in recruitment; for TV station, it could organise multicultural performance to show the negative influence of discrimination. For example, Hong Kong TV station once invited 30 movie stars and popular singers to make a advertisement that Hepatitis B carriers should not be discriminated. Also cases where discrimination has been successfully eliminated should be publicized, such as *Zhang Xianzhu v. Wuhu Personal Bureau*.

“An effective plan of action should cover all these areas and should focus on strengthening knowledge, advocacy and services.”²⁰² Anti-discrimination in employment in China has a long way to go, with the guide of ILO Convention and Recommendation, the gap between the principle of equality at work and the reality of discrimination in China will be narrowed.

²⁰⁰ Ibid.197.

²⁰¹ Ibid 187, para 362, p117.

²⁰² Ibid 187, para 353, p116.

“Societies identify discrimination through the prism of their conceptual framework, based on knowledge available to them and on prevailing attitudes.”²⁰³ To remedy it, the institutions and mechanism in China should be available for addressing discrimination, and they harness political will and social mobilization to provide the necessary impetus to reach the target of eliminating discrimination and promoting equality of opportunity at work.²⁰⁴

²⁰³ Ibid 200.

²⁰⁴ Ibid 201.

Supplement

COMPARATIVE STUDY OF USA MODELS OF ANTI-DISCRIMINATION LAW

USA

The concept of equal employment opportunity is an essential ingredient of the 'American dream'. In the abstract, the concept of equal employment opportunity requires that all employment opportunities be awarded either:

- a. On the objective assessment of performance ability be awarded either:
- b. On the basis of age or seniority (characteristics that all persons share with equal prospects for change), or
- c. Randomly.

For most Americans, the concept of equal employment opportunity is defined in terms of possibility (a), above.²⁰⁵

The Fifth Amendment to the Constitution of the United States says, among other things, that the federal government shall take life liberty and property only for public purpose and shall not do so without due process of law and just compensation. This language has been construed to include the requirement that persons not be denied equal protection of the law. The Fourteenth Amendment to the Constitution expressly imposed the equal protection requirement on state and local governments. Government employees, or applicants for such positions, in the event of employment discrimination, can therefore, bring a suit based on a constitutional cause of action.

Title VII of The 1964 Civil Rights Act

Title VII of the Civil Rights Act of 1964 (42 U.S.C.&2000e, et seq.) prohibits employers whose businesses affect interstate commerce, an who

²⁰⁵ *see* Alvin L. Goldman, Labour and Employment Law in the United States, p143.

employ 15 or more persons for each workday of at least 20 weeks a year, from discrimination against any employee or applicant for employment on the basis of the person's race, religion, national origin, or sex. The same prohibition is extended to the state, local and federal governments in their capacities as employers. The law applies, too, to unions and to employment agencies. The prohibitions against employment discrimination also apply to apprenticeship training and retraining programs, as well as to employment itself. However, religious organizations are exempt from the Act to the extent that they are permitted to discriminate in employment in favour of members of their religion even when the discrimination involves secularly related jobs.²⁰⁶ State and local governments are included in the definition of 'employer' under the Act and, therefore, are subject to the Act's general enforcement structure. The Act separately prohibits federal government employment discrimination but does so in a manner that excludes the federal government from the Act's normal enforcement procedures.

Employers, unions, and employment agencies covered by the Civil Rights Act of 1964 are required to post notices in conspicuous places informing their workers, members or clients of their rights under Title VII.

The Act attempts to encourage voluntary compliance, conciliated settlements, and the use of state and local fair employment practices agencies in lieu of federally imposed sanctions.

The Title VII prohibitions against discrimination are enforced by the EEOC. If the Commission decides to not bring an enforcement suit, a private enforcement action is available in the federal courts.

The Act goes beyond prohibiting hiring discrimination. It is violated, as well, if it is shown that an employee was adversely treated respecting promotion or transfer opportunities, any employment terms or conditions, or

²⁰⁶ See *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1989).

was subject to an adverse work environment, because of the employee's sex, race, religion or national origin.²⁰⁷

²⁰⁷ See *Harris v. Forklift Systems, Inc.*, 114 S.Ct.367 (1993).

Bibliography

- (1) Anti-discrimination in regards of employment and occupation of China
Edited by Cai Dingjian, Law Press of China, 2007

- (2) Discrimination Law, Text, Cases and Materials
Aileen McColgan, Oxford and Portland, Oregon Publisher, 2005.

- (3) Economic, Social and Cultural Rights
A Textbook Second Revised Edition, Edited by Asbjorn Eide, Catarina Krause and Allan Rosas, Martinus Nijhoff Publishers, 2001

- (4) ILO: *Equality at work: Tackling the challenges*, Global Report under the follow-up to the ILO Declaration on Fundamental principles and Rights at work, International Labour Conference, 96th Session, Geneva, 2007

- (5) ILO: *Equality in employment and occupation*, Report III (4B), 2003, International Labour Conference, 75th and 83rd Sessions (Geneva, 1988 and 1996) and Governing Body docs. GB.277/3/1, GB.280/3/1 and GB.283/3/1.

- (6) International Labour Review, Vol.142 ,2003

- (7) Non-discrimination Law: Comparative Perspectives,
Edited by Titia Loenen and Peter Rodrigues, The Hague: Kluwer Law International Publisher, 1999

- (8) Systemic Discrimination in Employment and the Promotion of Ethnic Equality
Ronald Craig, Martunus Nijhoff Publishers, 2007

- (9) The International Journal of Comparative Labour Law and Industrial Relations, Volume 16/1, 5-24, 2000, Kluwer Law Publishers International

(10) Remedies in International Human Rights Law,
Second Edition
Dinah Shelton, Oxford University Press, 2001