

REGULATING EMPLOYMENT DISCRIMINATION IN CHINA: A DISCUSSION FROM THE SOCIO- LEGAL PERSPECTIVE

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China’s legal system continues to struggle with the political and social complications of its rapid economic development. One of the more glaring tensions in China is the treatment of workers in a capitalist economy nested within a socialist political system. Employment discrimination is an emerging issue in Chinese workplace, although studies on discrimination-related subjects, such as the definition of discrimination and its wrongfulness, the nature of anti-discrimination law, the burden of proving discrimination, and remedial measures to discrimination victims, etc. are relatively unsophisticated. This paper focuses on an important but often neglected area on employment discrimination—the capacity of people to perceive discrimination and how that may affect legal remedies. Applying a socio-legal theory in the emergence and transformation of dispute, the paper analyzes the question of why few people file discrimination claims in Chinese courts while violations are many. The paper argues that conceptual and institutional barriers substantially limit the ability of discrimination

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victims to seek legal remedies. It argues that in addition to perfecting the legal institutions, from the conceptual level Chinese people must perceive discrimination as injurious and violative of their equal employment rights.

I. INTRODUCTION

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

Employment discrimination and its regulation did not garner any attention in China thirteen or fifteen years ago.³ Now the prevalence of discrimination in the Chinese workplace has been well observed and

1. International Labor Conference, Geneva, Switzerland, *Time for Equality at Work, Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*, ¶ 11, Int’l Labor Conference, 91st Sess., (2003).

2. Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 235 (1971).

3. In 2002, a graduate from Sichuan University sued People’s Bank of China Chengdu Branch for height discrimination during employment was considered the nation’s first employment discrimination case ever filed in Chinese court. See Jiefeng Lu, *Employment Discrimination in China: Current Situations and Principle Challenge*, 32 HAMLINE L. REV. 133, 140 (2009).

documented,⁴ however, the Chinese labor law system, which is largely inherited from its plan-oriented economic system, is believed to have not adequately deterred and redressed discrimination. This is particularly evidenced by the phenomenon that the number of employment discrimination cases filed in the Chinese courts each year is quite trivial, while violations widely occur.⁵ Statistics show that in more than a decade from 2000 to 2011, the total number of discrimination cases reported in China was only 92.⁶ Although most of these reported cases involve employment discrimination, some involve other discrimination, such as tickets price and educational right.⁷ As a comparison, the Chinese courts tried 4.887 million civil cases in the year of 2011 alone.⁸ Why are there so few employment discrimination disputes coming to the courts? Why do people not use the legal system to challenge illegal discriminatory employment practice? Is it because Chinese people are more tolerant on employment discrimination, or they think that they have little chance of securing useful relief? Or is it because they simply do not know how to proceed with their complaints?

This paper attempts to answer these questions. It tries to use a socio-legal theory explaining how a legally redressable dispute emerges and transforms from a daily incident. Such theory provides a framework for studying the processes by which unperceived injurious experiences are or are not perceived, do or do not become grievance and ultimately disputes. These processes are also known as naming, blaming and

4. See, e.g., ZHOU WEI ET AL., *Employment Discrimination in China: Legislation and the Reality*, China Legal Press, 2006; Li Weiwei and Lisa Stearns, *Employment Discrimination: International Standards and National Practice*, China Legal Press, (2006); Xun Zeng, *Enforcing Equal Employment Opportunities in China*, 9 U. PA. J. LAB. & EMP. L. 991 (2007); see generally Ronald C. Brown, *China's Employment Discrimination Laws During Economic Transition*, 19 COLUM. J. ASIAN L. 361 (2006).

5. See Jiefeng Lu, *Curb Your Enthusiasm: A Note on Employment Discrimination Lawsuits in China*, 10 RICH. J. GLOBAL L. & BUS. 211, 214 (2011) [hereinafter Lu, *Curb Your Enthusiasm*].

6. See Zhou Wei, *From Height to Gene: The Legal Development of Anti-Discrimination in China*, 6 TSINGHUA L.J. 2 (2012).

7. See *id.*

8. See The Annual Working Report of the Supreme People's Court of the People's Republic of China (2012).

claiming.⁹ Socio-legal scholars have urged us to “pay more attention to the early stages of disputes and to the factors that determine whether naming, blaming and claiming will occur,” because “[l]earning more about the existence, absence or reversal of these basic transformations will increase our understanding of the disputing process and our ability to evaluate dispute processing institutions.”¹⁰

Part II gives an overview on Chinese employment discrimination situations and presents the question of why few discrimination cases emerged in Chinese courts in spite of wide violations. Part III analyzes the question presented using a socio-legal model of how incidents emerge and transform into legally redressable disputes. Part IV concludes the paper. The paper aims at identifying and analyzing the question rather than offering solutions to fix it.

II. WHY SO FEW CLAIMS?

China has a good, at least seemingly, anti-discrimination in employment legal system. Its anti-discrimination rules are laid out at multiple levels enacted by different legal authorities, including the Constitution, the basic laws, the State Council Administrative Regulations and the government policy documents. Specifically:

(1) Constitution. Article 33 of the Constitution, also known as the Chinese Equal Protection Clause, provides that all citizens of People’s Republic of China are equal before the law. In addition, Articles 4, 36, 48 and 89 prohibit discrimination based on ethnic minority status, gender and religion.¹¹

(2) Basic laws. Four basic laws provide protection against discrimination. The Employment Promotion Law of the People’s Republic of China enacted in 2007 prohibits discrimination based on

9. WILLIAM L.F. FELSTINER ET AL., *The Emergence and Transformation of Disputes: Naming, Blaming, and Claiming*, 15 LAW & SOC’Y. REV. 631, 636 (1980-81).

10. *See id.*

11. *See* Art. 4, 33, 36, 48 and 89 of the Constitution of the People’s Republic of China (Adopted at the Fifth Session of the Fifth National People’s Congress and promulgated for implementation by the Announcement of the National People’s Congress on December 4, 1982).

ethnicity, race, gender, religious belief, migrant worker status, carrier of an infectious disease status;¹² the Labor Law of the People's Republic of China enacted in 1994 prohibits discrimination based on nationality, race, sex, or religious belief;¹³ the Law on the Protection of Rights and Interests of Women of People's Republic of China in 1992 prohibits discrimination against female workers;¹⁴ and the Law of the People's Republic of China on the Protection of Disabled Persons in 1990 prohibits discrimination against people with disabilities.¹⁵

(3) Administrative regulations. As the top executive agency, the State Council has issued a large number of regulations that affect labor and employment in China. The 2007 Regulation on the Employment of the Disabled People prohibits discrimination against people with disabilities,¹⁶ and the 2012 Special Provisions on Labor Protection of Female Workers prohibits discrimination against pregnant women.¹⁷

(4) Government policy documents. The central government has the authority to issue governmental policy documents as long as they do not contradict with the Constitution and other superior laws and regulations. There are a large number of governmental policy documents issued by various levels of governments in forms of guidelines, governmental

12. See Art. 3, 28, 29, 30, 31 of the Employment Promotion Law of the People's Republic of China (Adopted on August 30, 2007 at the 29th meeting of the Standing Committee of the 10th National People's Congress, promulgated and implemented on January 1, 2008).

13. See Art. 12 of the Labor Law of the People's Republic of China (Adopted at the 8th session of the Standing Committee of the 8th National People's Congress on July 5, 1994, promulgated and implemented on January 1, 1995).

14. See Art. 22 and 23 of the Law 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, and amended at the 17th Meeting of the Standing Committee of the Tenth National People's Congress on August 28, 2005).

15. See Art. 38 of the Law on the Protection of Disabled Persons (Adopted and amended at the Second Meeting of the Standing Committee of the 11th National People's Congress on April 24, 2008, promulgated and became effective as of July 1, 2008).

16. See Art. 4 of the Regulation on the Employment of Disabled People (Adopted at the 169th Executive Meeting of the State Council on February 14, 2007, promulgated and took effective on May 1, 2007).

17. See Art. 5 of the Special Provisions on Labor Protection of Female Workers (Adopted at the 200th executive meeting of the State Council on April 18, 2012, promulgated and took effective on the date of promulgation).

opinions, notices, instructions, and the like. Typical governmental policy documents concerning equal employment opportunity include: State Council Notice on Further Improving Service for Migrant Workers;¹⁸ Ministry of Labor and Social Security Notice of Questions Concerning the Participation in Working Injury Insurance for Migrant Workers.¹⁹

It seems to me that the legislative measures adopted in China prohibiting employment discrimination are at least as good as those of the United States. In the United States, federal legislation prohibits employers from considering certain attributes in making employment decisions. They require employers to disregard particular characteristics of job applicants or workers. These attributes and characteristics include: race, color, gender, religion, and national origin (in the Title VII of the Civil Rights Act); disability (in the American with Disabilities Act); and age (people over 40, in the Age Discrimination in Employment Act).²⁰ Many state laws provide still wider protection.²¹ Similarly, in China discrimination in employment based on characteristics such as ethnicity, race, gender, religious belief, migrant worker status, carrier of an infectious disease status and disability are explicitly prohibited.²²

On the one hand, employment discrimination still widely occurs in China. A detailed discussion on the forms, manifestations, and current situation on employment discrimination in China can be found in my previous paper.²³ In addition, in a questionnaire survey conducted by China University of Political Science and Law, 85.5% of respondents reported that they experienced discrimination or observed it happening to

18. Document No.: Guo Fa [2014] No. 40 (Promulgated by the State Council, and effective on Sept. 12, 2014).

19. Document No.: Lao She Bu Fa [2004] No. 18 (Promulgated by the Ministry of Labor and Social Security, and effective on June 1, 2004).

20. See generally Harold S., Jr. Lewis & Elizabeth J. Norman, *Employment Discrimination Law And Practice*, West Group, 2nd Edition (September 30, 2004).

21. For instance, in the state of California, the Fair Employment and Housing Act prohibits employment discrimination based on race or color, religion, national origin or ancestry, physical disability, mental disability or medical condition, marital status, sex or sexual orientation, age (with respect to persons over the age of 40), and pregnancy, childbirth, or related medical conditions. See generally Fair Employment and Housing Act, codified as Government Code §§12900 – 12996.

22. See Zhou Wei, *supra* note 6.

23. See Lu, *supra* note 3.

others, and 50.5% of them see the discrimination as serious; only 6.6% reported seeing no discrimination.²⁴ Alleged discrimination occurs during all stages of employment—from application, hiring, work assignment, compensation and benefits, to promotion and termination of employment. In particular, 30.8% reported experiencing discrimination in compensation and employment benefits, 22.7% in job assignment, 21.3% in promotion and, 17.6% in the application process.²⁵ As a whole, 54.9% responded as having been discriminated against in their employment and 15.6% described the discrimination they experienced as severe.²⁶ A broad range of factors are considered when employers review job applicants and assess employees, according to the survey. These factors include gender, age, health condition, physical appearance, height, disabilities, ethnicity, religious belief, political affiliation, registered permanent residency, and sexual orientation.²⁷

On the other hand, the number of employment discrimination cases filed in the Chinese courts appeared to be trivial. As a matter of fact, the number of employment discrimination cases coming to the court is so insignificant that employment discrimination lawsuits have not been included as a separate category of civil litigation by the Chinese Supreme People's Court.²⁸ The official statistics on employment discrimination cases in China are largely unavailable. Statistics from the NGOs and new agencies show that in more than a decade there are less than 90

24. See Cai Dingjian, *The Employment Discrimination in China: Current Conditions and Anti-discrimination Strategies*, China Social Science Press, 2007, at 505-47. Directed by Prof. Cai Dingjian, the Institution of Constitutionalism Study of China University of Political Science and Law carried out a survey respectively in May 2006 and October 2006, in ten cities in China including Beijing, Guangzhou, Nanjing, Wuhan, Shenyang, Xi'an, Chengdu, Zhengzhou, Yinchuan, Qingdao, on the employment discrimination situation in China. *Id.* Of the 3500 questionnaires issued, 3454 valid answers were retrieved. *Id.*

25. *See id.*

26. *See id.*

27. *See id.*

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

employment discrimination cases filed in Chinese courts.²⁹ And so far, no high-profile employment discrimination cases on trial or appeal on a national or provincial levels have been seen. Cases in the dockets of lower courts are minor as well.³⁰ Since employment discrimination that violates Chinese anti-discrimination rules frequently occurs, the obvious question is why are there so few employment discrimination disputes that come to the courts? Why do people not use the seemingly “well-designed” Chinese anti-discrimination legal system to challenge illegal discriminatory employment practice?

III. THE ANALYSIS FROM A SOCIO-LEGAL PERSPECTIVE

To answer these questions, we must consider how an injurious experience becomes a legally addressable dispute and what must happen before it can be redressed adequately by the legal institutions.

A. The Emergence and Transformation of Disputes: Stages and Barriers

According to socio-legal scholars, while trouble, problems, and personal and social dislocation are everyday occurrences, the responses to those events could be understood as occurring in three stages.³¹ The first stage is called naming, in which a particular experience is defined as injurious.³² Naming is hard to study empirically, but “the level and kind of disputing in a society may turn more on what is initially perceived as an injury than on any later decision.”³³ The next step is called blaming, in which a person attributes an injury to the fault of another individual or social entity. In this step, a perceived injurious experience is transformed into a grievance. By including fault within the definition of grievance, the “concept of injuries is viewed both as violations of norms and as

29. For a complete list of these cases, see Wei, *supra* note 6, at 220.

30. See Lu, *Curb Your Enthusiasm*, *supra* note 5, at 214.

31. See WILLIAM L.F. FELSTINER ET AL., *supra* note 9, at 633.

32. See *id.*

33. See *id.* at 635.

remediable.”³⁴ The third step is called claiming, in which someone “with a grievance voices it to the person or entity believed to be responsible and asks for some remedy.”³⁵ This process encompasses the emergence and transformation of disputes. After these steps, only a small fraction of injurious experiences ever mature into disputes, because in many cases “experiences are not perceived as injurious; perceptions do not ripen into grievances; grievances are voiced to intimates but not to the person deemed responsible.”³⁶

Thus, if we draw a picture of the disputing processing in socio-legal studies the emergence and transformation of disputes can be portrayed as a dispute pyramid.³⁷ At the base is the number of injuries that could potentially ripen into lawsuits and at the apex is the number of cases that ultimately progress through various stages of disputing to trial and appellate litigation. The steepness of the disputing pyramid indicates the percentage of cases that can finally come to court for legal adjudication. Although the steepness of the pyramids varies, in virtually all areas of law, far fewer people pursue their claim to the top than, in theory, they have opportunity to do so because different barriers exist in different stages of the disputing pyramid.³⁸

In the employment discrimination context, the bottom tier of the pyramid is populated with people who have suffered discrimination. If people do not recognize that they have suffered harm, they will not cross what is known as the recognition barrier. Some people may name their injuries, but if they do not blame the discriminating employer, they will

34. *See id.*

35. *See id.* at 635-36.

36. *See id.* at 636.

37. For similar discussions, *see generally* Scott Burris, Kathryn Moss, Michael Ullman & Matthew C. Johnsen, *Disputing under the Americans with Disabilities Act: Empirical, Answers and Some Questions* 9 TEMP. POL. & CIV. RTS. L. REV. 237 (2000) [hereinafter *Disputing under the Americans with Disabilities Act*]; Austin Sarat, *Exploring the Hidden Domains of Civil Justice: “Naming, Blaming, and Claiming” in the Popular Culture*, 50 DEPAUL L. REV. 425 (2000); Herbert M. Kritzer, Neil Vidmar & W. A. Bogart, *To Confront or Not to Confront: Measuring Claiming Rates in Discrimination Grievances*, 25 LAW & SOC’Y REV. 875 (1991).

38. *See Disputing under the Americans with Disabilities Act*, *supra* note 37, at 239.

not cross what is called the attribution barrier. Research finds that an individual's assessment of his injury and his decision on how to respond to it depend to a considerable extent on factors such as how fairly he feels the employer's decision was made and how friends and co-workers judge the event.³⁹ Some people may cross the recognition and attribution barriers, they then will encounter the claiming barrier when they have to confront the employer, presenting the problem and demanding for redress.⁴⁰ At this stage, cases may fail to move up the pyramid for at least two reasons.

One is that some people will simply be unable to articulate their injury or demand redress because they are overawed, because they perceive themselves to be vulnerable to retaliation, or because they think resistance is futile, for example. The other reason cases end here is that sometimes the person who is accused of wrongdoing apologizes or otherwise resolves the dispute. Employers commonly provide internal dispute resolution procedures that can sometimes resolve disputes.⁴¹

Finally, after the naming, blaming and claiming process, a person must cross a litigation barrier to file a claim with the legal authority.⁴² The person must be aware that relating laws exist to enforce their rights, "must know, (or be able to find out) how to file a claim, and have the support, time and skills to do so."⁴³ Sometimes, even the person is fully aware of his right and is willing to resort to the legal authority, the problems existing in the legal institution itself—bad legislation or bad enforcement, may impose significant litigation barriers.

If we think carefully of these various barriers emerged in different stages of the dispute resolution process, we will find that they generally arise from two sources: one associated with the claimant itself and the other associated with the institution—the legal system. For the former, how a person perceives discrimination, how he understands his legal rights and the extent to which he is willing or able to guard his legal

39. *See id.* at 240.

40. *See id.*

41. *See id.*

42. *See id.*

43. *See id.* at 241.

rights will affect his reaction to discrimination. This is a typically conceptual reconstruction process. The barriers emerged during this process, such as naming, blaming and attributing barriers are what I call conceptual barriers. The latter are what I call institutional barriers, which may be created as a result of the inconsistency in legislation, lack of meaningful legal remedies, the inefficient operation of legal authorities, administrative or judiciary, and the possible corruption of legal officials. These institutional barriers impose significant hardship to people who successfully cross the conceptual barriers in seeking a legal remedy through mediation, arbitration, or litigation. Furthermore, the existence of the institutional barriers will consciously or unconsciously influence a person's assessment on what kind of action he should take. From this perspective, the conceptual barrier increases if a person sees a larger institutional barrier. But to realize a legal right or a successful redress of a violation, both the conceptual and the institutional barrier must be overcome.

B. The Application of Disputing Process Theory to the Question Presented

Now let's turn back to the questions that I raised in the precious discussions: Why are there so few employment discrimination cases in Chinese courts in spite of wide violations of those seemingly good anti-discrimination laws and regulations in China? Applying the dispute processing theories, we can see the answer probably lies in the process of whether a discrimination experience emerges and transforms into a legally remediable dispute. If there is a conceptual barrier—that people in China have trouble perceiving discrimination, or do not see discrimination as injurious, or let such experience go unnoticed, or do not know how to respond to discrimination, then no employment discrimination disputes will emerge no matter how well the anti-discrimination legal system is designed. If there is an institutional barrier—that behind these well-drafted anti-discrimination laws and regulations, there are inconsistencies or conflicts among different rules, or if these seemingly good rules simply do not work in practice, then no employment discrimination disputes will emerge. The conceptual barrier substantially limits people's ability to perceive discrimination as

wrongful and remediable. The institutional barrier substantially limits people's efforts to use the legal institutions to challenge discriminatory employment practice.

Now, increasing attention has been paid to the institutional level in regulating employment discrimination in China, and a detailed discussion on institutional barriers China faces can be found in my previous paper.⁴⁴ However, issues on conceptual levels in early stages of disputes, such as people's perception on discrimination, emergence and transformation of disputes—naming and blaming process, and barriers in these processes that may prevent an experience from maturing into a legally redressable claim, did not garner sufficient attention in China.

1. *Studying the Way Ordinary Chinese Workers Perceive and Respond to Employment Discrimination: An Initial Effort and a Field Study*

Legal or social studies on how Chinese workers perceive, understand, and respond to employment discrimination are very rare in China. In the first study of its kind, in 2004, researchers at the Peking University Department of Sociology carried out a field study of how ordinary Chinese workers understand and respond to discrimination that they may have experienced in the workplace.⁴⁵ The research targeted 117 ordinary workers in four provinces and one autonomous region of China, including Henan Province, Zhejiang Province, Fujian Province, Liaoning Province and Inner Mongolia Autonomous Region.⁴⁶ The workers came from state-owned enterprises as well as private enterprises, but the research did not identify how the samples were selected.⁴⁷ Both male and female workers were included. The researchers talked face-to-face with those workers using pre-designed questions.⁴⁸ The following were typical

44. See Lu, *supra* note 3.

45. See TONG XIN, ZHU XIAOYANG & HU YU, *The Methodology of Discrimination Research: The Perception of Discrimination from the Grass-roots Chinese Workers*, in *EMPLOYMENT DISCRIMINATION: INTERNATIONAL STANDARDS AND NATIONAL PRACTICE*, Li Weiwei & Lisa Stern eds., China Law Press (2006), at 80-108.

46. See *id.*

47. See *id.*

48. See *id.*

questions: How do you understand discrimination? What does discrimination mean to you? Have you ever experienced discrimination in your work? Do you know any laws regulating discrimination? What will you do in response to discrimination?⁴⁹

Research shows that “discrimination,” when used in a legal sense, was a term that appeared to be strange to most of those selected workers.⁵⁰ When asked during the interview whether they experienced discrimination that is not allowed by law in their work, the first response from the workers was “what is discrimination?”⁵¹ “To these workers, discrimination is something beyond their daily talk,” as one participating researcher commented.⁵² The interview was continued after the researchers gave descriptions and examples of unfair treatment as discriminatory. The researchers then found that when the workers talked about being unfairly treated, many attributed the experience to their own fate, incompetency or even bad luck. “To them, it seems as if admitting being discriminated is a shameful thing and a symbol of being in a low social class, because discrimination is understood not as an unfair treatment caused by others, but a manifestation of your own weakness,” according to the researchers, “they did not seem to have the consciousness of perceiving discrimination as a violation of certain rights they have”, and the last thing they would think of is “to use the law to protect their rights on equal employment opportunity.”⁵³ To many workers interviewed, if someone is discriminated against, it means he or she is looked down upon because of certain traits he or she possesses while others do not.⁵⁴ The researchers concluded that employment discrimination as a legal concept is something Chinese workers are not familiar with; they are not sensitive about employment discrimination issue in the workplace; they are not fully aware of their rights on equal

49. *See id.*

50. *See id.*

51. *See id.*

52. *See id.*

53. *See id.*

54. *See id.*

employment opportunity and they do not know how to properly respond to discrimination and protect their own rights.⁵⁵

This research may not warrant sweeping generalizations about the way people understand and respond to discrimination in China as a whole because it may not be systematic and sufficiently representative.⁵⁶ But it is a ground-breaking attempt to study the Chinese employment discrimination issue at a fundamental level: how ordinary workers perceive discrimination and how such perception may affect their understanding of and response to discrimination. The fact that most workers selected in the research did not know what “discrimination” means in a legal sense shows that even they have experienced workplace discrimination prohibited by law, still they probably would not be able to recognize it. This is typically recognition barrier. The recognition barrier—that people have suffered harm but do not recognize it, will kick those workers off the disputing pyramid at its lower level. The research further shows that after being told what discrimination is, most workers treated discrimination as their bad luck and a manifestation of their own weakness.⁵⁷ This is typically attribution barrier. The attribution barrier—that people may know their discriminatory experience was an injury, but do not blame the discriminating employer, again will block the way up in the disputing pyramid. In general, the dispute emergence and transformation theory explains what the researchers from Peking University observed. If the injured person does not feel wronged or believe that something might be done in response to discrimination, it is not likely that we will see such disputes in Chinese courts.

But why people in China reacted to discrimination as in this study? Why are ordinary workers in China not sensitive about employment discrimination issue?⁵⁸

55. *See id.*

56. As mentioned, the researchers only interviewed 117 workers in 4 provinces and 1 autonomous region out of 31 provinces and autonomous regions in China, and the reason why the researchers selected these places are not known. It is also not clear how these sample workers were selected. In general, these targeted workers are less educated and working in the lower social tier, if not the bottom. *See id.*

57. *See id.*

58. By comparison, the Administrative Office of the U.S. Courts reports that in 2005 one out of every twelve civil cases filed in the federal district court involved claims

2. “Employment Discrimination” under the Chinese Context

The term “employment discrimination” is not a Made-in-China term. It is a concept transplanted from somewhere else. As reflected from the above research, when used in a legal sense, ordinary Chinese workers were neither familiar with nor sensitive to such term. In trying to understand the way people treat employment discrimination, it might be helpful if we consider, among other things, China’s economic status, cultural and traditional implications.

China’s former economic system may have an impact on workers’ perception of employment discrimination.⁵⁹ For decades, the socialism plan-oriented economic system was China’s dominating economic form, under which “everyone has an equal share of rice and everyone has an equal share of work.”⁶⁰ This was the old fashion of thinking for many members of the Chinese working class.⁶¹ Under that system, the government made employment need-and-supply plans and was responsible for assigning available working positions to people with working capacities. The employers at that time were almost always state-owned enterprises managed in accordance with the state-issued economic plans. People tend to agree that there was no such thing as employment discrimination, of the modern sense, under the strict plan-oriented economy decades after the establishment of the socialist New China.⁶²

The reason why employment discrimination did not exist in the modern sense in the strict plan-oriented economic system has not been well discussed in China. I believe managers in a strict plan-oriented economic system lack incentives to discriminate. Discrimination consists

of employment discrimination. See BARBARA LINDEMANN & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 1 (4th ed. 2007).

59. As some scholars have pointed out, discrimination in employment is not only a legal question, but also an economic question, and sometimes it is the combination of both the legal question and the economic question. See David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 GEO. L.J. 1619, 1621 (1991).

60. See LIN JIA ET AL., *LABOR AND EMPLOYMENT LEGAL ISSUES RESEARCH*, 35-41 (China Labor & Soc. Sec. Press 2005).

61. See *id.* at 35-38.

62. See *id.*

of treating similarly situated people differently (or treating differently situated people the same). Discrimination in employment occurs when an employer treats employees or applicants for employment differently because of irrelevant traits. The economic literature offers two basic explanations of why an employer might treat employees or applicants differently. In one model, discrimination results from a “taste for discrimination.”⁶³ In the other model, discrimination in the workplace is a product of “statistical discrimination.”⁶⁴ In the first model, the taste is, for instance, antipathy to a racial minority group. “[E]ither the employer itself or someone whose tastes the employer has an incentive to consider—such as employees or customers—dislikes members of a minority group and does not want to associate with them.”⁶⁵ The effect of this taste is that the employer incurs an additional cost (or loss in utility) for employing a minority group member. If the taste for discrimination is held by the employer, the utility loss will be the employer’s own. If the employer itself lacks any antipathy to minorities, it will still incur an additional cost if its nonminority employees dislike minorities and demand additional wages (or show reduced productivity) when forced to work with minorities.⁶⁶ Similarly, the employer will incur an additional cost if customers are less willing to do business with firms that have minority employees.⁶⁷ The second model of statistical discrimination can occur in the absence of any antipathy toward a minority group. Instead, the employer discriminates against a minority group because it is using membership in that group as a proxy for characteristics that are legitimate employment qualifications. Discrimination of this form occurs as the result that information about an employee’s qualifications is often costly to obtain.⁶⁸ An employee’s race, however, is cheaply ascertained.

63. See generally GARY BECKER, *THE ECONOMICS OF DISCRIMINATION* (2d ed. 1971).

64. For principal early works on statistical discrimination, see Kenneth Arrow, *The Theory of Discrimination* (Indust. Relations Section Princeton Univ., Working Paper No. 30A, 1971), and Edmund S. Phelps, *The Statistical Theory of Racism and Sexism*, 62 *Am. Econ. Rev.* 659 (1972).

65. Strauss, *supra* note 59, at 1622.

66. *Id.*

67. *Id.*

68. *Id.*

Therefore, if a firm concludes that “an employee’s race correlates with his or her qualifications, and if better information about the qualifications is too costly to discover, it will be rational, profit-maximizing behavior for the firm to offer lower wages to a minority employee than it would offer to a nonminority employee.”⁶⁹

In a strict plan-oriented economy, the employers and other actors like the customers have no incentive or opportunity to discriminate because state-issued plan, rather than personal taste or statistics-based information, is the exclusive rule to be obeyed. As a result, the employment discrimination issue was practically a non-issue for most working Chinese in the plan-oriented economy of socialist China.⁷⁰ Since 1990s, the ways companies do business have changed after China embraced a market system by loosening governmental control over enterprises. After the start of litigation of several high-profile groundbreaking employment discrimination lawsuits in beginning years of the twenty-first century,⁷¹ it became apparent that job applicants could be rejected for discriminatory reasons. But looking back years later, the effects these lawsuits brought about are overstated. On the one hand, the transition from plan market to free market, along with the economic expansion and privatization, results in more people coming out from rural areas; and considering China’s large population, there is an imbalance between the availability of the supply of human labor resources and the demand from the market.⁷² Most people care about

69. *Id.*

70. See LIN JIA ET AL., *supra* note 60.

71. Among these high-profile cases, the most pioneering one began in 2002, when the plaintiff, a graduate from Sichuan University sued the People’s Bank of China Chengdu Branch for height discrimination. This case was followed by a remarkable Hepatitis-B employment discrimination case against a local government agency in Anhui Province in 2003. Other high-profile cases at the time included gender-based discrimination in the mandatory retirement policies at the China Construction Bank Pingdingshan Branch in 2005, age-based discrimination against the Ministry of Personnel of the State Council in 2006, and physical appearance-based discrimination against an education investment group in Shanghai in early 2007, see Lu, *supra* note 3, at 140-41.

72. See Zhang Li & Zhang Mingru, *Research on the Causation and Countermeasures of Employment Discrimination in China*, 19 J. CHINA INST. INDUSTRIAL RELATIONS 79 (2005) (P.R.C.). Data shows that in 2003 alone, there were 14 million unemployed urban people, and annually there were 10 million new urban people waiting

having a job. On the other hand, we have not seen strong internal force in the government and the legislature for their commitment to regulate employment discrimination.⁷³ Is it because enforcing anti-discrimination law may cause tension between the employers and employees, which may affect economic stability and ultimately political stability? We don't know.

There may also be cultural reasons why people are reluctant to sue discriminating employers. Scholars have observed that cultural norms shape most of what occurs in the domain of civil justice.⁷⁴ Traditionally lawsuits in China are the least preferred mechanism for resolving personal disputes. The concept of “harmony” and “no suits” are basic in traditional Chinese legal culture.⁷⁵ As Confucius said, “To handle lawsuits, I am resolved to eliminate lawsuits.”⁷⁶ In this tradition, many people in China regard a lawsuit as a very unfriendly form of dispute resolution, especially for those disputes arose from the workplace. It would be not a likely scenario in China even nowadays that someone will be willing to seek an order from the court against an employer to ask to be hired.⁷⁷ From this point of view, the implication from Chinese “no suits” culture reinforced the conceptual barrier—even if people are aware of their rights on equal employment opportunity, know their rights infringed and attribute the violation to discriminating employer, they may be reluctant to bring such dispute to the attention of legal authorities.

In addition, traditionally Chinese people care about saving face. It might be a reason that people keep silent on workplace discrimination in order to save face. As the study of Peking University Department of Sociology had shown, being discriminated was interpreted by many as a

for employment. *Id.* There were also more than 100 million surplus labor forces in rural areas in China. *Id.*

73. See Lu, *supra* note 3, at 172.

74. See Austin Sarat, *Exploring the Hidden Domains of Civil Justice: “Naming, Blaming, and Claiming” in Popular Culture*, 50 DEPAUL L. REV. 425, 427 (2000).

75. See Zhang Wenxiang & Sagironggui, *The Dilemma of Traditional Litigation Conceptions—the Intrinsic Logic among ‘No Suit’, ‘Dropping Suit’ and ‘Disgusting Suit’*, 22 HEBEI L. REV. 79 (2004).

76. THE ANALECTS OF CONFUCIUS Book XII, ¶. 12.13.

77. See Lu, *supra* note 3, at 189.

symbol of being in a low social class, a manifestation of one's own weakness and a reason to be looked down upon.⁷⁸ As a result, discrimination victims may not want to come forward in fear of losing face.

3. *Some Remarks*

Facts show that very few discrimination cases emerged in Chinese courts in spite of wide violations. While the ineffectiveness of the legal institutions in China in dealing with discrimination was often blamed, the capacity of people to respond to discrimination and how cultural recognition affects legal remedies of discrimination shall not be neglected. In general people in China who suffered discrimination in employment rarely perceived discrimination as injurious or as a violation of their equal employment rights.⁷⁹ And even fewer people would ever think of using the laws to fight against the discrimination they experienced.⁸⁰ Socio-legal scholars have referred to such harmful events as "Unperceived Injurious Experiences" in recognition of the fact that many people who suffer an injury redressable by law do not recognize that they have suffered harm.⁸¹ An unperceived injurious experience must be transformed into a perceived injurious experience in order for disputes to emerge and remedial action to be taken.⁸²

To some extent, "Unperceived Injurious Experiences" are not uncommon. Even in some western countries, most types of legally actionable grievances produce behaviors intended to obtain redress, but discrimination grievances stand out as instances of what some scholars called "lumping it."⁸³ Based on their analysis of claiming rates for a variety of different types of common problems examined by the Civil

78. See TONG XIN ET AL., *supra* note 45.

79. *Id.*

80. *Id.*

81. An injurious experience is any experience that is devalued by the person to whom it occurs. See FELSTINER ET AL., *supra* note 9, at 650.

82. *Id.* at 633.

83. See generally William L.F. Felstiner, *Influences of Social Organization on Dispute Processing*, 9 LAW & SOC'Y. REV. 63, 81 (1974).

Litigation Research Project (CLRP), Miller and Sarat reported that the rate of claiming by victims of discrimination was much, much lower than for any other kind of problem they examined.⁸⁴ Claiming rates varied from a low of 79.9 percent for grievances having to do with real property to 94.6 percent for debt-related grievances. In contrast, the claiming rate was only 29.4 percent for discrimination problems.⁸⁵ Low discrimination claiming rate reflects a variety of factors: lack of knowledge of the available remedies, inadequate resources or inefficient procedures at administrative agencies charged with handling discrimination problems, unwillingness of lawyers to accept cases that will be difficult to win or not profitable to handle on a contingency fee basis, and the likelihood that persons or organizations charged with discrimination will vigorously resist the complaints because they see themselves as blameless and because the prospects for unfavorable court action are limited.⁸⁶ In addition to those factors, under the Chinese context, former economic system and current economic status, cultural implications and traditional face-saving value may have complicated the issue in China.⁸⁷ Needless to say, the legal remedies will be substantially less effective if people in China who suffered discrimination in employment rarely perceived discrimination as injurious or as a violation of their equal employment rights.

IV. CONCLUSION

Employment discrimination laws forbid employers from considering certain attributes in making employment decisions. This formal command to disregard particular characteristics of job applicants or workers is based on the premise that bearers of these characteristics should be treated equally with members of some favored comparison group who lack these traits. China does have seemingly well-designed

84. See Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y. REV. 525, 537 (1980).

85. See *id.*

86. See LAWRENCE BAUM, *AMERICAN COURTS: PROCESS AND POLICY* 230-31 (2d ed. 1990).

87. See generally ZHOU WEI ET AL., *supra* note 4.

employment discrimination laws, but the small number of employment discrimination cases filed in the Chinese courts is a signal that the discrimination issue is not being adequately addressed through its legal institutions, especially in light that discrimination occurs frequently in the Chinese workplace. In addition to the problems inside the legal institutions, it is equally important to pay attention to the basic question of how people perceive and understand employment discrimination. As the dispute emergence and transformation theory explains, that if the injured person does not feel wronged or believes that something might be done in response to discrimination, it is not likely that we will see such disputes addressed through the legal institutions.

A healthy social order is one that “minimizes barriers inhibiting the emergence of grievances and disputes and preventing their translation into claims for redress.”⁸⁸ Therefore, it is critically important to convince Chinese people that discrimination is wrongful and should not be tolerated. People must change the way perceiving and responding to discrimination. They must be educated that when discrimination occurs, using laws to guard their rights by referring the discriminatory practice to legal authorities may not only provide remedies for their losses but may also deter future discrimination.

Last but not least, the Chinese society and its people shall develop and promote an anti-discrimination principle. Discrimination based on those immutable characteristics, such as gender, race, height, and age, is fundamentally wrongful; and that discrimination based on other factors, such as appearance, HB virus carrier status, migrant worker status, religious belief, marital status, and ethical minority status--those not related to the performance of the job, is inherently unfair.

88. See FELSTINER ET AL., *supra* note 9, at 654.

