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Dealing With Discrimination In Mainland China

Jean-Francois Seguin, *New York University*



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DEALING WITH DISCRIMINATION IN MAINLAND CHINA

**AN OVERVIEW OF DISCRIMINATION IN EMPLOYMENT
AND THE LEGAL FRAMEWORK ADDRESSING IT**

By Jean-François Séguin,

LL.M Candidate

New York University School of Law

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1. INTRODUCTION

China has emerged as a global economic superpower. Its economic growth, since the reforms of Deng Xiaoping until today, is unique in history. Its development, in many aspects, is phenomenal. While the Chinese government is building a modern and industrialized state, questions on social and legal development in China may arise.

One critical challenge of China's emergence is the modernization of its legal system and moving toward the rule of law¹. In Marc Galanter's definition of a "modern legal system", the law should be transactional and people's rights should not be influenced by factors like their sex, ethnicity or religion². In other words, a modern system should recognize that all are equals and prevent discrimination. According to Galanter, the law should also be "universal" and applied without discrimination³. In pursuing the modernization of its legal system, China needs to counter discrimination and advance equality for minorities.

Like in nearly all nations, discrimination has always been part of China's history⁴. For instance, Shuping Wang, a 2002 *Global Public Service Scholar* at NYU School of Law, noted in a paper on China's policy toward minorities that ethnic groups were seen and treated as barbarians in ancient China:

[F]or most of China's history, the Han in Central China discriminated against 'backward' ethnic groups; while in other periods ethnic groups assumed power, such as in the Yuan and Qing Dynasties. In such periods, the governing minority ethnic groups discriminated against other ethnic groups, including the majority Han.⁵

¹ See generally RANDALL PEERENBOOM, *CHINA'S LONG MARCH TOWARD RULE OF LAW* (Cambridge University Press) (2002).

² In Frank K. Upham and Xin He, *Class One: What Is A Modern Legal System?*, Law And Society In East Asia, New York University School of Law, Spring, 2009, at 2 (distributed in class).

³ *Id.*

⁴ Shuping Wang, *The Peoples's Republic Of China's Policy on Minorities and International Approaches to Ethnic Groups: A Comparative Study*, Int'l J. on Minority & Groups Rts. 159 2004, at 163.

⁵ *Id.*

The world's most populous country has over 56 minority ethnic groups (*minzu*), with the Han population being the majority group⁶. Although development is lifting people out of poverty at a rapid rate, minorities in the country seem to benefit far less from the economic progress in China: minorities represent 8.2% of the total population but they comprise 40% of the poor⁷. The treatment of minorities and other forms of discrimination documented in China have been criticized by Western media, NGOs and scholars⁸.

While the author does not have the requisite expertise to fully and justly analyze discrimination in China and to judge of how the government is dealing with it through policies and the law, this paper reviews the relevant literature and provides an overview of the existing legal framework protecting against discrimination in the workplace⁹. The four main questions the author tries to answer are the following:

- What are the main forms of discrimination in employment?
- Do Chinese citizens have a recognized fundamental right to equality?
- Is the legal corpus and system adequately protecting people against illegal discrimination?
- Is China evolving toward less discrimination?

After looking at the possible grounds of discrimination such as gender, ethnicity and religion, the relevant laws are examined. How non-discrimination provisions are and can be enforced in Chinese courts is then discussed. It concludes with an assessment of the Chinese government's actions to cope with discrimination.

⁶ Shuping Wang, *supra* note 4, at 162.

⁷ Susan K. McCarthy, *The State, Minorities, And Dilemmas Of Development In Contemporary China*, 26 Fletcher F. World Aff. 107 (2002), at 107.

⁸ See *Internal Migrants: Discrimination And Abuse - The Human Cost Of An Economic 'Miracle'*, Amnesty International, March 2007, available online at <http://www.amnesty.org/en/library/info/ASA17/008/2007>.

⁹ This paper examines discrimination and legal protection against it in mainland China. It does not cover Autonomous and Special Administrative Regions.

2. DISCRIMINATION IN THE WORKPLACE

Discrimination in employment is widespread and well documented in China. A study conducted in ten large cities by a team of academics from Peking University, Tsinghua and the China University of Political Science & Law in 2006 indicated that about 85.5% of the 3,424 respondents interviewed thought that discrimination in the workplace exists and 58% of them thought the problem was severe¹⁰. Ronald C. Brown, a professor of law and former Fulbright Distinguished Lecturer at Peking University Law School, had his attention caught by a job advertisement posted on a wall outside of the Ministry of Labor in Beijing in 1996. The add read as follows:

Seeking an office clerk. Female, decent height and appearance. All five facial organs must be in the right place [wu guan duan zheng].¹¹

Discrimination can also go much further than physical attributes. Apparently, in 2005, it was reported by Chinese media that some employers refused to hire qualified candidates because they were born as dogs in the Chinese astrological cycle¹². Although this can be a somewhat isolated peculiar case of discrimination, it is fair to say that discrimination in work is quite common in China.

2.1. Possible grounds of discrimination

Discrimination exists based on many grounds. Gender, health status, physical traits, ethnicity (residence) and religious beliefs are among the most common factors of discrimination in employment¹³.

¹⁰ Xun Zeng, *Enforcing Equal Employment Opportunities In China*, 9 U. Pa. J. Lab. & Emp. L. 991 (2006-2007), at 992.

¹¹ Ronald Brown, *China's Employment Discrimination Laws During Economic Transition*, 19 Colum. J. Asian L. 361 (2005-2006), at 362.

¹² Xun Zeng, *supra* note 10, at 993.

¹³ Ronald Brown, *supra* note 11, at 362.

Other types of discrimination, based on the name or the age, have been reported as well. For example, the manager of a store wanted to hire a woman to be a salesperson but quickly changed his mind when he learned that her family name was “Pei”, which in Mandarin can sound like “loosing money”¹⁴. Same situation happened when a young man named “Jia” applied for a customer service position in a company. The manager did not hire him because Jia is pronounced like the word “fake”¹⁵. Another department store had stipulated in its official employment policy that all sales representatives should be below 35 years old and be registered as permanent resident of Beijing¹⁶. It is well known in China that many employers prefer to employ young people and that older candidates, even though qualified, may struggle more to find a job¹⁷.

i) Gender

Women clearly play a very important role in all aspects of the Chinese society. Their equality to men has long been recognized and is now officialised by the Constitution¹⁸. Mao Zedong, in a speech given in 1955, declared:

Enable every woman who can work to take her place on the labor front under the principle of equal pay for equal work. This should be done as soon as possible.¹⁹

Nonetheless, many women continue to be victim of gender-based discrimination. The online China Information Center²⁰ reports that general discrimination against women has

¹⁴ Charles Chen and Jihong Wu, *Employment Discrimination in China*, Canadian International Lawyer, Vol.6, No.1 (2004), at 40.

¹⁵ *Id.*

¹⁶ *Id.*, at 41.

¹⁷ *Id.*, at 40.

¹⁸ Article 48, Constitution of the People’s Republic of China, available online at http://english.gov.cn/2005-08/05/content_20813.htm (the Constitution have been adopted at the Fifth Session of the Fifth National People's Congress and promulgated for implementation by the Proclamation of the National People's Congress on December 4, 1982).

¹⁹ Ronald Brown, *supra* note 11, at 371.

created a severe newborn gender imbalance, mainly caused by selective abortions²¹. In an interview with the Xinhua News Agency, Liu Bohong, vice-director at the All-China Women's Federation, highlighted the fact that “*gender inequality is everywhere: from selective abortions to employers' preferences for male graduates*”²². According to Ms. Liu, gender discrimination is the result of “*male chauvinism that is deep-rooted in Chinese culture*”²³.

Professor Ronald Brown notes that it is “*an open secret in China that female college graduates suffer discrimination from employers when applying for jobs, with the inequality known to almost all college students*”²⁴. Brown even reports the fact that some female graduate students have started to include sexy photos wearing bikinis or short skirts in their job applications²⁵.

Statistics demonstrate the seriousness of the problem. A recent survey on employment realized by the Southwest University of Political Science & Law confirmed that “*[n]early 70 percent of Chinese women college graduates face sexual discrimination while job-hunting*”²⁶. Female executives earn around 58% of what males earn while female doctors earn approximately 63% of the male doctors' salary²⁷. The results of another survey realized by the Ministry of Labor and Social Security showed that “*67% of employers set gender restrictions*

²⁰ The China Internet Information Center, available online at <http://www.china.org.cn>. The China Internet Information Center provides daily information on China and is published under the auspices of the State Council Information Office and the China International Publishing Group in Beijing.

²¹ *Expert Blames Gender Discrimination for Growing Sex Imbalance* (Xinhua News Agency December 18, 2006), available online at <http://www.china.org.cn/english/features/cw/192838.htm>.

²² *Id.*

²³ *Id.*

²⁴ Ronald Brown, *supra* note 11, at 373.

²⁵ *Id.*

²⁶ *Job Discrimination Against Women Graduates* (Xinhua News Agency January 18, 2007), available online at <http://www.china.org.cn/english/education/196472.htm>.

²⁷ Ronald Brown, *supra* note 11, at 364.

against women or required in employment contracts that female employees don't become pregnant for a certain number of years'²⁸.

What is the most troubling however is the resilience that many women tend to show when they face discrimination. The Southwest University of Political Science & Law's survey on employment reveals that most women victim of discrimination often simply choose to tolerate it²⁹. One survey participant said: "[w]hen turned down by one employer we just try another", "it's a waste of time arguing with employers about the discrimination"³⁰. Referring to the laws protecting women against discrimination, Zhang Youyun, vice-president of the China's Employment Facilitation Association, notes that "when it comes to gender inequality, the gap between legal stipulations and reality is wider than in any other area"³¹.

ii) Health status

Discrimination based on health conditions is well known. It constitutes an important problem in China given the large population and the huge number of people infected by diseases. For example, more than 10% of the population, around 120 million people, is believed to be infected by hepatitis B³². Studies also report that approximately 840,000 people are HIV positive³³.

A British firm conducted a survey on employment conditions for people living with hepatitis B in China and found that 52% of the participants, all carriers of the virus, once lost their job or educational opportunity due to their health condition³⁴. The Beijing University

²⁸ *Job Discrimination Against Women Graduates*, *supra* note 26.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Expert Blames Gender Discrimination for Growing Sex Imbalance*, *supra* note 21.

³² Thomas E. Kellogg, *Constitutionalism With Chinese Characteristics?: An analysis of Constitutional Litigation In China*, Yale Law School China Law Center, September 2007, at 25 (distributed in class).

³³ Ronald Brown, *supra* note 11, at 382.

³⁴ *Id.*

Law School found similar results in surveying job seekers. Their results show that 56% of hepatitis B carriers have not been employed, mostly because they were classified as “substandard” on their physical exam³⁵. Perhaps more disturbing is the fact that 36.6% of the general public interviewed found that not hiring someone because she is infected by hepatitis B is not a form of discrimination³⁶.

Hepatitis B discrimination has been at the center of the quest for equality and non-discrimination³⁷. Many important cases involving hepatitis B carriers have paved the way to discrimination litigation in China³⁸. Thomas E. Kellogg, Senior Fellow at Yale Law School, notes that “*a key factor in the rise of hepatitis B discrimination litigation in China has been the active engagement of civil society groups*”. One of the most mediatized and tragic story of hepatitis discrimination is the case of Zhou Yichao which caught the attention of NGOs and the general public³⁹. Zhou Yichao was a graduating student of Zhejiang University, in the Zhejiang province, who applied for a position with the local government⁴⁰. He passed the city’s civil servant qualification test with success but his application was eventually turned down because of his health condition, being a hepatitis B carrier⁴¹. Desperate and angry, he killed a government representative responsible for recruitment and seriously injured another one. Mr. Zhou was arrested and sentenced to death. He was executed in March 2004⁴².

Following the Zhou incident, in November 2003, the first hepatitis B discrimination lawsuit was brought before the People’s Court in the Xinwu District, in Anhui Province. Zhang Xianzhu was a young university graduate who received the highest score in the Wuhu

³⁵ Thomas E. Kellogg, *supra* note 32, at 25-26.

³⁶ *Id.*

³⁷ *See e.g.* Thomas E. Kellogg, *supra* note 32.

³⁸ *See infra* Section 5 on enforcement of non-discrimination provisions in Chinese courts.

³⁹ Xun Zeng, *supra* note 10, at 1003. *See also* Ronald Brown, *supra* note 11, at 382.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

civil service qualifications examination⁴³. The local Personnel Bureau, however, rejected his application because it was found after an employment medical exam that he was infected by hepatitis B⁴⁴. Zhang filed a lawsuit and alleged discrimination and a violation of his right of equality guaranteed by the Chinese Constitution⁴⁵. The Court accepted to hear the case and delivered a judgment ruling in favour of Zhang. However, the Court decision was not clearly “anti-discrimination” and did not impose any sanction or suggest any measure to redress the wrongdoing. The Court simply held that “*there was insufficient evidence to demonstrate that Zhang, although an HBV carrier, belonged to one of the seven HBV groups that Anhui’s provincial health standards barred from public service*”⁴⁶. As pointed out by a Chinese lawyer, Mr. Zhang won purely on technical grounds⁴⁷.

The Zhou and Zhang cases sparked national and international attention and became emblematic of the cause of millions of people who are denied job opportunities because of their health conditions. For instance, a non-profit organization defending hepatitis carriers’ rights has set up an Internet forum for people living with the disease in China. Available at www.hbvhbv.com, the website’s welcome page states the following:

The hbver (Hepatitis B virus carriers) group has met different degree [of] discrimination in education, employment and many other aspects of life for some histor[ic] reason. We offer a communication platform for 120 million hbver to search medicine, exchange feeling[s] and seek help and make the hbver never feel lonely and helpless. We made much effort for protecting hbvers' legal right such as [in] the first HBV discrimination lawsuit of Zhang Xianzhu, [a] review of constitutionality submitted by 1161 citizens, etc.⁴⁸

Until recently, several governmental agencies had, as a policy, bans on employment of hepatitis B or/and HIV carriers (and people with disabilities or “non-standard” physical

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Bonny Ling and Wing Lam, *Hepatitis B: A Catalyst For Anti-Discrimination Reforms?*, at 70, available online at http://hrichina.org/public/PDFs/CRF.2.2007/CRF-2007-2_Hepatitis.pdf.

⁴⁷ Xun Zeng, *supra* note 10, at 1004.

⁴⁸ “*In the hepatitis B camp*” Website, available online at <http://www.hbvhbv.com/english/>.

traits). However, in 2005, in the aftermath of the Zhou and Zhang affairs, the Ministries of Health and Personnel drafted the first health standards for public servants⁴⁹. A new regulation was issued, mostly to ease the tensions resulting from the wave of sympathy the Zhou and Zhang cases caused, called *General Standards on Physical Examinations Relating to the Employment of Civil Servants*⁵⁰. These standards officially allowed people with hepatitis B and other diseases or disabilities to be hired for a government position⁵¹. Nonetheless, it may be quite possible that some discrimination persists in a number of local governments and agencies⁵².

iii) Physical traits

Discrimination based on physical attributes is perhaps the most widespread type of discrimination in China, like anywhere else. Chinese employers, public and private, are often known to give importance to factors such as good look, height, weight, body-shape and, obviously, disabilities⁵³. Many cases physical discrimination have been reported. One example is a man who could not be hired as teacher because his height was below the required standard⁵⁴. The China Daily published an article on discrimination in public service recruitment revealing that “*many regional governments had regulations disqualifying public servants with physical disabilities*” and that “*some regulations limit public servants' height and some provinces had strange requirements for the appearance of public servants*”⁵⁵. It also reported that agencies in the Hunan Province used to refuse women having asymmetrical

⁴⁹ *Hep B carriers allowed to join public service* (China Daily, January 1, 2005), available online at http://www.chinadaily.com.cn/english/doc/2005-01/21/content_411013.htm.

⁵⁰ Xun Zeng, *supra* note 10, at 1004.

⁵¹ *Id.*

⁵² Ronald Brown, *supra* note 11, at 383.

⁵³ Charles Chen and Jihong Wu, *supra* note 14, at 40.

⁵⁴ *Id.*

⁵⁵ *Hep B carriers allowed to join public service*, *supra* note 50.

breasts⁵⁶. Today, many of the hiring policies setting unnecessary physical requirements have been abandoned in China, mainly due to public criticism and a growing recognition that discrimination should be proscribed⁵⁷. Interestingly, Professor Ronald C. Brown, arguing against discrimination based of people's height, remembers the fact that Deng Xiaoping was only 4 feet 11 inches!

The first case involving the constitutional right to equality was one alleging the “illegality” of a minimum height requirement⁵⁸. In 2001, a Sichuan University law student named Jiang Tao could not qualify for a position with the People's Bank of China because he did not meet the minimum height requirement, stated in a job advertisement, which was set at 5 feet 6 inches⁵⁹. Jiang decided to challenge the bank's hiring policy in courts and sued on the basis of a violation of his right to equality guaranteed by the Chinese Constitution. He also argued that the bank should “*assume corresponding legal liabilities*” and wanted the Court to conclude that height discrimination was illegal⁶⁰. Unfortunately, because the bank removed the advertisement containing the height requirement, Mr. Jiang's case was dismissed by the Court who concluded that the case could not be judicially reviewed⁶¹. The Court also specified that cases like Jiang's one would fail anyway because “*the Chinese Administrative Litigation Law only permits review of administrative action taken within the scope of the sued entity's formal regulatory responsibilities*”⁶². In this case, hiring policies were not part of the People's Bank of China's regulatory responsibilities. From a Western point of view, this narrow interpretation and rigid view of judicial review can appear uncommon. Although the

⁵⁶ *Id.*

⁵⁷ Charles Chen and Jihong Wu, *supra* note 14, at 40.

⁵⁸ Xun Zeng, *supra* note 10, at 991.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

Jiang Tao case was not successful, scholars generally agree that it advanced both anti-discrimination and constitutional litigation⁶³.

iv) Migrants and minorities

The official position in China is that there is no racial discrimination. According to Dainzhub Ongboin, vice director of the State Ethnic Affairs Commission, “*China's ethnic groups enjoy equal status and live in harmony*” and “*there is no discrimination (directed at any ethnicity)*”⁶⁴. Mr. Dainzhub also argued that “*[t]he 56 ethnic groups are like brothers and sisters living in one family*”⁶⁵. Yet, many trivial incidents have been reported where Hans were preferred over people of other ethnic groups for jobs⁶⁶.

The target of most criticism from anti-discrimination and human rights groups was the *hukou* system established in China – or maybe more the consequences of it for migrant workers⁶⁷. Briefly, with the *hukou* system, all Chinese citizens have a registered permanent residence at the local Public Security Bureau⁶⁸. The residence registration normally appears on their personal identification documents and it led many employers and local governments to discriminate based on the permanent residence of applicants⁶⁹. Discrimination on this ground, already a big problem for decades, could become a pressing issue. Studies show that the number of migrant workers, leaving rural areas for the cities, could reach 300 million by 2010⁷⁰. For example, the Beijing Municipal Government had a hiring policy allowing Beijing

⁶³ See Thomas E. Kellogg, *supra* note 32, at 25, Xun Zeng, *supra* note 10, at 991 and Ronald Brown, *supra* note 11, at 400.

⁶⁴ *Official: China Has No Racial Discrimination* (Xinhua News Agency, March 30, 2007), available online at <http://www.china.org.cn/english/China/205320.htm>.

⁶⁵ *Id.*

⁶⁶ Ronald Brown, *supra* note 11, at 379.

⁶⁷ See *Internal Migrants*, *supra* note 8, at 5.

⁶⁸ Charles Chen and Jihong Wu, *supra* note 14, at 40.

⁶⁹ *Id.*

⁷⁰ Ronald Brown, *supra* note 11, at 375.

non-residents to work in only 12 out of 204 types of jobs⁷¹. As a sign of progress and a result of the central government's commitment to eliminate discrimination, this policy has been abandoned in 2004⁷². The government also ratified the *International Labour Organization Discrimination Convention* in 2006 that came into force in January 2007 and banned employment discrimination on the basis of social origin⁷³.

Concrete measures to fight discrimination has been taken but as Amnesty International put it, “*although the central government has shown increased commitment to addressing discrimination against internal migrants and denial of their rights, enforcement of new regulations has not been effective at the local level*”⁷⁴. Improving enforcement is key to the reduction of discrimination on all grounds.

v) Religious beliefs

Experts generally agree that minorities of Islamic and Christian faith along with Tibetans and, more particularly, the followers of the Falun Gong cult are often persecuted and repressed⁷⁵. Yet, very few cases of employment discrimination based on religious beliefs are reported in the literature⁷⁶. As presented below in sections 3.1 and 3.2, the Chinese Constitution and the Labor Law respectively guarantee freedom of religion and protect workers against discrimination based on religious beliefs⁷⁷.

⁷¹ Charles Chen and Jihong Wu, *supra* note 14, at 40.

⁷² *Id.*

⁷³ *Internal Migrants*, *supra* note 8, at 7.

⁷⁴ *Id.*

⁷⁵ Preeti Bhattacharii, *Religion in China*, Council on Foreign Relations, New York, May 16, 2008, available online at <http://www.cfr.org/publication/16272/>.

⁷⁶ Ronald Brown, *supra* note 11, at 399 (Brown refers to the case of a Muslim Chinese who saw his job offer withdrawn when his employer learned he was Muslim and that his faith would not allow him to cook pork).

⁷⁷ *See infra*, Sections 4.1 and 4.2. Article 36, Constitution of the People's Republic of China, *supra* note 18 and Article 12, Labor Law of the People's Republic of China, available online at <http://www.lawinfochina.com/law/display.asp?db=1&id=705&keyword=laborlawpeople'srepublicofchina>.

3. THE ANTI-DISCRIMINATION LEGAL FRAMEWORK

The Chinese government deals with the issue of discrimination through many legal instruments. After an overview of the relevant constitutional provisions, the specific laws addressing discrimination in employment are examined.

3.1. The Chinese Constitution, equality and unity

The Constitution contains several provisions addressing the issue of discrimination. Given the long history of tensions with minorities, importance is conferred to unity and equality between the different ethnic groups. The preamble of the Constitution highlights the “official” position of the government on minorities as well as ethnicities’ role and relevance in the Chinese society:

*The People's Republic of China is a unitary multi-ethnic state created jointly by the people of all its ethnic groups. Socialist relations of equality, unity and mutual assistance have been established among the ethnic groups and will continue to be strengthened. In the struggle to safeguard the unity of the ethnic groups, it is necessary to combat big-ethnic chauvinism, mainly Han chauvinism, and also to combat local-ethnic chauvinism. The state will do its utmost to promote the common prosperity of all ethnic groups.*⁷⁸

The real challenge, as stated in this paragraph of the preamble, may well be to reduce considerably chauvinism. The government may adopt correct laws and policies to fight discrimination but the outcome of its legislative actions will always depend on social and cultural change. Eliminating discrimination requires time, public acquiescence, support and concrete actions. To properly act against discrimination, the government has to provide citizens with enforceable rights and promote simple procedures to complain and be compensated.

Equality between all ethnic groups is recognized as a general constitutional principle in Article 4 of the Constitution. This provision stipulates that “[a]ll ethnic groups in the People's Republic of China are equal” and that the State shall protect the “lawful rights and

⁷⁸ Preamble, Constitution of the People’s Republic of China, *supra* note 18. Emphasis added.

interests of the minority ethnic groups” in developing a “*relationship of equality, unity and mutual assistance*” between all ethnic groups⁷⁹. It furthermore asserts that any type of discrimination or oppression against minorities is prohibited and allow for some governance autonomy for some ethnic communities⁸⁰.

However, the key constitutional provision sanctioning the principle of equality is Article 33⁸¹. This article confirms equality for all citizens as a fundamental right and is seen as enabling litigation against discrimination⁸². It reads as follow:

All persons holding the nationality of the People's Republic of China are citizens of the People's Republic of China. *All citizens of the People's Republic of China are equal before the law.* The state respects and guarantees human rights. *Every citizen is entitled to the rights* and at the same time must perform the duties prescribed by the Constitution and the law.⁸³

It is worth noting that the third paragraph on human rights has been added in the 2004 constitutional amendments to the Constitution at the 2nd Session of the 10th National People’s Congress⁸⁴. The Universal Declaration of Human Rights recognizes the right to equality as an essential human right: “*[a]ll human beings are born free and equal in dignity and rights*”⁸⁵. Consequently, equality among Chinese citizens should be seen as a constitutional guarantee and should be protected by the government.

The broad ‘equal protection clause’ that is Article 33 is reinforced by other more specific provisions⁸⁶. For example, Article 34 protects the right of all citizens to vote

⁷⁹ Article 4, Constitution of the People’s Republic of China, *supra* note 18.

⁸⁰ *Id.*

⁸¹ Article 33, Constitution of the People’s Republic of China, *supra* note 18.

⁸² Thomas E. Kellogg, *supra* note 32, at 24.

⁸³ Article 33, Constitution of the People’s Republic of China, *supra* note 18. Emphasis added.

⁸⁴ See Zhen-min Wang, *An Introduction to the Constitutional Law of China*, Chinese Law Program, China University of Political Science and Law, Beijing, 2005, at 5.

⁸⁵ Amnesty International, *supra* note 8, at 3.

⁸⁶ Thomas E. Kellogg, *supra* note 32, at 24.

regardless of their ethnic status, race, sex, religion, level of education, etc⁸⁷. Article 36 guarantees freedom of religion and ensures that no citizen should be victim of discrimination because of its religious belief⁸⁸.

In contrast, Article 42, where it is stipulated that every citizens have the right and the duty to work, does not expressly mention discrimination:

Citizens of the People's Republic of China have the right as well as the duty to work. Using various channels, the state creates conditions for employment, strengthens labour protection, improves working conditions and, on the basis of expanded production, increases remuneration for work and social benefits. Work is the glorious duty of every able-bodied citizen. All working people in state enterprises and in urban and rural economic collectives should perform their tasks with an attitude consonant with their status as masters of the country. The state promotes socialist labour emulation, and commends and rewards model and advanced workers. The state encourages citizens to take part in voluntary labour. The state provides necessary vocational training to citizens before they are employed.⁸⁹

Similarly, Article 46 stating that Chinese citizens have a duty to and a right to receive education is relatively quiet on discrimination. It simply says that the State should promote the moral, intellectual and physical development of young people⁹⁰.

Article 48 of the Constitution however affirms clearly the equality of women and men in the Chinese society and provides legal protection against employers tempted to discriminate based on gender:

Women in the People's Republic of China enjoy equal rights with men in all spheres of life, in political, economic, cultural, social and family life. The state protects the rights and interests of women, applies the principle of equal pay

⁸⁷ Article 34, Constitution of the People's Republic of China, *supra* note 18.

⁸⁸ Article 36, Constitution of the People's Republic of China, *supra* note 18. It reads as follow:

Article 36. Citizens of the People's Republic of China enjoy freedom of religious belief. No state organ, public organization or individual may compel citizens to believe in, or not to believe in, any religion; *nor may they discriminate against citizens who believe in, or do not believe in, any religion.* [...]

Emphasis added.

⁸⁹ Article 42, Constitution of the People's Republic of China, *supra* note 18.

⁹⁰ Article 46, Constitution of the People's Republic of China, *supra* note 18.

for equal work to men and women alike and trains and selects cadres from among women.⁹¹

Article 48 is fundamental, as important as the provisions addressing issues with ethnic groups.

If Chinese minorities and women enjoy equality as a constitutional right, citizens also have a sacred duty to maintain the nation and all ethnic groups united⁹². The duty to safeguard unity in the country is one of the fundamental duties enunciated in the Chapter Two of the Constitution that includes, among others, the duty to safeguard the security, honor and interests of the motherland, the duty to defend the country and resist aggression and the duty to pay taxes⁹³.

Finally, the State Council is the governmental entity in charge of directing and administering “*affairs concerning the ethnic groups and to safeguard the equal rights of minority ethnic groups*”⁹⁴. Section 4 below will analyze the potential role of the courts.

3.2. Specific laws addressing discrimination in employment

In addition to constitutional provisions, the Chinese government has enacted several specific laws regulating employment and expressly addressing discrimination. Among the most often cited by scholars are the *Labor Law*⁹⁵, the *Regulation of Labor Market Management*⁹⁶, the *Rules on the Administration of Human Resources Markets*⁹⁷, the *Regulation of Women’s Work Protection*⁹⁸, the *Law on Protection of Women’s Rights and*

⁹¹ Article 48, Constitution of the People’s Republic of China, *supra* note 18.

⁹² Article 52, Constitution of the People’s Republic of China, *supra* note 18.

⁹³ Article 52, 54, 55 and 56, Constitution of the People’s Republic of China, *supra* note 18.

⁹⁴ Article 89(11), Constitution of the People’s Republic of China, *supra* note 18.

⁹⁵ Labor Law of the People’s Republic of China, *supra* note 77.

⁹⁶ Issued on December 8, 2000. The Regulation of Labor Market Management, available online at <http://www.lawinfochina.com/law/display.asp?db=1&id=1766&keyword=labormarketregulation>.

⁹⁷ Ronald Brown, *supra* note 11, at 368.

⁹⁸ Issued on June 28, 1988. See Charles Chen and Jihong Wu, *supra* note 14, at 42.

*Interests*⁹⁹, the *Notice on Migrant Worker's Employment*¹⁰⁰, the *Law on the Prevention and Control of Infectious Diseases*¹⁰¹, the *Law on the Protection of Disabled Persons*¹⁰², the *Civil Service Law*¹⁰³ and the *Employment Promotion Law of the People's Republic of China*¹⁰⁴. The most important ones are examined below.

The *Labor Law of the People's Republic of China* is the premier legal text governing labor relations. The Labor Law was adopted on July 5, 1994 and entered into force in January 1, 1995. Article 1 defines the general goals of the law:

This Law is hereby formulated in accordance with the Constitution in order to protect the legitimate rights and interests of labourers, readjust labour relationship, establish and safeguard the labour system suiting the socialist market economy, and promote economic development and social progress.¹⁰⁵

Article 2 provides that the Labor Law applies to enterprises, individually-owned economic organizations, governmental agencies and labourers and Article 3 stipulates workers' general rights: to be employed on an equal basis, to choose occupations, to obtain remunerations for labour, to take rests, to have holidays and leaves, to receive labour safety and sanitation protection, to get training in professional skills, to enjoy social insurance and welfare treatment, and finally, to submit applications for settlement of labour disputes¹⁰⁶.

⁹⁹ Promulgated by the Standing Committee of the National People's Congress on April 3, 1992 and revised on August 28, 2005. See Ronald Brown, *supra* note 11, at 390.

¹⁰⁰ Ronald Brown, *supra* note 11, at 394.

¹⁰¹ *Id.*

¹⁰² Adopted at the 17th Meeting of the Standing Committee of the Seventh National People's Congress on December 28, 1990. See Eric G. Zhang, *Employment Of People With Disabilities: International Standards And Domestic Legislation And Practices In China*, 34 Syracuse J. Int'l L. & Com. 517 (2006-2007), at 543 and Ronald Brown, *supra* note 11, at 395.

¹⁰³ Ronald Brown, *supra* note 11, at 406.

¹⁰⁴ The Employment Promotion Law of the People's Republic of China, available online at <http://www.lawinfochina.com/law/display.asp?db=1&id=6382&keyword=EmploymentPromotionLaw>.

¹⁰⁵ Article 1, Labor Law of the People's Republic of China, *supra* note 77.

¹⁰⁶ Articles 2 and 3, Labor Law of the People's Republic of China, *supra* note 77.

Article 12 is the principal anti-discrimination clause in the Labor Law and reads as follow: “[l]abourers shall not be discriminated against in employment due to their nationality, race, sex, or religious belief”¹⁰⁷. It is worth noting that physical traits and health status, perhaps the most common grounds of employment discrimination, have not been included in this provision. Health status discrimination, at least in the public sector, has been tackled by the government with the *General Standards on Physical Examinations Relating to the Employment of Civil Servants* issued jointly by the Ministry of Personnel and the Ministry of Health on January 20, 2005¹⁰⁸. This set of regulations was drafted in 2004 in response to the hepatitis B litigation cases, especially the Zhang Xianzhu case. The regulation lists many diseases and allows carriers to be hired if the disease has not manifested severely itself, is not contagious and doesn’t alter the carrier’s capacities¹⁰⁹. However, the difficulty to force and monitor enforcement at the local level limits the *General Standards* reach¹¹⁰.

Gender-based discrimination, however, is expressly prohibited by Article 13 of the Labor Law stating that:

Women shall enjoy equal rights as men in employment. Sex shall not be used as a pretext for excluding women from employment during recruitment of workers unless the types of work or posts for which workers are being recruited are not suitable for women according to State regulations. Nor shall the standards of recruitment be raised when it comes to women.¹¹¹

¹⁰⁷ Articles 12, Labor Law of the People’s Republic of China, *supra* note 77.

¹⁰⁸ *Voices against Discrimination: An Update of Recent Cases and Developments*, China Law and Governance Review, available online at <http://www.chinareview.info/pages/case.htm>.

¹⁰⁹ Liang Chao, *Law Drafted To End Hep B Discrimination*, China Daily, August 11, 2004, available online at http://www.chinadaily.com.cn/english/doc/2004-08/11/content_364055.htm.

¹¹⁰ *Voices against Discrimination: An Update of Recent Cases and Developments*, *supra* note 107.

¹¹¹ Articles 13, Labor Law of the People’s Republic of China, *supra* note 77. Some exceptions are stipulated at Articles 59 to 63 prohibiting, for example, women to work in mines or during pregnancy if the work is of high physical intensity.

As noted above, specific regulations reaffirm and complement the protection given to women in the Labor Law¹¹².

People with disabilities and minorities are also vaguely addressed in the Labor Law under Article 14: “[a]ny special stipulations in laws and regulations about the employment of the disabled, minority people, and demobilized soldiers shall be observed”¹¹³. In fact, it mainly refers to the provisions included in the *Law on the Protection of Disabled Persons* that was amended and adopted at the 2nd Session of the Standing Committee of the 11th National People’s Congress on April 24, 2008¹¹⁴. With this law, the government made progress on the ground of protecting vulnerable groups, notably in promulgating special measures or affirmative actions in favor of them, notes Eric G. Zheng, an expert on social development in China¹¹⁵. Article 2 of this law provides a description of what should be considered as being a “disabled person”: “a person who suffers from the loss or abnormality of a certain organ or function, psychologically, physiologically or in human structure, and has lost all or in part the ability to normally carry out certain activities”¹¹⁶. Article 3 articulates a general principle of non-discrimination toward disabled people:

Disabled persons shall enjoy *equal rights* with other citizens in political, economic, cultural, social, family life and other aspects. *It shall be prohibited to discriminate against, insult and injure disabled persons and derogate the personal dignity of disabled persons through mass media or by other means.*¹¹⁷

Chapter IV on the *Law on the Protection of Disabled Persons* deals with employment of people with disabilities and includes several directives to governmental agencies to promote

¹¹² Among the pertinent regulations are the *Regulation of Women’s Work Protection* and the *Law on Protection of Women’s Rights and Interests*. See Charles Chen and Jihong Wu, *supra* note 14, at 42.

¹¹³ Articles 14, Labor Law of the People’s Republic of China, *supra* note 77.

¹¹⁴ Law of the People’s Republic of China on the Protection of Disabled Persons (2008), available online at <http://www.lawinfochina.com/law/displayModeTwo.asp?ID=7015&DB=1&keyword=>.

¹¹⁵ Eric G. Zhang, *supra* note 101, at 543.

¹¹⁶ Article 2, Law of the People’s Republic of China on the Protection of Disabled Persons, *supra* note 113.

¹¹⁷ Article 3, Law of the People’s Republic of China on the Protection of Disabled Persons, *supra* note 113.

the hiring and assistance of disabled. For instance, Article 33 stipulates that the State should adopt a “*pro rata employment arrangement system for disabled persons*” and Article 35 provides that “*the local People’s governments at all levels and the rural organizations at the grassroots level shall organize and support disabled persons in rural areas being engaged in planting, breeding, handicraft and other forms of production*”¹¹⁸.

Finally, Article 46 of the Labor Law enacts the principle of “equal pay for equal work” among all workers in China, regardless of their status or origin¹¹⁹.

Another legal instrument of great importance is the *Regulation of Labor Market Management*¹²⁰. This regulation applies to worker’s job application and recruitment activities by employers¹²¹. Article 11 is the key anti-discrimination provision and stipulates:

While hiring a person, the employer shall not refuse to hire or enhance hiring standard on the basis of gender, nationality, race and religion, except those provided by state laws concerning unsuitable types of work or positions.¹²²

Once again, discrimination based on physical attributes and health status is not expressly forbidden under this provision. Also, a major weakness of the Labor Market Regulation is that although its Chapter VI provides sanctions that can be imposed in some cases when employers breach their obligations, no sanction is imposed under this law if the employer violates Article 11 in discriminating among job applicants.

Lastly, in reaction to public pressure and in conformity with the foremost objective of maintaining stability, the Standing Committee of the Tenth National People’s Congress adopted the *Employment Promotion Law* in 2007¹²³. It entered into force on January 1,

¹¹⁸ Articles 33-35, Law of the People’s Republic of China on the Protection of Disabled Persons, *supra* note 113.

¹¹⁹ Article 3, Law of the People’s Republic of China on the Protection of Disabled Persons, *supra* note 113.

¹²⁰ The Regulation of Labor Market Management, *supra* note 96.

¹²¹ Article 2, The Regulation of Labor Market Management, *supra* note 96.

¹²² Article 11, The Regulation of Labor Market Management, *supra* note 96.

¹²³ The Employment Promotion Law of the People's Republic of China, *supra* note 103. *See also* Thomas E. Kellogg, *supra* note 32, at 35.

2008¹²⁴. The *Employment Promotion Law* is perhaps the most important anti-discrimination legal instrument ever adopted in China. It is a sort of compendium of all anti-discrimination provisions examined above and can be seen as a serious attempt to address and eliminate all forms of discrimination in labor. As Thomas E. Kellogg highlights, this law has been designed in consultation with the public and NGOs and offers workers equal protection whether they work in the public or private sectors¹²⁵.

Article 1 provides that the law is enacted to promote employment, positive interaction between economic development and increase of employment as well as to promote the harmony and stability of society¹²⁶. Article 3 forbids discrimination based on “*on factors such as ethnicity, race, gender, religious belief etc.*” for job seekers¹²⁷. It is interesting to note that the provision does not limit the grounds of discrimination considered illegal as previous laws did¹²⁸.

Chapter III of the *Employment Promotion Law* entitled “Fair Employment” includes several provisions that are very protective of the workers and seem to tackle forcefully labor discrimination. Article 25 stipulates that:

The people’s governments at all levels shall create an environment for fair employment, *eliminate employment discrimination* and formulate policies and take measures to support and aid the people who are difficult to get a job.¹²⁹

Article 26 provides that:

When an employer recruits employees, or when a job intermediary agency engages in job intermediary activities, it *shall provide workers with equal employment opportunities* and fair employment conditions and *shall not have any employment discrimination*.¹³⁰

¹²⁴ The Employment Promotion Law, *supra* note 103.

¹²⁵ Thomas E. Kellogg, *supra* note 32, at 35.

¹²⁶ Article 1, The Employment Promotion Law, *supra* note 103.

¹²⁷ Article 3, The Employment Promotion Law, *supra* note 103.

¹²⁸ Article 27, The Employment Promotion Law, *supra* note 103.

¹²⁹ Article 25, The Employment Promotion Law, *supra* note 103. Emphasis added.

¹³⁰ Article 26, The Employment Promotion Law, *supra* note 103. Emphasis added.

Article 27 reaffirms the equality of women and states that “[t]he state shall ensure that women enjoy labor rights equal to those of men”¹³¹. It also provides that no employment contract should contain clauses restricting women to from getting married or pregnant¹³². Article 28 confirms the equal status of all ethnic groups by stating that “[w]orkers of all ethnic groups enjoy equal labor rights” and even seems to promote employment of minorities: “[w]hen an employer recruits employees, it shall give appropriate consideration to workers of ethnic minorities”¹³³. Article 29 reinforces the *Law on the Protection of Disabled Persons* by stipulating that:

The state shall guarantee the employment rights of disabled persons. The people’s governments at all levels shall make an overall plan on the employment of disabled persons so as to create employment conditions for disabled persons. When an employer recruits employees, it *shall not discriminate disabled persons*.¹³⁴

Article 29, in addition to protect disabled people, promotes affirmative actions for them¹³⁵.

Article 30 bears great significance and is at the center of the movement against employment discrimination for people infected by hepatitis B or other diseases. It reads as follow:

When an employer recruits employees, it *shall not refuse to recruit any person under the excuse that he is a carrier of an infectious disease*. However, before a carrier of an infectious disease is confirmed upon medical test that he is cured or excluded from the possibility of spreading the disease, he shall not take up the jobs, in which it is likely to spread the disease and which are prohibited in laws and administrative regulations and by the health administrative department of the State Council.¹³⁶

Last pertinent provision of Chapter III is Article 31 that clearly protects migrant workers:

¹³¹ *Id.*

¹³² Article 28, The Employment Promotion Law, *supra* note 103.

¹³³ *Id.*

¹³⁴ Article 29, The Employment Promotion Law, *supra* note 103. Emphasis added.

¹³⁵ *Id.*

¹³⁶ Article 30, The Employment Promotion Law, *supra* note 103. Emphasis added.

Rural workers who go to cities in search of employment *shall enjoy labor rights equal to those of urban workers. It is prohibited to set discriminatory restrictions against rural workers seeking employment in cities*¹³⁷.

One very unique feature of this law is its relatively straightforward “enforceability”. Article 62 stipulates that “[f]or anyone who violates this Law due to employment discrimination, workers may lodge a lawsuit in the people’s court”¹³⁸. This is an incredible step forward for workers in China. Finally, Article 60 also provides that the Labor Administrative Department “shall supervise and inspect the implementation of the law”¹³⁹.

Other laws, regulations, standards and policies exist and may apply to labor discrimination. However, the pages above surveyed the most referred to and important anti-discrimination legal instruments.

4. ENFORCEMENT OF NON-DISCRIMINATION PROVISIONS IN COURTS

Discrimination litigation is relatively new in China. One factor explaining the underdevelopment of litigation is the nature and the role of the Constitution in the Chinese political and legal system. The Constitution has generally widely been seen as a political document rather than a binding legal text¹⁴⁰. The Constitution that enshrines the principle of equality does not have the same function constitutional texts play in the West. It is normally viewed as being an enunciation of ideals and the formulation of the government’s philosophy¹⁴¹. In fact, Chinese courts have a long tradition of not directly applying the Constitution to a case and not citing it as a source of applicable law¹⁴². Courts have

¹³⁷ Article 31, The Employment Promotion Law, *supra* note 103. Emphasis added.

¹³⁸ Article 62, The Employment Promotion Law, *supra* note 103.

¹³⁹ Article 60, The Employment Promotion Law, *supra* note 103.

¹⁴⁰ Thomas E. Kellogg, *supra* note 32, at 2-3.

¹⁴¹ *Id.*

¹⁴² *Id.*, at 17.

historically shown an “*extreme reluctance to interpret the Constitution to find a particular law or government enactment in violation of the Constitution*”¹⁴³.

In an article on discrimination litigation in China published by the Columbia Human Rights Law Review, the author provides a harsh description of Chinese courts that summarizes legal scholars’ general criticism toward the judicial branch:

Chinese courts do not have the power and authority accorded to courts in the West; this lack of autonomy diminishes their ability to protect the rights of individuals. They are, in essence, bureaucratic organs performing the types of tasks other Chinese bureaucracies do, such as helping with tax collection drives or birth control campaigns. Courts do not, in practice, operate separately from, nor are they superior to, the rest of the government. They are not required to hear every case that comes before them, and the concerns of party leaders often determine whether a trial may go forward. Therefore, a case involving the rights of [people victim of discrimination] might not be heard if its outcome could conceivably conflict with Party interests. If it were heard, the judge would be required to balance the Party’s views on the matter with the existing law when meting out a decision.¹⁴⁴

Professor Upham, in his famous review of Zhu Suli’s book, highlights that the role of judges is quite different in China and writes that “*Chinese judges operate within a bureaucracy that significantly constrains their freedom of action*”¹⁴⁵. Professor Rendall Peerenboom further notes that according to Article 128 of the Constitution, courts are administratively and institutionally accountable to the corresponding level of people’s congresses that created them¹⁴⁶. Yet, Peerenboom also points to some slight attempts to reinforce the judiciary’s independence (or latitude), notably through the Judges Law enacted in 1995¹⁴⁷. Professor Xin provides a nuanced view in “*The Judiciary Pushes Back: Law, Power and Politics in Chinese Courts*” where he acknowledges the perceived influence of the government on the judiciary:

¹⁴³ Xun Zeng, *supra* note 10, at 1005.

¹⁴⁴ Orianne Yin Dutka, *Turning A Weapon Into A Shield: Using The Law To Protect People Living With HIV/AIDS In China From Discrimination*, 38 Colum. Hum. Rts. L. Rev. 421 (2006-2007), at 453.

¹⁴⁵ Frank K. Upham, *Who Will Find The Defendant If He Stays With His Sheep? Justice In Rural China*, 114 Yale L. J. 1675 (2005), at 1681.

¹⁴⁶ Randall Peerenboom, *supra* note 1, at 280.

¹⁴⁷ *Id.*

“the courts are often portrayed as little more than a loyal subordinate of the party-state that carefully carries out assigned tasks; they have virtually no will or capacity to resist the party-state’s interference”¹⁴⁸. However, he also argues that the judiciary is not simply and purely a marionette of the government:

The courts are not simply a passive instrument of the governments and the Party, yielding to various external forces which have been imposed on them. Under the seemingly peaceful surface of iron control exist dynamic turbulences of conflict, repression, resistance, competition, compromise, and cooperation in which law, power, and politics interact.¹⁴⁹

Generally speaking, it is fair to say that the non-recourse to litigation when faced with discrimination comes largely from the perceived inefficiency of the courts combined with the technical difficulties related to arguing and enforcing constitutional rights in China – the Constitution having been for long one of the sole texts providing general anti-discrimination clauses.

Some scholars, however, have alleged that the role of the courts in ensuring constitutional rights is gradually changing¹⁵⁰. Thomas E. Kellogg underlines that scholars, activists, lawyers and judges are challenging the status quo and push for courts to take a more active role in interpreting and applying the Constitution. The relevant jurisprudence, although relatively limited, evidences a “subtle shift”¹⁵¹ in the behaviour of the courts and the beginning of what could be called the “judicialization of the Constitution”¹⁵².

¹⁴⁸ Xin He, *The Judiciary Pushes Back: Law, Power and Politics in Chinese Courts*, first page (distributed in class).

¹⁴⁹ *Id.*, at 20.

¹⁵⁰ See e.g. Keith Hand, *Can Citizens Vitalize China’s Constitution?*, Legal Reform, at 15 (distributed in class) and Thomas E. Kellogg, *supra* note 32, at 4.

¹⁵¹ Keith Hand, *supra* note 164, at 15.

¹⁵² Thomas E. Kellogg, *supra* note 32, at 5.

As highlighted above, the first lawsuit in which the constitutional right to equality in labor was argued is the Jiang Tao case in 2001¹⁵³. Even if Mr. Jiang did not have full satisfaction and was not indemnified, it prompted a movement¹⁵⁴. The famous Qi Yuling case was also historic and had an important impact on the development of constitutional litigation¹⁵⁵. It marked, in some ways, the beginning of a steady push for broader judicial review and enforcement of constitutional rights by courts¹⁵⁶. *Qi Yuling v. Chen Xiaoqi et al.* is the story of a 28-year-old woman living in the province of Shandong, working in a factory, who sued Chen Xiaoqi, also 28 years old, Chen's father, the Jining Business School, the Eighth Middle School of Tengzhou and the Education Committee of Tengzhou for violation of her rights to her name and education¹⁵⁷. The plaintiff, Qi Yuling, accused Chen to have stolen her identity by intercepting and using a letter informing her of her success in a qualification examination and also formulated a request for compensation:

After taking the unified entrance exam, the plaintiff was accepted by Jining Business School (a defendant) as a new student in finance and accounting (to be trained by the school on behalf of another agency, *weipei*) in 1990 according to her own preference. Because of the fraudulent act committed by all the defendants named in this case, Chen Xiaoqi was able to get into Jining Business School using the plaintiff's name. It violated the plaintiff's right to her own name and her right to education. The plaintiff requests that such infringement be stopped immediately. She also demands an apology from all defendants. In addition, she also demands 160,000 yuan for economic losses.¹⁵⁸

As point out Thomas E. Kellogg and Keith Hand, what was significant in this case is that the Supreme People's Court indicated that “*the constitution could be directly applied in ordinary*

¹⁵³ See *infra*, at 12.

¹⁵⁴ Xun Zeng, *supra* note 10, at 992.

¹⁵⁵ Thomas E Kellogg and Keith Hand, *China Crawls Slowly Towards Judicial Reform* (Asia Times, January 25, 2008), available online at <http://www.atimes.com/atimes/China/JA25Ad01.html>.

¹⁵⁶ Thomas E. Kellogg, *supra* note 32, at 5.

¹⁵⁷ *Case 1. Qi Yuling v. Chen Xiaoqi et al., Opinion by the Higher People's Court of Shandong Province, Chinese Education and Society*, vol. 39, No. 4 (July/August 2006), at 60 (also available online at <http://mesharpe.metapress.com/media/ecxx5jxttm2rn1mg9bt7/contributions/8/h/0/7/8h07jtr608310307.pdf>).

¹⁵⁸ *Id.*, at 61.

civil litigation”¹⁵⁹. In the end, the courts decided in favour of Qi. On August 23 of 2001, the Higher People’s Court of Shandong, based on Article 46 of the Constitution, ruled against the defendants and concluded the following:

In conclusion, the lower court was correct in ruling against appellees Chen Xiaoqi et al. for *violating the right to her name* of the appellant Qi Yuling and held them civilly liable for such damages. However, in the lower court decision it was ruled that Qi Yuling gave up her right to education. This was found to be lacking any factual evidence. Qi Yuling’s *claim that various appellees are liable for violating her right to education is upheld* by this court.¹⁶⁰

Kellogg and Hand note that even if the court has been criticized for the outcome of this case, legal actors generally saw the Qi decision as “*the first step in a process of bringing meaningful judicial review to China*” and it provoked a horde of commentaries and discussions on constitutional rights enforcement¹⁶¹. It is important to know however that in late 2008, the Supreme People’s Court has withdrawn, and therefore cancelled, its Qi Yuling interpretation¹⁶². This renders the case “ineffective” and inapplicable in future judicial decisions. Donald C. Clarke, professor at George Washington University School of Law says that “*this notice really just confirms what was already pretty obvious - that Qi Yuling was an outlier, not a trendsetter*”¹⁶³.

After the Jiang Tao and Qi Yuling cases came the Zhou and Zhang cases that gained hepatitis B discrimination the national spotlight¹⁶⁴. The Zhou and Zhang affairs rallied public opinion and, as the NGO Human Rights in China puts it, really exerted pressure on the

¹⁵⁹ Thomas E Kellogg and Keith Hand, *supra* note 151.

¹⁶⁰ *Case 1. Qi Yuling v. Chen Xiaoqi et al.*, *supra* note 153, at 74. Emphasis added.

¹⁶¹ Thomas E Kellogg and Keith Hand, *supra* note 151.

¹⁶² Donald C. Clarke, *Supreme People's Court Withdraws Qi Yuling Interpretation* (Chinese Law Prof Blog, Januray 12, 2009), available online at http://lawprofessors.typepad.com/china_law_prof_blog/2009/01/supreme-peoples.html (this blog on Chinese legal developments is edited by Professor Donald C. Clarke of the George Washington University School of Law).

¹⁶³ Donald C. Clarke, *supra* note 162. (this blog is edited by Professor Clarke of the George Washington University School of Law).

¹⁶⁴ *See infra*, at 9.

government to bring legal and administrative changes – changes that resulted from the adoption of new laws and standards¹⁶⁵. As reported by Professor Kellogg, more litigation cases followed and more than twenty hepatitis B discrimination lawsuits have been filed since 2002, with some of the plaintiffs finding compensation such as being reinstated in their job¹⁶⁶.

Keith Hand, senior fellow at Yale's China Law Center, talks about “*significant steps in China's constitutional development*”, the gradual legitimatization of the concept of constitutional compliance and the acknowledgement of the citizens' right to challenge legal provisions on constitutional ground¹⁶⁷. But force is to recognize that even today, constitutional litigation is far from being the utmost protection against discrimination citizens can rely on.

While constitutional enforcement is evolving and developing, victims of illegal discrimination might have a chance to succeed in bringing litigation based on anti-discrimination clauses provided in specific laws, supported by constitutional principles. For example, in addition to banning most forms of discrimination, the Employment Promotion Law examined above provides that workers can file a lawsuit in the People's court¹⁶⁸. Litigation based on specific laws should be considered as the best means to fight discrimination, mainly because it appears to be more easily enforceable and because the constitutional right of equality is also enshrined in laws like the Labor Law and the Employment Promotion Law. Nonetheless, three key remaining issues create a significant barrier for discrimination litigation: the limited scope of possible judicial review¹⁶⁹, the lack

¹⁶⁵ Bonny Ling and Wing Lam, *supra* note 46, at 71.

¹⁶⁶ Thomas E. Kellogg, *supra* note 32, at 24.

¹⁶⁷ Keith Hand, *supra* note 164, at 15.

¹⁶⁸ Article 62, The Employment Promotion Law, *supra* note 103.

¹⁶⁹ *See infra*, at 12, the analysis of the ruling and the court's reasoning in the Jiang Tao case. *See also* Xin He, *Administrative Law as a Mechanism for Political Control in Contemporary China*, in DOWDLE and BALMES (eds.), *CONSTITUTIONALISM AND JUDICIAL POWER IN CHINA* (Palgrave) (2009), at 10 (forthcoming).

of any clear definition of discrimination¹⁷⁰ and the troubles of enforceability at the local level¹⁷¹.

5. CONCLUSION

Undoubtedly, discrimination is widespread in China and exists in all spheres of the society, not only in labor but also in education¹⁷². Yet, it is important to underline the progress made by the government in advancing the interests of millions of victims of discrimination in the workplace – whether they are not hired because they carry a non-contagious virus, because they are females and not males, because they are coming from the countryside or simply because they are not tall enough. The progress is slow, very slow, but the process of change has manifestly begun in the early 2000s.

Theoretically, the government has provided adequate legal protection to protect minorities and others from employment discrimination. However, in practice, the reforms undertaken will not have an immediate effect and will not easily eliminate discrimination. The new laws and the apparent openness shown by the courts are only one half of the equation. What is important now is not really to expand the protective legal framework already existent but to work on ensuring enforcement at the national, regional and local level. What is also crucial is to empower citizens and incite them to assert and defend their rights through complaints, mediation and litigation. The Jiang, Qi and Zhang cases also emphasized the important role media can play in defending people's right to equality. Finally, if China is to become the great superpower it is supposed to be, one might expect the government to progressively develop a more responsive mechanism for judicial review along with, arguably, a needed judicialization of the Constitution.

¹⁷⁰ Xun Zeng, *supra* note 10, at 1007.

¹⁷¹ Orianne Yin Dutka, *supra* note 144, at 454.

¹⁷² See e.g. Xia Chunli, *Migrant Children And The Right To Compulsory Education In China*, 7 Asia-Pac. J. on Hum. Rts. & L. 29 (2006).

Political goals and ambitions for China suggest that the government may gradually further encourage enforcement of non-discrimination provisions and give more latitude to courts and more weight to the Constitution. The primary concern of the Party and the government is stability. Maintaining a peaceful and stable growth will increasingly push the government to move toward the rule of law and address the issue of enforcement. It seems clear that every actors of the Chinese society can benefit from eliminating discrimination – from political, legal and economic perspectives. To paraphrase professor Barry Sautman’s paper on affirmative action and ethnic minorities in China, minorities and the State have a common interest in the enforcement of anti-discrimination provisions and in the improvement of minorities’ economic situation: for minorities, it means a better life and a stake in the country’s fantastic economic growth; for the State, it means the bulwark of stability¹⁷³.

In the *long march toward the rule of law*, enacting appropriate laws and tackling discrimination represent a big step forward¹⁷⁴. However, in the pursuit of a modern legal system as defined by Marc Gallanter¹⁷⁵, China still have to seriously address the constitutional and institutional deficiencies highlighted by the difficulties related to the enforcement of constitutional rights.

¹⁷³ Barry Sautman, *Affirmative Action, Ethnic Minorities And China’s Universities*, 7 *Pac. Rim. L. & Pol’y J.* 77 (1998), at 109.

¹⁷⁴ Referring to the title of Peerenboom’s book, Randall Peerenboom, *supra* note 1.

¹⁷⁵ Marc Gallanter, *supra* note 2.