



# **UNIVERSIDAD DE LEÓN**

**DEPARTAMENTO DE DERECHO PRIVADO Y DE LA EMPRESA**

**IGUALDAD Y DISCRIMINACIÓN EN EL EMPLEO EN EUROPA  
Y CHINA**

**EQUALITY AND DISCRIMINATION IN EMPLOYMENT IN  
EUROPE AND CHINA**

**Xinwen Zhang  
León 2014**



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**EQUALITY AND DISCRIMINATION IN EMPLOYMENT IN  
EUROPE AND CHINA**

**TESIS DOCTORAL**

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## Part 1 Equality and non-discrimination

Abstract:

Since Human beings entered into civilized society, they have never changed their beliefs of pursuing **equality**. Their pursuit of equality ranges from equality among parts of people to everyone, from the natural state of equality to the benignant social differences, the **relevant equality**. The pursuit of **equal rights** has been fully developed after breaking the cage of feudal autocracy and successfully overcoming the harassments of **discrimination**. Nations over the world and all kinds of national organization has never stopped their **anti-discrimination** movements. Equality and human rights are no longer the proclamation used to motivate people or the far away ideal dreams. It now becomes the moral norms and legal regulations that deeply rooted in people's heart. So far, we can follow the surviving rules, preserve and ameliorate our equal rights in employment. We can have a tit for tat struggle against the discrimination in employment.

“**Employment discrimination**” is defined: “Any distinction, exclusion or preference made on the basis of race, color, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation...”<sup>1</sup>, and divided into: **direct discrimination**, **indirect discrimination**, **harassment** and **instruction to discrimination**, etc..

In order to overcome all kinds of complicated discrimination, most countries still take some **position action** to change the situation that some special groups at a

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<sup>1</sup> Art.1 of *Convention No. 111 Discrimination (Employment and Occupation) Convention*, 1958.

disadvantage for long-term, in addition to establish the conventional laws and regulations under the principle of equality. In order to better help workers to have a relief through the legal channels; most countries even lay the **burden of proof** to employers to transfer most the responsibility of the employers. **Part 1** gives a brief introduction of the related terms of discrimination in employment.

## 1. An overview of equality and discrimination

### 1.1 Equality---A game between natural rules and political aspiration

The great nature endows us equality, however, we can't strip this word from a strong sense of political that exclusively existed in human society, and even see it as a reflection of civilization of human society and the level of politics.

The initial concept of equality is embodied in the adjustment of unequal social relations. Some philosophers putted forward and described it:

According to the records of Aristotle, the concept of equality was reflected in the laws enacted by Solon. Aristotle studied the principle of equality systematically. He said: "that a state should be ordered, simply and wholly, according to either kind of equality is not a good thing; the proof is the fact that such of government never last"<sup>2</sup>. It was usually called the formal principle of equality. Aristotle have told us that the equality we want is a must of political system, however, this system denies the absolute equality.

Cicero started from the principle of natural law, believing that: "the true law is the correct rule, which is consistent with nature and applies to all people. It's stable and

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<sup>2</sup> Aristotle, *The Politics of Aristotle*, translated by Benjamin Jowett, Oxford, at Clarendon Press, 1921, p. 109.

permanent”<sup>3</sup>. “Indeed there is nothing better than freedom, but if freedom is not equal for everyone, then freedom would not exist”<sup>4</sup>. Based on the concept of equality, Romans enacted the *Roman Law*. However, influenced by the level of human civilization and human cognition at that time, the Roman law was an unequal law from today’s perspective. It was divided into natural law, civil law, and the law of peoples. Romans denied the equal rights to women, slaves and foreigners. Therefore, it is different from what people say now that everyone is equal.

After that, with the development of human society, the sprout of capitalism has broken through of the feudal monarchy consciousness barriers. As a result, it need more room for the development of freedom and equality.

So enlightenment thinkers took equality seriously and drew the conclusion from the natural law: all men are created equal, which is an inherent birthright. Spinoza believed that: “thus all men remain as they were in the nature, equals”<sup>5</sup>. Hobbes pointed out that, “from equality proceeds diffidence from this equality of ability, ariseth equality of hope in the attaining of our Ends”<sup>6</sup>.

Locke believed that, “everybody was entitled to the equal right to life, liberty, property, and the right to punish criminals. Everyone is equal before laws”<sup>7</sup>. “A state also of equality, wherein all the power and jurisdiction is reciprocal, no one having more than another; there being nothing more evident, than that creatures of the same species

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<sup>3</sup> Cicero, *On the Republic of law*, translated by Wang Huansheng, China University of Political Science Press, 1997, p. 120.

<sup>4</sup> Cicero, *On the Republic of law*, translated by Wang Huansheng, China University of Political Science Press, 1997, p. 44.

<sup>5</sup> Baruch Spinoza, *A Theologico-Political Treatise*, Forgotten Books Press, 2008, p. 212.

<sup>6</sup> Thomas Hobbes, *Leviathan*, produced by Edward White, Winn Road, M Courteray, project Gatenberg eBook.

<sup>7</sup> John Locke, *Second Treatise of Government*, C.B. Malpherson Press, 1980, p. 8.

and rank, promiscuously born to all the same advantages of nature, and the use of the same faculties, should also be equal one amongst another without subordination or subjection, unless the lord and master of them all should, by any manifest declaration of his will, set one above another, and confer on him, by an evident and clear appointment, an undoubted right to dominion and sovereignty”<sup>8</sup>.

Rousseau pointed out that, “from whatever side we approach our principle, we reach the same conclusion, that the social compact sets up among the citizens an equality of such a kind, that they all bind themselves to observe the same conditions and should therefore all enjoy the same rights”<sup>9</sup>. Rousseau attached importance to the function of achieving equality through laws. “It is precisely because the force of circumstances tends continually to destroy equality that the force of legislation should always tend to its maintenance”<sup>10</sup>.

Even the Enlightenment thinker’s understanding with equality has its own age limitations, yet it was influenced by the Enlightenment thinkers that the concepts and theories of equality were gradually approved by people. And then they evolved as equal rights and declared as his universal human rights.

History has never stopped its step to go forward. And human beings can always continuously open up new structures of civilization based upon the summarization of the forerunners’ experience. In 1775, the world first large-scale war of colonials fighting for national independence and freedom broke out---the Independence War of America. In 1776, Jefferson drafted the “*Declaration of Independence*”, which clearly states: “We

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<sup>8</sup> John Locke, *Second Treatise of Government*, C.B. Malpherson Press, 1980, p. 82.

<sup>9</sup> Jean Jacques Rousseau, *The Social Contract*, translated by G.D.H.Colo, rendered into HTML and text by Joh Road of Constitution Society, p. 33.

<sup>10</sup> Jean Jacques Rousseau, *The Social Contract*, translated by G.D.H.Colo, rendered into HTML and text by John Road of Constitution Society, p. 75.

hold these truths to be self-evident: that all men are created equal, endowed by their Creator with certain inalienable rights, including the right to life, liberty and the pursuit of Happiness. That to secure these rights, people in their midst to establish a government, the Government's legitimate rights, is granted by the consent of the governed..." The "*Declaration of Independence*", had been separated, highly generalized, and refined Locke and others' thoughts the essence from the lack of convincing arguments, in order to make it catchy and widely spread. From then on, a lot of warriors have had unremitting efforts on equal human rights, so that the ideal theory can be turned into reality that is establishing government on the basis of natural rights and democracy. The revolution has moved ahead under the support of a faraway but holy faith.

Moreover, we can see that Jefferson used "create" not "born" in "all men are created equal". Maybe because "born" means that due to the influence of family, environment, not everyone can be equal, however, "create" reflects that sense of equality. The "equal" in the Declaration of Independence means the equality on the aspects of anti-feudalism and social ranks, in other words it refers that everyone is equal of natural rights<sup>11</sup>.

To sum up, "all men are created equal" is a gift from the nature. It is a non-transferable, inalienable right. This equal right is approved by morality and protected by laws. We have to take it for granted that as human beings, we are equal. This is equality in human bodies, in self-esteem and in spirit as well. No matter you are pretty or plain-looking, you are equally withstood the test of time; No matter you are a president or a doorkeeper, you should be equally respected; No matter you are an aristocrat or a poor, you are all equally doom to go to the cemetery one day.

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<sup>11</sup> Zhantai Keke, *Meaning and Source of Independent Spirit Referred in "Declaration of Independence"*, [http://blog.sina.com.cn/s/blog\\_4bb3b6d0010006ur.html](http://blog.sina.com.cn/s/blog_4bb3b6d0010006ur.html)

*The Encyclopedia on Chinese Human Rights* defines equality as “everyone is treated equality in terms of personal dignity, and enjoys the fair distribution of rights”<sup>12</sup>. The equality discussed above is in the conception of human’s essential characteristics, and that is the equality under natural state. It is also regarded as one of the basic moral values of human rights.

But human society is a political society, a society with differences. After equally be created, everyone are endowed with difference characters by society, for solely rely on the idea of equal human rights can’t bring the equality in daily life.

As the first document that clearly expressed the principle of equality *Declaration of Human Rights* (1789) put its first requirement as: “Men are born and remain free and equal in rights. Social distinctions may be founded only upon the general good”<sup>13</sup>. The *Declaration of Independence* has not only shows the equality of human rights but also shows the differences existed in society, and it also briefly shows the criteria of social differences.

## 1.2 Discrimination---- A rational limitation and defect

From barbarism to civilization, Human beings have been using their special rationality to understand and transform the world, and at the mean time, they have been also continuously getting to know themselves and constantly have self reflection. However, this general rationality has its own limitations and defects. People are tends to be decisive and no one can realize the absolute lofty and perfection. These defects and limitations would be revealed through all kinds of hostile, unhealthy, unjust social relationships. Discrimination is a part of it.

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<sup>12</sup> Wang Jiafu, Liu Hainian, *Encyclopedia of human rights in China*, Encyclopedia of China Press, 1998, p. 434.

<sup>13</sup> Art. 1 of *Declaration of Human Rights* (1789).



From a broad sense, discrimination can be concluded as a personal relation just the way equality has been defined. It is a person to person attitude. " *Blackwell Encyclopedia of Political Thought*" has defined discrimination as: "From the broadest sense, this word (discrimination) is a feeling towards differences, differential and different treatment"<sup>14</sup>.

Although the innate human rights have been commonly accepted, yet people still have a lot different characters, no matter from the aspect of material basis or personal traits or ideology, due to the changes of exterior factors and environment. All of these changes have influenced our judgment and criterion towards things and people. Once we ourselves are critics, we have made some comments with certain kinds of personal affection and even been influenced by ideology. Thus, it is very hard to make a just judgment towards others or towards other countries.

In short, to put it simply, discrimination is an unequal treatment. That means there is prejudice when you judging somebody else. Of course, in reality, discrimination is trend to be a psychological state or it is a description of a special scenario but it is not an appropriate description. This thesis considers discrimination in legal sense or in text should be a legal term. It refers that is someone or a certain group of people has undergone discrimination due to their sex, ethnicity and nationality, Genetic characteristics, religion, disability, age, sexual orientation and other features.

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<sup>14</sup> David Miller, Vernon Bogdanor, *Blackwell Encyclopedia of Political Thought*, translated by Deng Zhenglai, China University of Political Science and Law Press, 2002, Beijing, p. 204.

## 2. Discrimination in the legal performance and anti-discrimination process

### 2.1 Right of equality, all is equal before the law and non-discrimination

Right of equality, as a legal right was first appeared in *Virginia Declaration of Rights* which came into being in American war of independence in 1770, of which art. 1 provides: “that all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety”.

This provision is summarized by the *Declaration of independence* 6 weeks later as: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that they are among these are life, liberty and the pursuit of happiness”.

In the previous text, we made a simple analysis of *the Declaration of Independence*. While we want to emphasis more on the real meaning of equality, which is the legal right that is non-transferable and everyone should have.

In 1789, the first constitutional document, *Declaration of the Rights of Man and of the Citizen* (1789) in France history was enacted, of which art. 1 provides: “Men are born and remain free and equal in rights. Social distinctions may be founded only upon the general good”. The subsequent art. 3 to art. 11 and the art. 13 provide all specific equal rights, especially in the provisions of art. 6: “Law is the expression of the general will. Every citizen has a right to participate personally, or through his representative, in its foundation. It must be the same for all, whether it protects or punishes. All citizens,

being equal in the eyes of the law, are equally eligible to all dignities and to all public positions and occupations, according to their abilities, and without distinction except that of their virtues and talents”.

The *Declaration of the Rights of Man and of the Citizen* was then loaded in the first constitution of the French Revolution (1791), which was generally accepted by all national constitutions. Thus, the equal right has become into a real constitutional right. From the early equal right legislations, we can see that they first provide that the right is equal, and then provide all specific rights. Therefore, the equal right is on first place of basic right system, which is a more fundamental right. The generation of equal right, as one of the important outcomes of the bourgeois revolution, plays a very important role on the establishment of human democracy<sup>15</sup>.

The equal rights were included into the scope of the Constitution in all of the following national legislations, which was considered as a fundamental human right. Almost all States laws unanimously regard it as the basic principle: “all is equal before the law”<sup>16</sup>.

In according to *Universal of Declaration of Human Right*, States’ Constitutions, regional legals etc., content of “all is equal before the law” can be generalized. It includes three aspects:

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<sup>15</sup> Pierre Lelrou: *On Equality*, translated by Wang Yundao, Commercial Press, 1988, p. 244: “if we want to form the foundation of political rights, every one should have the equal political rights; before this, there were no rights at all”. “The End of Evolution of history, No matter how equality is disorganized and lack of content, it is always the law of souls, and the law of law, and it also a legal right and the sole legal right”.

<sup>16</sup> Art. 7 of *Universal of Declaration of Human Right*.

1. Every citizen, regardless of nationality, race, sex, occupation, family background, religious belief, education, property status, and residence, is entitled to the rights and at the same time perform the duties prescribed by the Constitution and other laws.

2. All citizens' legitimate rights and interests are equally protected. Any violations shall be investigated according to the law. Any criminals are not allowed at large.

3. The law does not allow any citizen to enjoy the privilege outside the regulations of laws. No citizen shall compel others to bear the obligations or to punish others outside the law. In other words, we are equal within the scope of the law. The law should be applied equally. When our rights are violated, we are entitled to resort the protection of laws equally. It's not hard to find out that the equality applied above is based on laws, namely, everything prescribed by legal rules must be equal.

The concept of non-discrimination principle is very broad, which is roughly the same with equality. Non-discrimination and equality are prescribed by both domestic and international laws and are closely linked. Besides, both of the two principles may have their formal aspect and substantive aspect. The former principle refers to that all people enjoy the same treatment based on the law; the latter one refers to the equal distribution of rights and interests in a specific society<sup>17</sup>.

Their difference lies in that "equality" emphasizes the protection of human rights and freedom from the angle of positive and "doing something" attitude; while "non-discrimination" or prohibition of discrimination calls for the protection of all human rights and fundamental freedom from the angle of negative and "doing nothing" attitude.

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<sup>17</sup> Zhu Xiaoqing, *The Principle of Equality and No-discrimination in the Treaty of European Human Right*, 26/03/2007, <http://www.chinalawedu.com/news/15300/157/2007/3/li14961245301623700242-0.Htm>, p.1.

With the development of society, all kinds of conflicts have emerged. The sole equal right has been gradually losing its practical significance, as a declarative principle. No matter the sentence that “all is equal in legal performance” or the comparatively detailed non-discrimination principles, they all sound like declarative clauses, yet they only shows our minimum request for equality and this request can’t give us the sense of security. As a result, it is natural, to transfer this dull, empty principle into a concert relief together with specific provisions of different ways. As for the discriminations in different areas, there should be some specific provisions with some relevant laws and regulations.

All States laws which provide the equal rights simply have developed to achieve equal rights through anti-discrimination. The manifestation of the equal rights in modern society is equal opportunities and equal treatments, which requires first that every one can get equal accesses to employment opportunities in same situation or the similar circumstances in the employments, and then are treated equally after getting the job opportunities.

## **2.2 Generation and development of international anti-discrimination campaign**

Racism and racial discrimination were the first forms of discrimination that preoccupied the international community<sup>18</sup> and the form of discrimination that first galvanized the international community<sup>19</sup>. Since racial discrimination has been causing injuries greater than any other forms of discrimination, the bottom line of the global society was firstly shook by it. The Slavery Convention was passed by the League of Nations in 1926, which further opened the curtain of anti-discrimination activities in the

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<sup>18</sup> International Labor Conference 91st Session 2003 Report I (B), *Time for Equality at Work Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*, p. 8.

<sup>19</sup> International Labor Conference 91st Session 2003 Report I (B), *Time for Equality at Work Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*, p.x.

global society. As the colonial era approached its end, concern emerged with respect to the use of forced labor for ideological reasons or as a means of racial, social, national or religious discrimination<sup>20</sup>. It was only until the Second World War that various international organizations, regions and nations began to truly bring anti-discrimination into laws and regulations in explicit statements.

Gender discrimination is regarded as the second form of discrimination that has been attracting close attention from the global society. During the Second World War, a large number of women entered the labor market because the number of men involved in wars boosted. As a result of the disastrous and extensive death of men and the development of women's liberty movements during that period, there's a tendency that women played an increasingly important role in the labor market, and women were no longer substitutes while men were absent from the labor market. However, women who just entered the labor market were in a vulnerable status due to various reasons, the discrimination they received also affected the recovery and development of our social economy. Therefore, discrimination against women began to attract a wide range of attention from the global society, and relevant anti-discrimination contents were found in different legal documents in specific terms.

Age discrimination has also been attracting great attention from the global society with the increasing degree of aging. As age will indeed have certain influence on individuals' abilities, especially on the seniors, who are often regarded as the weak physically and intellectually, age discrimination has not received enough attention for a long time and has even been considered as natural. It was until 1969 when Robert N. Butler suggested that age discrimination should be concluded into the same mode as

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<sup>20</sup> International Labor Conference 91st Session 2003 Report I (B), *Time for Equality at Work Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*, p. 8.

racial discrimination and gender discrimination.

Disability discrimination has not received much attention from the global society until 1980s. Although the *American Civilian Vocational Rehabilitation Act*, the first law on the disabled's rights and interests in the world, was formulated in 1920, the concerns about the disabled were firstly focused on their rehabilitation and social welfare. Ever since 1980s, the United Nations and the International Labor Organization began to forbid disability discrimination. Anti-discrimination contents were brought into the European and American common law system and civil law countries in 1990s.

With the development in social economy, politics and culture, the civilized degree of human beings has been improving, so do the protection different groups receive. The global society pays close attention to the form of traditional discrimination, health discrimination and sexual orientation discrimination as well.

With the development of international human rights movements, anti-discrimination campaign has also made the significant progress, which undergoes the following processes:

1. At first only constitutional documents include the statements about anti-discrimination, and then many laws, regulations and directives are specifically made to restrain discrimination.
2. It extends from the human rights to all fields including social, economic and cultural fields and so on.
3. From the statements which are against the direct and blatant discrimination to the statements which are against indirect and hidden discrimination, and then to those that include the harassment and instruction to discriminate against persons.

4. From the statements which require that men and women get equal pay for equal work to replace “equal work” with “equal work and work of equal value”.

5. The statements which require equal pay simply are replaced by those that require to get equal rights in working life including job opportunities, job training, promotion and labor insurance and so on.

6. From sole equal payment to equal opportunity and equal payment.

7. From the single request of anti-discrimination to the demand of share social responsibilities by different social groups.

8. Stress the role of social dialogue and the influence of social partners.

9. With the continuous development of society, in response to new social conflicts, the scope of anti-discrimination are continuously updated and revised. For example, transgender discrimination is forbidden, special provisions are made on sexual harassment, and so on.

### **2.2.1 The United Nations’ anti-discrimination process**

1. The non-discrimination provisions in the International human rights laws which are based on the concept that discriminatory treatment of individuals does not meet the principle of equality come into being. After the provisions in *Charter of the United Nations* are made, non-discrimination principles applicable to every one become universally recognized international laws. The para. 3 of art. 1 in *Charter of the United Nations State* that one of the purposes of the United Nations is “...in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion...”. United Nations General Assembly



and ECOSOC are both responsible for promoting the respect for human rights and fundamental freedoms<sup>21</sup>.

2. *Universal Declaration of Human Rights* adopted by United Nations General Assembly in 10 December 1948. It includes 30 articles, of which more than 10 articles refer to equality specifically, or reflect the content of equality by using “people and people” repeatedly. For example, art. 7 provides: “All are equal before the law and are entitled without any discrimination to equal protection of the law”.

3. In 20 December 1952 General Assembly of the United Nations adopted *Convention on the Political Rights of Women*. On the basis of “everyone is equal” of *Universal Declaration of Human Rights*, this convention emphasizes the equality of men and women. This convention regulates that women also have the rights to vote and to be elected, and to hold a post at government offices. This convention aims at realizing the equality of men and women by improving women’s participation in politics.

4. For racial discrimination, *International Convention on the Elimination of All Forms of Racial Discrimination* was adopted by United Nations General Assembly in 21 December 1965, of which art. 2 provides: “States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races...”. Art. 5 provides: “In compliance with the fundamental obligations laid down in art. 2 of this *Convention*, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, color, or national or ethnic origin, to equality before the law...”. In addition, art. 6 provides: “States Parties shall assure to everyone within their

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<sup>21</sup> See e.g. art. 55 and para. 1 of art. 13 of *Charter of the United Nations*.

jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.”

5. *International Covenant on Civil and Political Rights* was adopted by United Nations General Assembly in 16 December 1966, of which art. 26 provide: “all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

6. *International Covenant on Economic, Social and Cultural Rights* was adopted by United Nations General Assembly 16 in 1966, of which the para. 2 of art. 2 includes the general discrimination provisions included in above documents, in addition, *International Covenant on Economic, Social and Cultural Rights* specifically provides equal rights to work. Art. 6 provide: “The States Parties to the present *Covenant* recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right”. Art. 7 provide: “The States Parties to the present *Covenant* recognize the right of everyone to the enjoyment of just and favorable conditions of work which ensure, in particular: (a) Remuneration which provides all workers, as a minimum, with: (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work...”. Art. 2 and art. 7

provide specifically forbidding employment discrimination.

7. For employment discrimination generating from sex-based discrimination, *Convention on the Elimination of All Forms of Discrimination against Women* was adopted by United Nations General Assembly in 18 December 1979, of which para. 2 of art. 2 provides: “States Parties condemn discrimination against women in all its forms: ... (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women...”. Art. 11 provides: “1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular: (a) The right to work as an inalienable right of all human beings; (b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment; (c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training; (d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work; (e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave...”. In addition, art. 4 provides: “Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present *Convention*, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.”

8. In 1990 United Nations General Assembly adopted *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*. The art. 2 provides: “the term ‘migrant worker’ refers to a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national”. Art. 7 provides, “States Parties undertake, in accordance with the international instruments concerning human rights, to respect and ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the present Convention without distinction of any kind such as sex, race, color, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status”.

9. In 12 December 2006, United Nations General Assembly adopted *Convention on the Rights of Persons with Disabilities*, which was constituted of the preface and fifty articles, including the tenet, definition and general rules. The core of this convention was to guarantee that the disabled also enjoys the same rights as the healthy people and the life as official citizens, thus endowing them the equal opportunity to make contributions to the society. The convention included all the rights the disabled deserved, such as the right of equality in front of the laws, the right to be free of discrimination, the right to enjoy health, employment, education and accessibility environment, and the right to get involved in political and cultural life. The second article of this convention defined disability discrimination and reasonable accommodation, which had significant effect on going against disability discrimination. The third article included the non-discrimination rule and equal opportunity for all. The fourth article suggested that all contracting states must accept that all necessary measures shall be taken to protect the disabled from being discriminated. The fifth article regulated that all contracting

states must forbid any discrimination based on disability and take measures to ensure reasonable and convenient. The ninth article specifically elaborated various measures of “accessibility”.

Apart from the above convention, United Nations General Assembly also formulated many optional declarations and standards. For example, the *Declaration to Eliminate Any Form of Racial Discrimination* formulated by the United Nations on November 20, 1963; the *Declaration to Eliminate Gender Discrimination* on November 7, 1967; the *Declaration on the Disabled's Rights* on December 9, 1975; the *Declaration to Eliminate Any Form of Intolerance and Discriminated out of Religion or Beliefs* on November 25, 1981; the *Declaration on the Minority's Rights in Nation, Race, Religion and Language* on December 18, 1992; the *Opportunity Equality Rule for the Disabled* on December 20, 1993; the *Declaration on Human Rights Education and Training* on November 19, 2011.

### 2.2.2 Process of anti-discrimination of EU

As one of the areas with the soundest legal system in the world, the Europe Union is in the front of the world in the aspect of anti-discrimination. Its unshaken determination on anti-discrimination is manifested in a large number of treaties, conventions, charters and directives. With the help of treaties and charters, the European Union's judicial spirit on anti-discrimination is confirmed. Specific directives are also cited as a weapon to go against discrimination and assure human rights.

1. In 1957 the EC established the *Treaty of Rome*. It made the earliest equal pay provisions in the field of employment and the prohibition of nationality discrimination

in TEC<sup>22</sup>. The content of non-gender-discrimination and prohibition of nationality discrimination is not for the aim of human rights, but for the aim of economy<sup>23</sup>.

In 1997, *Treaty of Amsterdam* added art. 13 of *Treaty establishing the European Community*, which provided: “In the premise of not affecting other provisions and within the limits given by European Community, and after the Commission discussed with the European parliament, the council may take appropriate action to oppose discrimination based on gender, race or ethnicity, religion or belief, disability, age, or sexual orientation in common consent”. Moreover, art. 119 (new art. 141) on equal pay was amended significantly. Art. 141.1 (ex art. 119.1) extended the definition of equal pay for equal work with reference to ‘or work of equal value’<sup>24</sup>. And the new art. 141.4 allows Member States to adopt or maintain positive action measures for the under-represented sex in respect of professional careers<sup>25</sup>.

*Treaty of Lisbon* in 2007 on gender discrimination did not change too much. It was art. 141 originally, now become art. 157. *Treaty of Lisbon* as the *Constitution of Europe*, make gender-equality has the constitutional nature.

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<sup>22</sup> Miguel Ángel Falguera Baró, Sebastián Moralo Gallego: *Derecho social europeo, Madrid: Consejo General del Poder Judicial, Centro de Documentación Judicial [2007]*, p. 209: “origen de lo que va a ser la amplia política antidiscriminación en el Derecho Comunitario, se articulaba en torno a dos ejes: la igualdad que debía existir entre hombres y mujeres en materia salarial (art.119 EE) y la prohibición de discriminación por razón de nacionalidad art.7 TCEE).”

<sup>23</sup> Miguel Ángel Falguera Baró, Sebastián Moralo Gallego: *Derecho social europeo, Madrid : Consejo General del Poder Judicial, Centro de Documentación Judicial [2007]*, p. 209: “ambos(hombres y mujeres en materia salarial y la prohibición de discriminación por razón de nacionalidad) se pongan al servicio de los objetivos económicos de la Comunidad...”

<sup>24</sup> See the proposals in Dashwood, *Reviewing Maastricht: Issues for the 1996 IGG* (Sweet Maxwell, London, 1996), and esp.297. art.1 of *Directive 75/117/EEC* already makes provision of this and, as the Court pointed out in *Case 96/80 Jenkins v. Kingsgate* [1981] ECR 911, art.1 is principally designed to facilitate the practical application of the principle of equal pay outlined in art.119 [new art.141] of the *Treaty* [and] in no way alters the context or scope of that principle as defined in the *Treaty*’ and Catherine Barnard, *EC Employment Law*, Oxford University Press, 2000, second edition, p. 204.

<sup>25</sup> Catherine Barnard, *EC Employment Law*, Oxford University Press, 2000, second edition, p. 204.

2. In 2000, *Charter of Fundamental Rights of European Union* was passed. Art. 21 named “non-discrimination”, and added several types. Art. 21.1 provides, “any discrimination based on any ground such as sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited”.

3. In 2010, *Convention for the Protection of Human Rights and Fundamental Freedoms* was established. Art. 14 provides: “prohibition of discrimination, the enjoyment of the rights and freedoms set forth in this convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”<sup>26</sup>.

4. Apart from the above mentioned principle-based laws and regulations, the European Union also formulated many directives on specific types of discrimination. Over the sixty years since the formulation of the first equal pay for equal work directive in 1957, the European Union formulated a large number of directives with full contents while fighting against discrimination. These directives basically cover all the types of anti-discrimination suggested by the European Union, such as gender discrimination, racial discrimination, transsexual discrimination, age discrimination and disability discrimination. Those on the equality of men and women in special, because they contain the most contents.

### 2.2.3 Anti-discrimination process of International Labor Organization

ILO’s international conventions of eliminating employment discrimination include

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<sup>26</sup> Art. 14 of *Convention for the protection of human rights and fundamental freedoms*, 1/6/2010.

*Discrimination (Employment) Convention (No.111), Equal Remuneration Convention (No.100), Convention (No. 168) concerning Employment Promotion and Protection against Unemployment.* Moreover The International Labor Organization has made a lot of effort in aspect of protecting the Interest of vulnerable groups, for example, draw up the *Convention on Men and Women Workers with Family Responsibilities Have Equal Opportunities and Equal Treatments, Part-Time Work Convention (No.175), Home Work Convention, and Labor Convention on Migrant Workers* and so on.

1. the Main content of *Discrimination (Employment) Convention* and the *Recommendation* is:

A. The definition and interpretation of employment discrimination. "...the term 'discrimination' includes: Any distinction, exclusion or preference made on the basis of race, color, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation..."<sup>27</sup>.

Its forms could be direct or indirect. Because this provision can't summarize all kinds of discrimination, thus the Convention also provided a flexibility at the end of this definition: "Any Member may, after consultation with representative employers' and workers' organizations, where such exist, determine that other special measures designed to meet the particular requirements of persons who, for reasons such as sex, age, disablement, family responsibilities or social or cultural status, are generally recognised to require special protection or assistance, shall not be deemed to be discrimination"<sup>28</sup>.

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<sup>27</sup> Art.1.1 (a) of *Convention No.111.1958 of ILO*.

<sup>28</sup> Art.5.2 of *Convention No.111.1958 of ILO*.



B. The definition of which the forms could be direct or indirect. The explanation of limit between discrimination and non-discrimination<sup>29</sup>.

C. The definition of employment, both of which include provisions and conditions which provide the content of vocational training, getting job opportunities and specific occupations<sup>30</sup>. *Recommendation No. D111* points out that Member States should establish a national policy to prevent employment discrimination. *Recommendation* points out that member states should establish appropriate mechanisms for the elimination of discrimination, such as equal opportunities and so on.

2. *Equal Remuneration Convention* provide that member states should take some measures which are corresponding to the current methods determining remuneration standards to promote coordinating with these methods as far as possible and ensure implementing the principle of equal pay for men and women in all workers<sup>31</sup>. *The Term Equal Remuneration* refers to the remuneration standards which are not set according to the gender. The content of *Recommendation No. 90* is the supplement and emphasis of the *Convention* in order to determine the standards and remuneration according to principle of equal pay for men and women, after asking for the permission of employers

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<sup>29</sup> Art. 4 and 5 of *Convention No. III of ILO*. Art. 4 Any measures affecting an individual who is justifiably suspected of, or engaged in, activities prejudicial to the security of the State shall not be deemed to be discrimination, provided that the individual concerned shall have the right to appeal to a competent body established in accordance with national practice. Art. 5: 1. Special measures of protection or assistance provided in other Conventions or Recommendations adopted by the International Labour Conference shall not be deemed to be discrimination. 2. Any Member may, after consultation with representative employers' and workers' organizations, where such exist, determine that other special measures designed to meet the particular requirements of persons who, for reasons such as sex, age, disablement, family responsibilities or social or cultural status, are generally recognized to require special protection or assistance, shall not be deemed to be discrimination.

<sup>30</sup> Art. 1.3 of *Convention No. III*: For the purpose of this Convention the terms 'employment' and 'occupation' include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment.

<sup>31</sup> Art. 2 of *Convention No. 100*: Each Member shall, by means appropriate to the methods in operation for determining rates of remuneration, promote and, in so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal.

and workers organizations, member states should establish a job evaluation method to all workers, such as post analysis and so on<sup>32</sup>.

3. Art. 6 of *Convention (No. 168) concerning Employment Promotion and Protection against Unemployment* provides: “Each Member shall ensure equality of treatment for all persons protected, without discrimination on the basis of race, color, sex, religion, political opinion, national extraction, nationality, ethnic or social origin, disability or age...”. It should be noted that the prohibition of nationality, ethnic origin, disability and age discrimination are added in the *Convention*.

In addition, The ILO also made a lot of effort to protect the interests of vulnerable groups. It established *Convention concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities*(NO. 156), *Part-Time Work Convention*(NO.175), *Home Work Convention*(NO.177), *Migrant Workers*(NO.143), and so on.

### 3. Discrimination (Employment and Occupation)

#### 3.1 The concept and definition of employment discrimination

Work is a privileged entry point from which to liberate society from discrimination. The elimination of discrimination at work is essential if the values of human dignity and individual freedom, social justice and social cohesion are to go beyond formal

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<sup>32</sup> *Equal Remuneration Convention (Recommendation No.90)*, 1958, Chinese edition. Art. 5: In order to determine the rate or equal pay according to the principle of *Equal Remuneration*, each member state should make an agreement with the relevant employers and workers organizations at the appropriate time, and should establish or promote to establish the methods by which objective evaluation can be made on work by work analysis or other approaches, so that work can be classified without considering the gender. These measures should be implemented under the provisions of art. 2 of *Equal Remuneration convention*.

proclamations<sup>33</sup>.

ILO defines “employment discrimination” as for the purpose of this Convention the term discrimination includes<sup>34</sup>:

1. Any distinction, exclusion or preference made on the basis of race, color, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

2. Such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers’ and workers’ organizations, where such exist, and with other appropriate bodies. But, whether constituting discrimination or not still depends on that if the concrete measures damage “opportunity equality or treatment equality”.

Whether theoretically constituting discrimination depends on the objective relationship between the differentiated treatments involved in discrimination and public interests they propose. In practice, it also relies upon court investigation as the subjective standard. During real operation, for the various kinds of restrictions and rules in the employment field, the aim of their formulation should be viewed to guarantee the legality.

Afterwards, we should further determine whether the relevant rules are the effective measures to achieve the legal aim as declared, so as to prevent these rules from

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<sup>33</sup> International Labor Conference 91st Session 2003 Report I (B), *Time for Equality at Work Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*, p. ix.

<sup>34</sup> Art.1 of *Convention No. 111 Discrimination (Employment and Occupation) Convention, 1958*.

being in fraud of laws' reasonable requirements under the guise of legality<sup>35</sup>.

Apart from the definition of employment discrimination by international organization in the previous text, the idea of only regarding race, color, sex, religion, political opinion, national or social origin as reasons for employment discrimination has been outdated with the development of society and this definition can't cover the all kinds of discrimination happened in modern society. As a result, in order to deal with the newly emerging discrimination, all countries and areas has taken in all the possible reasons according to their own situations, such as list disability, age, sexual orientation<sup>36</sup>, pathogen carriers<sup>37</sup>, rural registered permanent residence<sup>38</sup>. This has decreased discrimination to a large extend, yet there are still some reasons that haven't been listed in. Such as the discrimination against the released prisoners and see constellation, blood types as entry requests, etc.

### 3.2 Classifications of employment discrimination

#### 3.2.1 Discriminations in legislative and judicial practice

1. Discrimination caused by legal norms refers to that the statues themselves violate the principle of equality. In many countries have these situation, such as China's *the Notice of State Council's Issuing: the State Council's Interim Procedures for Rehousing Cadres Who are Old and Weak, Ill and Disabled* and *the State Council's Interim Procedures for workers retiring and resigning* (state council issued, number [1978] 104). In that notice, it explicitly stipulates that under ordinary conditions, men

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<sup>35</sup> Cai Dingjian, Zhang Qianfan, *System and Practice of Overseas Employment Discrimination*, China Social Sciences Press, Beijing, June 2007, p. 10.

<sup>36</sup> See re. in art. 1 of *Directive 2000/78/EC*.

<sup>37</sup> See re. in art. 30 of *Law of the People's Republic of China on Promotion of Employment*.

<sup>38</sup> See re. in art. 31 of *Law of Promotion of Employment*.

retire at the age of 60 years old whereas women at 55.

People who consume underground, at high temperature, high altitude, especially in heavy manual labor or other work that is harmful to health, their the retirement age is 55 years old if they are men, if they are women then their retirement age is 45 years old; People who has illness or disability due to work, which had been identified by the hospital and confirmed by the evaluation committee work completely lost the ability to work, their retirement age is 50 years of age for men, and 45 for women.

From the current provisions of retirement age, the female workers can be retired five to ten years earlier. This made some female workers lost some opportunities in the aspects of education training, positions and promotions, especially in the era that the social development and medical treatment have been improved a lot and women's health situations and educational standard have improved a lot. Most well-educated women, who engage in the area of the science and research, are very healthy when they are 50 years old. As a result the current provisions of retirement age have prevented these female talents to have a further contribution to the society. Moreover, since the legal retirement age for the female workers is lower than that of men, thus these female works' time to pay endowments is shorter than that of men, especially when the gap of retirement age id 10 years, as a result the female workers' pension is 10 percents less than that of men. For example, if the retried female workers get 1000yuan pension, then they get 100yuan less than men. From this aspect, they have a lower income than men<sup>39</sup>.

The retirement age provided in *State Council of the Interim Measures on the resettlement of sick and elderly cadres* and *the State Council on retired workers, retirees and temporary measure* (State 104), obviously, itself violates the principle of equality

<sup>39</sup> *Investigation and Thinking of Retirement Age for Female Workers*, from *Worker's Daily*, 22/03/2011, [http://www.chinadaily.com.cn/micro-reading/dzh/2011-03-23/content\\_2091843.html](http://www.chinadaily.com.cn/micro-reading/dzh/2011-03-23/content_2091843.html)

between male and female, and its regulations are not based on BFOQ<sup>40</sup>.

This kind of discrimination is a fact, yet the legislators did not have the purpose of discrimination. However, in some conditions, even legal norms or provisions themselves have discriminative aim, especially for the racial discrimination. Of course, in modern society with significant development of modern civilization, this type of legal norms with discrimination as their aims gradually steps out of the historical arena.

2. Discriminations in the judicial practice. The discrimination caused by law-enforcement officers refer to that, when hearing a case, the judges or courts fail to make objective and fair evaluation because of their own subjective wills or limitation of specialized knowledge. Thus rights holders are not able to effectively maintain and realize their own rights.

The Judicial Practice in China has a very serious problem that is it is commonly regarded that is the lack of judicial credibility, public trust in the administration of justice generally not high, even a crisis of confidence in the judicial. And in fact, currently there are seldom judges make the verdicts according to the personal relationships, and money in Chinese courts. Some judges don't pay much attention to their public images and made inappropriate remarks to one party or even often go to some improper entailment areas. These push the public to doubt about their rationality and even some big influential erroneous cases showed the insufficient professional knowledge and the factor of twisted and wrong understanding of legal terms existed. Recent years, litigation continued to increase the number of complaint cases, Parties to the cases prefer to believe "visit" rather than "law". This is an expression of the public's

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<sup>40</sup> BFOQ: kind-hearted occupation qualification, bona fide occupational qualification.

distrust towards judicial<sup>41</sup>.

This phenomenon doesn't only exist in China. Wherever corruption existed, wherever people have their own reasons to worry about the unjust verdict happened in the employment discrimination case. Thus discrimination happened or it caused that some discrimination case, which are due to be solved in the mean of legal, have no mean to solve. Regardless of judicial corruption, some accidental discrimination happened are due to the judge's lack of sufficient professional knowledge, sometimes their biased understanding of case and legal articles can also lead to discrimination.

### 3. The related methods to the listed issues.

As for the objects of the different kinds of discriminations that have been mentioned in the previous text, there is much difference among different countries and regions. For example, the Europe Union is in the world front in the area of anti-professional discrimination. It keeps on improving its anti-professional laws and regulations. To counter the possible discriminations, the Europe Union has given a lot of directives based on EU Treaty, EU fundamental Conventions, and the European Convention on Human Rights. Basically there is no discrimination in laws and regulations in the Europe Union.

In contrast, in China, the anti-professional discrimination starts very late. Although there is certain achievement, yet there are still many problems. So far, there is still no specialized anti-professional discrimination law. China relies only on a chapter of the Professional Promote Act and some related regulations of Labor Law and some low professional executive acts to deal with the related professional issues. Besides some

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<sup>41</sup>Xiong Tiantian, *The Reasons for the Lack of Judicial Credibility and Solution*, 2009-02-16, <http://gxfy.chinacourt.org/public/detail.php?id=6442>

executive acts have the problems of discrimination in themselves. So China and the Europe Union are different in solving the professional discriminations. As a result, when considering about solving the problems, we have to base on the differences of the countries and regions and the specific condition and concrete situations to seek for a solution.

### **3.2.2 Direct discrimination, indirect discrimination, harassment and instruction to discrimination**

Speaking from the patterns of employment discrimination, this can be divided into: direct discrimination, indirect discrimination, harassment and instruction to discriminate against persons.

1. The direct discrimination, also called as differentiated treatment<sup>42</sup>, “direct discrimination shall be taken to occur where one person is treated less favorably than another is, has been or would be treated in a comparable situation...”<sup>43</sup>.

The legal norm or employment behavior evidently express discrimination towards different groups of people through wordage or other ways, which obviously constitutes discrimination and does not conform to the principle of equality on the surface. This is the deliberate and barefaced discrimination form which is directly related to the pioneer anti-discrimination law.

It embodies in four parts: A. whether the target regarded as being discriminated gets unfavorable treatment compared with others under the identical or similar conditions as others. B. Whether this kind of unfavorable treatment is related to

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<sup>42</sup> In America, direct discrimination is also called as discrimination with differentiated treatment.

<sup>43</sup> Art. 2.2(a) of *Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation*.



legislatively-protected features such as gender, age, race, disability, nationality, etc.. C. Whether there are reasonable and lawful reasons to support that “discrimination behavior”. D. Whether this discrimination express the discriminate feelings publicly or obviously. It doesn’t matter whether this behavior has the word of “discrimination” or some related words, as long as it has some content of discriminating some specific groups then it should be regarded as direct discrimination.

For example, some explicit legal provisions, such as China’s “Statutory Retirement Age”, formulate that female retirement age in party and government institutions is 55 years old, but female in factories should retire at the age of 50. That regulation is direct discrimination towards women working in factories.

Obviously, this regulation has generated discrimination against female employees in company. This blatant discrimination is very rare in Western countries, where the court will give severe punishments towards this kind of discrimination. On the contrary, this kind of blatant discrimination is very common in China. It is a problem that needs to be solved in time.

Moreover, when the employment units adapt double standards to the legal protection against employment discrimination related to special groups, and other job seekers or workers it will constitute direct discrimination. For example, the employers refused to hire female workers who have preschool children, but are willing to hire male counterparts; or dismissal of married women but continue to employ married men<sup>44</sup>.

2. Indirect discrimination is quite important for employment discrimination because it does not display evidently like direct discrimination and is very easy to be

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<sup>44</sup>Ye Ronggui, *U.S.’s Anti-discrimination Law and Enlightenment for China*, *Law and Economics IV*, 2006, p. 14.

omitted by people. So, it is very worthy of exploration and research.

European Union directive legislatively defines indirect discrimination “...indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless: (i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or (ii) as regards persons with a particular disability, the employer or any person or organization to whom this *Directive* applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in art. 5 in order to eliminate disadvantages entailed by such provision, criterion or practice”<sup>45</sup>.

It can be divided into concealed discrimination and actual discrimination. Concealed discrimination refers to that although legal norm and employment behavior are equal on the surface, they include discrimination aim or result towards people of the same kind. The actual discrimination refers to that legal norm or employment policy themselves have no fault, but during their implementation process, discrimination phenomena arise.

3. “Harassment shall be deemed to be a form of discrimination within the meaning of para. 1<sup>46</sup>, when unwanted conduct related to any of the grounds referred to in art. 1<sup>47</sup>

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<sup>45</sup> Art. 2.2(b) of *Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation*.

<sup>46</sup> Art. 2.1 of *Directive 2000/78/EC*: “For the purposes of this Directive, the ‘principle of equal treatment’ shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.”

<sup>47</sup> Art. 1 of *Directive 2000/78/EC*: “The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.”

takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment”<sup>48</sup>. In EU’s anti-discrimination policies, the treatment of harassment is identical with direct discrimination, such as sexual harassment<sup>49</sup>.

Harassments are more direct to the victims and it has more hostile than some general discrimination. If some general professional discrimination would harm people from some neutral, negative attitudes, then harassments is a more direct attack, which focus on the victim’s some special character. It would possibly generate some serious harm towards the victims.

However, the subjects of harassments in the public places could be the employers themselves or the employees. Sexual harassments are most commonly happened, the implementers and the victims are usually superiors and subordinates. Although all countries vie with each other to make a lot of laws and regulations to restrict the occurrence of sexual harassments, yet it is very hard to avoid it, especially in the era of financial crisis with high unemployment rate and to find a satisfying job is very hard for most people. Even though in Europe, a area where people can barely stand sexual harassments, some people still concerns about the revenges from their employers or superiors, which is demotion or dismissal when sexual harassments happened to them. As a result, they dare not to assert their own just rights.

In China, there is no specific law, which set a relief way after harassment. Consequently, the majority of the victims wouldn’t seek for the help of law at the first time when they are hurt. Worse still, they keep silent. The permissive attitudes and

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<sup>48</sup> Art. 2.3 of *Directive 2000/78/EC*.

<sup>49</sup> Art. 2 of *Directive 2006/54/EC*.

tolerance of the harassments have indulged the happening of the harassments.

Of course, besides sexual harassments, there are still racial harassment, religious harassment and disease state harassment etc. These harassments usually happened among colleagues. Usually they see each other's dignity as direct targets, which make the victim under much psychological and mental stress.

4. Instruction to discrimination, in reality, refers to the behavior that one side gives out the other side some relevant features to instigate others to take discrimination actions. Harassment and instigation discrimination mainly aim at discrimination phenomena indirectly caused by employers existing in the employment field, such as conniving at other faculty's discrimination behavior.

The employers should provide sound working environment and condition to avoid the happening of the harassments and abetting, such as make some regulations in the working place to have severe punishments against some perpetrators and have some training toward their employees to against employment discrimination. If the employers don't take any measure to deal with the occurrence of any possible harassment, then it should be regarded as abetting.

In addition, EU anti-discrimination law also particularly points out the avoidance of revenge (victimization), which means that during the anti-discrimination law relief process, the rights of accusers may be damaged because of the accuser's taking revenge. "Member States shall introduce into their national legal systems such measures as are necessary to protect employees against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment"<sup>50</sup>. This kind of

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<sup>50</sup> Art. 11 of *Directive 2000/78/EC*.

measure to some extent increased the victims' sense of safety when safeguarding their legitimate rights and interests.

### 3.3 Positive action

There is a kind of behavior which seems discriminative on the surface but without the aim of discrimination. It is in order to accelerate equality. That behavior is called affirmative action, also called as positive action by Europeans. It refers to that in order to rectify the different competitive ability caused by former discrimination, some groups of people can get special look after, which is often called as affirmative action or reverse discrimination.

The Europe Union made some regulation towards the affirmative actions of different vulnerable groups, countering at the instructions of different kinds of discrimination as follows:

“With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers”<sup>51</sup>.

“With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds”<sup>52</sup>.

The basic presumption of equality principle is that everyone has the same starting

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<sup>51</sup> Art. 157.4 of *Treaty on European Union*, *Treaty of Lisbon*.

<sup>52</sup> Art. 7.1 of *Directive 2000/78/EC*.

point, and everyone can, under the fair legal environment and employment conditions, strive for his own rights and interests according to his own competence and opportunity. The problem is that because some disadvantaged group is always discriminated without equal education and employment opportunity for a long time, they can not regularly take part in the social activities and share the society's fruits, thus being in disadvantaged position just from the starting line of competition. Under this condition, government should take measures to correct the deviation caused by history. Only doing this can the real equality be guaranteed.

However, not all affirmative actions conform to the principle of equality. If overdone, the affirmation itself may become discrimination forbidden by Constitution and laws. Alike every differentiated treatment, affirmative action must also have proper purpose. For example, it can not simply be favorable to a certain race or gender, etc. The patterns and approaches used must be appropriate. Speaking from some sense, there is only one step distance between affirmative action and discrimination. If our era crosses this step, we need to reconsider the necessity and rationality of related policies.

In employment field, affirmative action is also helpful for people suffering from discrimination to be elevated to the equal starting point as soon as possible among market competition.

Long-term discrimination tradition may form a kind of objective result that government's doing nothing will connive at a kind of indirect discrimination. For example, some post promotion requires "long-term working experiences". But if that post is occupied by men for a long time, the requirement for female post applicant with "long-term experiences" may constitute a kind of indirect discrimination, since she is incapable of obtaining "long-term experiences" because of historical reasons. Under this

condition, if the state is dedicated to change the situation unbeneficial to female employment, it must utilize measures which are “unequal” to male job hunters.

EU court once thought this affirmative regulation violated EU laws. But later, it was only limited to the ban of its member states’ legislatively using gender as the single decisive factor. The exception is that if male and female applicants have more or less identical qualifications, female applicant can be enrolled with priority according to the reverse discrimination standard.

The European Council points out in *Council recommendation of 13 December 1984 on the promotion of positive action for women*: “Whereas existing legal provisions on equal treatment, which are designed to afford rights to individuals, are inadequate for the elimination of all existing inequalities unless parallel action is taken by governments, both sides of industry and other bodies concerned, to counteract the prejudicial effects on women in employment which arise from social attitudes, behaviour and structures...”<sup>53</sup>. “To adopt a positive action policy designed to eliminate existing inequalities affecting women in working life and to promote a better balance between the sexes in employment, comprising appropriate general and specific measures, within the framework of national policies and practices, while fully respecting the spheres of competence of the two sides of industry”<sup>54</sup>.

Within this era, EEC (EU, after Lisbon Treaty EEC became EU) laws, policies and organization construction all reflected this affirmative principle. In *the Protocol on Social Policy*, the principle of equal pay for the same work or the same valuable work “not prevent any Member State from maintaining or adopting measures providing for

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<sup>53</sup> *Council recommendation of 84/635/EEC, Council recommendation of 13 December 1984 on the promotion of positive action for women.*

<sup>54</sup> Art. 1 of *Directive 84/635/EEC*.

specific advantages in order to make it easier for women to pursue a vocational activity or to prevent or compensate for disadvantages in their professional career”<sup>55</sup>.

EU’s affirmative action policy finally won recognition and implementation from Europe courts. In the legal precedent of the year 1997, the accuser was public school male teacher from German North Westphalen State. When applying for high class teaching position, he was refused by the State Education Bureau because his female competitor had the same qualifications. Among this teacher rank, women had lower percentage. So the female teacher was automatically selected under this condition according to that State’s public affair law. European Court preserved German affirmative action and judged the accuser lost the lawsuit. The court noticed that that state’s law specially formulated that if a certain male candidate had particular advantage, the female candidate could not be enrolled or promoted with priority on the behalf of equal treatment, thus guaranteeing that male qualification and competence being able to win fair evaluation and avoiding the effect of discriminating male<sup>56</sup>. As the European Court have pointed out<sup>57</sup>:

It appears that even where male and female candidates are equally qualified, male candidates tend to be promoted in preference to female candidates particularly because of prejudices and stereotypes concerning the role and capacities of women in working life and the fear. For example, that women will interrupt their careers more frequently, that owing to household and family duties they will be less flexible in their working hours, or that they will be absent from work more frequently because of pregnancy, childbirth and breastfeeding. For these reasons, the mere fact that a male candidate and

<sup>55</sup> Art. 6.3 of *Protocol on Social Policy, Treaty of European Union*.

<sup>56</sup> Cai Dingjian, Zhang Qianfan, *System and Practice of Overseas Employment Discrimination*, China Social Sciences Press, Beijing, June 2007, p. 25.

<sup>57</sup> See re. Case C- 409/95 Marschall v. Land Nordrhein-Westfalen.



a female candidate are equally qualified does not mean that they have the same chances.

But the European Court holds a negative attitude towards the automatic priority quota system<sup>58</sup>. Of course the Court won't oppose all kinds of quota system, it only against the fixed quota system. The member states and the employers can take the flexible quota system to adapt all kinds of situations<sup>59</sup>.

Certainly positive action is a rather disputed issue since the benefit for minority races obviously means the impairment on the interests of other races under the finite social resources. If the affirmative action is to prevent other people to enjoy the legitimate rights of equality, then the law should not be legalized; but if it's dedicated to design and specifically for disadvantaged groups, then the law should regard it as an important tool of combating discrimination<sup>60</sup>. As a result, we need to be cautious for dealing with this problem and clear about its distinction with discrimination. We need to make continuous progress along with the time, make amendments for perfection or even elimination in the end, so as to realize the balance among all groups.

### 3.4 Burden of proof

In dealing with employment discrimination litigation, the principle of inversion of burden of proof is commonly used internationally. It refers to that the plaintiff should point out the basic facts for the damage they suffered, while the defendant must prove that he was not engaged in that activities; or to point out that the activities can not cause damage to the plaintiff; or himself has the disclaimer under the condition of irresistible natural disasters,

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<sup>58</sup> See Case C-407/98, *Abrahamsson and Anderson v. Fogelqvist*.

<sup>59</sup> See Case C-450/93, *Kanlanke v. Freie Hansestadt Bremen*.

<sup>60</sup> Li Weiwei, Lisa Sttearns, *Employment discrimination International Standards and National Practice*, Beijing, 2006, Law Press China, p. 50.

the victim's own fault, the fault of a third party, etc.<sup>61</sup>.

In reality, it has many considerable difficulties in burden of proof in employment discrimination, especially burden of proof of indirect discrimination. In the international community, the amount of penalties for employer discrimination is very large, frequently to hundreds of thousands or even hundreds of million, therefore employers should be extremely cautious to set job requirements and treat recruitment conditions and recruitment process.

Statements about age, sex, race and marital status can not almost be found in the employment advertisements. Employers are more cautious to the job interview, less the employees have something on them. But the discrimination in the actual operation can not be excluded, which is called indirect discrimination, in this case it is more difficult for a victim of discrimination to put to the proof. Therefore, rational allocation of the burden of proof becomes particularly important, which will largely determine the outcome of the proceedings. The misallocation of the burden of proof will cause victims to lose a reliable means of relief, disenable any perfect the laws and regulations perform their functions. General principle on this issue is "the party for which putting to the proof is more appropriate has burden of proof"<sup>62</sup>.

Generally speaking, in civil cases the burden of proof in civil proceedings shall be taken to occur where one party can not provide sufficient evidence to prove litigant requests and facts, and court will rule that the party lose the lawsuit. Civil action is generally applicable to rule that for both parties which party make a claim and put to the proof.

However, labor relations is different from the general civil relations, so as the main

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<sup>61</sup> Inversion of burden of proof. <http://baike.baidu.com/view/88790.htm>

<sup>62</sup> Cai Dingjian, Zhang Qianfan, *The System and Practice of Overseas Employment Discrimination*, China Social Science Press, Beijing, June 2007, p. 25.

bodies of labor relations, the employers and the employees are equal in formal status, but in fact they are unequal. The employer is in a dominant position in dispute cases concerning employment discrimination; it is extremely difficult for the employee to provide such evidence.

Therefore, for such disputes burden of proof whether discrimination is implemented or not should be allocated to employer, which is according to the principle of equity in the civil law and give full consideration to the fair burden in the burden of proof between the two parties, which helps court to investigate facts of the case, collect evidence and timely handle it.

Because the legislative intent of labor law is tilted to protect the legitimate rights and interests of workers, and the main action in the case of labor disputes is relatively special, labor legal relations has the characteristics of subordination and dependence in addition to the equality of general civil law relations. If the party of the labor dispute is stipulated uniformly, especially the party of workers is applicable to rule that which party makes a claim and puts to the proof, which are somewhat lopsided.

So the burden of proof for the particular case is stipulated to the contrary by law. The statement is that after the prosecution makes a claim, they don't need to prove the existence of discrimination. However, the defense shall undertake the burden of proof to prove the inexistence of discrimination. If the defense can not prove the inexistence of discrimination, the court shall rule in favor of the plaintiff, that is the "shift the burden of proof"<sup>63</sup>.

In any case the burden of proof is favor of the workers. If the burden of proof is shifted to the employers, which is the victim just need to prove that he is treated by

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<sup>63</sup> Shi Maosheng, *Dilemma and Solution of Chinese legislation on Anti- Discrimination of Employment*, Legal Education Network, the legal papers, 20/04/2009.

discrimination, it can be presumed that the discrimination exists in employers. The employers must overturn the assumption of discrimination with evidences to prove the legitimacy of their actions. If he can not provide the objective and effective evidence to prove that the differential treatment is reasonably necessary, the discrimination can be ruled to come into existence.

*Directive 2000/78/EC* stipulates: “Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment”<sup>64</sup>. It is not difficult to see that the provision of the European Union for the burden of proof is inclined to be favor of the prosecution.

Under such principle, the burden of proof includes three steps:

The first step is that employees can offer prima facie evidence of discrimination intention to prove that they meet the requirements, but are not hired. Thereby a reasonable inference of discrimination comes into being. Because this proof starts from the employers, it is relatively simple.

The second step is that after the employees’ initial proof, the burden of proof is shifted to the employees. In order to refute the inference of discrimination the employer must provide the so-called “intermediate evidence”, which can be considered as the legal non-discrimination reason for the employees’ action of refusing to hire. For example, the employees can prove that their actions do not result from the discrimination but that the

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<sup>64</sup> Art. 10.2 of *Directive 2000/78/EC*.

BFOQ employees have an obligation to prove relationship between their employment standards and the necessity of business. But for the burden of proof for affirmative action, as the party with right is the Government or relevant public institution which is in a more powerful position in the proceeding, much more attention is required.

The third step is that after the employees and employers have finished the proof in the above two steps, if the judge considers that there is substantial dispute in the case, the burden of proof shall be returned to the plaintiff employers, and the employers have the obligation to prove that the so-called non-discrimination reason for the employer is actually a pretext for discrimination, but the employers do not need to prove the employees' subjective motive with discrimination<sup>65</sup>.

In addition, the distribution principle for the burden of proof does not apply to criminal cases<sup>66</sup>. The professional discriminations related in criminal cases are pretty complicated. Every country and region would make an appropriate burden of proof concerning to their own situations.

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<sup>65</sup> See re. Cai Dingjian, Zhang Qianfan, *The System and Practice of Overseas Employment Discrimination*, China Social Science Press, Beijing, June 2007, p. 18-22. And Esther Carrizosa Prieto, *La concreción de los indicios de discriminación en la Jurisprudencia comunitaria*, Revista Doctrinal Aranzadi Social parafr.num.51/20127/2012 parte Presentación Editorial Aranzadi, SA, Pamplona, 2012, p. 2. "...el demandante debe alegar hechos de los que se obtenga la presunción de que existe una discriminación directa o indirecta (prueba de indicios) y solo una vez alegados y acreditados estos indicios (y siempre que sean suficientes para provocar la sospecha del juzgador) se invertirá la carga de la prueba, siendo el demandado el que debe demostrar que su conducta no vulnera el derecho a la no discriminación." y Caso C-104/10 (Caso Kelly), párrs. 29-30.

<sup>66</sup> In the *Directive 2000/78/EC*: "Paragraph 1 (burden of proof) shall not apply to criminal procedures.

## **PART II ANALYSIS AND COMPARISON OF LEGISLATION AND SITUATION OF ANTI-DISCRIMINATION IN EMPLOYMENT IN EU AND CHINA**

Abstract: During the global post financial crisis era, there is sharply increasing pressure of inflation, more and more serious employment situation, lasting high unemployment rate, technological change, aging societies , climate change, and bankruptcy in part of the countries. This chapter mainly describes the status of employment discrimination, laws and regulations in EU and China under such kind of background.

Although this thesis makes a lateral contrast of employment discrimination in EU and China, it is undeniable that in view of the reality of the issue, it is not comparable. The achievement of EU in anti-discrimination is the accumulation of experience for more than 60 years after World War II. It is one of the most developed regions studying employment discrimination in the world, while the anti-discrimination in China does not have a slow start until the recent two years. The lack of special laws of anti-employment discrimination is the most outstanding problem of China in the field of anti-discrimination in employment. This thesis aims to make a longitudinal survey of the overall architecture of EU anti-employment discrimination and to provide experience and reference for the anti-employment discrimination research in China. *Expert Opinion Draft on Anti-employment Discrimination Law* drawn up in 2008 by Constitutional Research Institute of China University of Political Science. Constitutional Research Institute put forward related legislative proposals and bills to two Conferences during the period of National People's Congress in 2009 and 2010. This *Expert Opinion Draft* takes laws and regulations of EU in anti-employment discrimination as one of the major reference foundations. Although it has not passed

until now, the author still believes that there will be an anti-employment discrimination law exclusively of China in the near future.

## **1. Framework of EU's anti-discrimination in employment**

### **1.1 Four phases of process of EU's anti-discrimination in employment**

After 60 years since the World War II, in the complex international and domestic political and economic environment, the legislators, law-executors, civil society organizations, scholars, and ordinary citizens in EU have made unremitting efforts in terms of anti-discrimination, in order to make EU become the most developed area in the beyond the field of employment anti-discrimination in the world. The principle of anti-discrimination becomes the fundamental right of European Union<sup>67</sup>. The evolution of anti-discrimination of EU is divided into four phases in the whole, as follows:

#### **1.1.1 The first phase, from post World War II to the beginning of 1970s**

Early at the beginning of the establishment of European Economic Community, the establishment treaty had included contents like forbidding national discrimination and protecting people's free flow. However, the postwar reconstruction task is imminent, and the political game among powers is perplexing. Therefore, for 20 years before and after the war, the process of European integration has concentrated on the cooperation in the economic field. To guarantee the equality of human rights has not immediately become the primary task of European Economic Community.

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<sup>67</sup> María Amparo Ballester Pastor, Jaime Cabeza Pereiro, Ferrán Camas Roda, Elena García Testal, Mercedes, López Terrada, Enrique Norez Torres, Cayetano Núñez Fernández, *La transposición del principio antidiscriminatorio comunitario al ordenamiento jurídico laboral español*, Tirant lo Blanch, Valencia, 2010, p.21-33.

During this phase, the primary goal of anti-discrimination policy action is to prevent the market competition from distortion, fully realize the free development and flow of labor, improve economic efficiency, and construct a unified market. Looking back from today's definition, the understanding of discrimination in the European society then was rather narrow. Major achievements on the protection of personal rights concentrated on the employment fields closely related to economy. The emphases are put on the anti gender discrimination in employment and allowing labors' free flow among the member states.

In 1957, on the base of the article 119 of *Treaties of the European Union and Treaty on the functioning of the European Union (Treaty of Rome )*, *Equal pay for equal work Directive (1957)* was established by European Community. According to the *Directive*, equal work not equal pay was prohibited specifically. However, EU law then was without actual effectiveness in this moment. It was not until 1971 that a retired air hostess of Belgian World Airlines took the airline company to court because of differential treatment of man and women in retirement age and pension<sup>68</sup>. Several years since then, she submitted to EU Court for explanation and gained success finally through domestic lawsuits with the help of the lawyer<sup>69</sup>. That was the first time for EU to realize Item 119 and *Equal Pay for Equal Work Directive (1957)* to be the practical legal right of females, which initiated the legal reform of member states promoted by EU anti-discrimination principle. It marked the beginning of the second development phase of the career of EU anti-discrimination.

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<sup>68</sup> See re. Case C-43/75, Defrenne v. Sabena.

<sup>69</sup> Deirdre Uí Bhrógáin, *Women and the European Union*, National Executive Committee, Communist Party of Ireland, to Desmond Greaves Summer School, 2009.  
<http://www.communistpartyofireland.ie/c-deirdre.html>



### 1.1.2 The second phase, from 1970s to 1990s

During this period of time, the progress of European integration was winding and complicated with few programmatic documents and declarations. However, it was an important period during which the concept and practice of anti-discrimination were gradually disseminated to the society of various countries. Therefore, it excited an extensive civil discussion and constantly enriched specific social policies, which found its expression in the following aspects:

1. A deeper understanding of different types of discrimination. Attention of the academic circle, decision makers and the civil society expanded from gender equality to racial discrimination, discrimination against the disabled and age discrimination. The year of 1997, for example, was defined as the year of anti-racial discrimination<sup>70</sup>.

The European Year against Racism (1997) sparked off a broad range of initiatives at all levels, established a European platform of anti-racism non-governmental organizations and launched major information and communication campaigns. Moreover, public opinion expressed clear support for strengthening the role of the European institutions in the fight against racism<sup>71</sup>.

The European Council of Ministers established European racism and xenophobia behavior monitoring center through resolution. By collecting information related to

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<sup>70</sup> Building on the achievements of the European Year against Racism (1997) [*Resolution of the Council and the representatives of the governments of the Member States, meeting within the Council, of 23 July 1996 - Official Journal C 237 of 15.08.1996*] to establish a coherent framework for combating racism at European level and to prepare the ground for future and more ambitious action within the framework of the new Treaty provisions on non-discrimination. [http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/combating\\_discrimination/c10417\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/combating_discrimination/c10417_en.htm)

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[http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/combating\\_discrimination/c10417\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/combating_discrimination/c10417_en.htm)

racial discrimination through the contact sites set in various member states, it makes analysis and raises solutions. In 1998, EU Committee passed *Action Plan against Racism*<sup>72</sup>.

2. Policy perspective expanding. For example, against gender discrimination especially, EU passed a series of directives relevant to equal treatment of men and women. It also further refined the requirements in equal pay for equal work, work places, and equal treatment for men and women. Moreover, it expanded the equal treatment of men and women to fields of social insurance, agriculture and individual business, etc..

3. Action principle changed pursuing of equal rights in legal definition into establishing support policy and aid agency especially targeted at discriminated groups and the perspective of safeguarding the rights of those who were discriminated. This change was significantly reflected in the appearance of new policy emphases of positive action and mainstreaming in succession in anti-gender discrimination. During this phase, all the member states of EU established special institutes to deal with the anti-discrimination work in succession. *Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex* greatly reduced the proofing difficulty that individuals were confronted with while launching anti-discrimination lawsuits.

What lie behind changes of concepts and policies are the changes of important ideologies and organizational elements.

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<sup>72</sup> *Commission Communication of 25 March 1998 concerning an action plan against racism.*  
[http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/combating\\_discrimination/c10417\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/combating_discrimination/c10417_en.htm)

1. The social environment in Europe underwent profound changes and the market economy becomes increasingly mature. The surge of progressive thoughts to strive for universal human rights won support among people. Besides pursuing economic rationality and efficiency, people engendered new demands for social justice.

2. The awakening of citizen consciousness grew with the organizational efficiency.

Firstly, the establishment and development of European Community stimulated the growth of a group of new legal and civil right workers. The 1980s was the period of significant development of non-governmental organizations and citizen groups in Europe.

With the help of legal practitioners, citizens and citizen groups in member states became increasingly active in utilizing the platform of European Court to launch anti-discrimination lawsuits and fight against the political resistance of member states and regions with the power of EU laws. New energy of anti-social discrimination found two “action points” inside European Community, i.e. employment, equality, social policy division and development directorate general<sup>73</sup>.

They provided organizational basis for the drafting and implementation of laws and regulations on the working level and became an important channel for individuals and groups to get into contact with, persuade and actively participate in the process of European decision making. Around these two cores, citizens, scholars, legal practitioners and officials devoted to the career against discrimination in the vast Europe combined an effective information network. The achievements against discrimination in this phase are demonstrated in some milestone cases.

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<sup>73</sup> Now replaced by Employment, Social Affairs and Inclusion.  
<http://ec.europa.eu/social/home.jsp?langId=en>

Efforts of fundamental organization and ability construction for years yielded positive results in 1997 and brought work against discrimination onto the constitutional level in Europe. During this year, with the help of the giant leap of EU integration, economic logic was surpassed for the first time. Equality and anti-discrimination, as a political and social goal, was included in *Treaty of Amsterdam*, the program of European integration movement. The famous art. 13 in the treaty prescribed “in case of no conflicts with other frames in the treaty and under the condition of compliance with authorization constraint of the Community by the Council, the Council could unanimously agree to adopt appropriate actions towards discrimination based on gender, race or ethnic origin, religion or belief, disability, age or sexual orientation according to relevant suggestions of the committee by referring to the opinions of European Parliament”. The Nice Conference in 1999 added a second section to this item, enabling the European Council to pass action measures of anti-discrimination that could be passed by limited majority. It greatly strengthened the power of this provision in reality. *Treaty of Amsterdam* officially took effect in 1999. Marked by it, the career of European anti-discrimination entered the third development phase.

### **1.1.3 The third phase, from 2000 to 2009**

During this phase, the European society was not only confronted with unemployment rate that remained high, but also felt the pressure of two new challenges, i.e. aging and globalization. On the one hand, as the fertility rate decreased, the average life expectancy grew. From 2005 to 2025, the absolute labor population of EU will have a declining trend and the number of “senior labors” whose ages are between 55 and 64

will increase by 30 million. Europe will enter the phase of “development without cradle”<sup>74</sup>.

On the other hand, a lot of foreign investment, finance, and especially the flow of labor in Europe profoundly changed the structure of employment and social economic pattern. These changes may provide opportunities for the vulnerable groups in the original economic structure. Meanwhile, it may also make these discriminations appear in new forms, such as immigration trend and the tension between the traditional European society and policy system<sup>75</sup>. The original relatively closed and stable European society demonstrated unprecedented diversification trend in race, language, religious belief, etc.. To guarantee equality of individuals in employment, social life and family life became an increasingly complicated and urgent task<sup>76</sup>.

The great challenges may lay a foundation for the construction of new anti-discrimination consensus. In 2000, the European Council held Lisbon Conference and formulated a 10-year plan of long-term economic development, overall employment, social integration and sustainable development, proposing to increase general employment rate in Europe to 70% by 2010 and female employment rate to 60%<sup>77</sup>. This meant the increase of employment opportunities for the major victim groups of employment discrimination, such as women, the disabled and the elderly, etc.. Lisbon Agenda later specifically formulated *European Employment Strategy* for the

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<sup>74</sup> Council of Europe, *Recent Demographic Developments in Europe*, Council of Europe Publishing: Strasbourg, France, 2005.

<sup>75</sup> There are more than 80 cases about the ground of nationality discrimination in CURIA, during 2000-2013.

<sup>76</sup> See re. Cai Dingjian, Zhang Qianfan, *System and Practice of Overseas Employment*, China Social Press, Beijing, 2007, p. 34-39.

<sup>77</sup> See *Lisboa Strategy*.

implementation of this target. EU formulated employment guidelines, and countries developed annual work plan of action with an assessment every year<sup>78</sup>.

With the new driving power of the increase of employment, EU passed two important anti-discrimination directives.

The one was *Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin*, shortly referred to as *Racial Equality Directive*. The same as *EU Gender Equality Directive*, it not only covered most activities of the field of employment, but also other racial discriminations in economy and social right, such as equality in education, social protection and ability to get commodities and service. However, due to reducing of racial and ethnic origin discrimination, this *Directive* do not play an important role. From establishment of this *Directive* to now, the Court handles six cases, including three cases about discrimination of racial or ethnic origin<sup>79</sup>, one case about sanctions<sup>80</sup>, and 2 cases about fail of a member state of fulfil obligations<sup>81</sup>.

Another was *Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation*, forbidding discrimination in employment field (without social insurance and other social protection fields) based on religious belief, disability, age or sexual orientation. This *Directive* is one of the most important directive about against employment discrimination in EU. From establishment of this *Directive*, the cases handled by the Court include twenty

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<sup>78</sup> See *Europe Employment Strategy*.

<sup>79</sup> See Case C-415/10 *Galina Meister v Speech Design Carrier Systems GmbH*, Case C-391/09 *Malgożata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others*, Case C-54/07 *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v Firma Feryn NV*.

<sup>80</sup> See Case C-310/10 *Ministerul Justiției și Libertăților Cetățenești v Ștefan Agafiței and Others*.

<sup>81</sup> See Case C-320/04 *Commission v Luxembourg*, Case C-335/04 *Commission v Austria*.

cases about age discrimination<sup>82</sup>, six cases about disability<sup>83</sup>, four cases about sexual orientation<sup>84</sup>, three cases about fail of a member state of fulfil obligations<sup>85</sup>, three cases about concept of pay<sup>86</sup>, two other cases<sup>87</sup>.

These two directives formulated a minimum requirements for anti-discrimination legal protection enjoyed by citizens of EU. It also clearly required the state members to set up specialized agencies against discrimination. Council of Ministers of EU demanded all the member states to fully implement the connection of domestic law and these two directives before 2003, while the new state members in May, 2004 started the implementation from the day of accession.

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<sup>82</sup> See Case C-546/11 Dansk Jurist- og Økonomforbund v Indenrigs- og Sundhedsministeriet, Case C-476/11 HK Danmark v Experian A/S, Case C-141/11 Torsten Hörnfeldt v Posten Meddelande AB, Case C-132/11 Tyrolean Airways Tiroler Luftfahrt Gesellschaft mbH v Betriebsrat Bord der Tyrolean Airways Tiroler Luftfahrt Gesellschaft mbH, Case C-297/10 Sabine Hennigs v Eisenbahn-Bundesamt, Case C-298/10 Land Berlin v Alexander Mai, Case C-159/10 Gerhard Fuchs, Case C-160/10 Peter Köhler v Land Hessen, Case C-447/09 Reinhard Prigge and Others v Deutsche Lufthansa AG, Case C-250/09 Vasil Ivanov Georgiev v Tehniceski universitet - Sofia, filial Plovdiv, Case C-45/09 Gisela Rosenblatt v Oellerking Gebäudereinigungsges. mbH, Case C-499/08 Ingeniorforeningen i Danmark v Region Syddanmark, Case C-341/08 Domnica Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe, Case C-229/08 Colin Wolf v Stadt Frankfurt am Main, Case C-88/08 David Hütter v Technische Universität Graz, Case C-555/07 Seda Küçükdeveci v Swedex GmbH & Co. KG, Case C-388/07 The Queen, on the application of The Incorporated Trustees of the National Council for Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform, Case C-427/06 Birgit Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH, Case C-411/05 Félix Palacios de la Villa v Cortefiel Servicios SA, Case C-144/04 Werner Mangold v Rüdiger Helm.

<sup>83</sup> See Case C-335/11 HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab, Case C-337/11 HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening acting on behalf of Pro Display A/S, Case C-312/11 European Commission v Italian Republic, Case C-152/11 Johann Odar v Baxter Deutschland GmbH, Case C-303/06 S. Coleman v Attridge Law and Steve Law, Case C-13/05 Sonia Chacón Navas v Eurest Colectividades SA.

<sup>84</sup> See Case C-81/12 Asociația ACCEPT v Consiliul Național pentru Combaterea Discriminării, Case C-267/12 Frédéric Hay v Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres, Case C-147/08 Jürgen Römer v Freie und Hansestadt Hamburg, Case C-267/06 Tadao Maruko v Versorgungsanstalt der deutschen Bühnen.

<sup>85</sup> See Case C-286/12 Commission v Hungary, Case C-133/05 Commission of the European Communities v Republic of Austria, Case C-43/05 Commission of the European Communities v Federal Republic of Germany.

<sup>86</sup> See Case C-124/11 Bundesrepublik Deutschland v Karen Dittrich, Case C-125/11 Bundesrepublik Deutschland v Robert Klinke, Case C-143/11 Jörg-Detlef Müller v Bundesrepublik Deutschland .

<sup>87</sup> See Case C-310/10 Ministerul Justiției și Libertăților Cetățenești v Ștefan Agafiței and Others, Case C-246/09 Susanne Bulicke v Deutsche Büro Service GmbH.

To better implement these two directives, the European Commission published *Council Decision 2000/750/EC of 27 November 2000 establishing a Community action programme to combat discrimination (2001 to 2006)*, emphasizing the realization of universal citizenship education training, policy evaluation and information sharing, and the coordination of measures of various governments in the field of employment against various discriminations. There were three focuses in the program contents:

1. Data collection and analysis of discrimination factors, and the evaluation of the effectiveness of policy, legislation and practice;
2. Promote typical experience, establish network in Europe and cultivate specific participants' ability to prevent from and deal with the phenomenon of discrimination through information exchange;
3. Actively promote values and practices embodied in the work of anti-discrimination<sup>88</sup>.

The program participants included EU employment institutions, anti-discrimination office of social affairs directorate general, member state governments, enterprises, non-governmental organizations, and all kinds of coordination institutes. EU specially established *Equal Community Initiative* to support various kinds of anti-discrimination projects in member states, places and regions. Moreover, it allocated 98.4 million Euros from European Social Fund<sup>89</sup>.

This program was characterized by the diversification of participants. Every specific project was participated by three sides: EU Commission, member state and one development cooperation group appointed by various member states. The cooperation

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<sup>88</sup> See re. *Decision 2000/750/EC*.

<sup>89</sup> See re. *Decision 2000/750/EC*.



group was constituted by different organizations and government agencies relevant to the work of gender equality. They proposed project applications, held responsible for the project preparation, assistance and evaluation, as well as the cooperation with the development cooperation group of other member states.

An equal development cooperation group of Britain in *Equal Community Initiative*, for example, held a theme of “Building London: Creating Future”. The purpose of this cooperation team was to coordinate various places in London and help the vulnerable group to enjoy equal employment and development opportunities in the central construction industry in London. The cooperation group was composed of 14 organizations, including construction industry training committee, construction and technical worker association, employers, women’s right-safeguarding group and labor union. The leader of the cooperation group was South Walker district government in London. Through promotion, visiting, introduction and other methods, it absorbed people in need, provided training and post consulting, took care of the elderly and children, and obtained transportation and equipment subsidy. This cooperation team also established partnership with similar cooperation groups in France and German<sup>90</sup>.

In 2004, EU issued *Green Paper on Social Policy*, particularly appealing to all regions of Europe to take a more active immigration protection and integration policy, in order to coordinate with the increasingly important status of immigration in the employment market of Europe.

In May, 2004, EU Commission issued *Green Paper on Equality and Non-Discrimination in an Enlarged Union*, launching another round of consulting of the

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<sup>90</sup> See re. Cai Dingjian, Zhang Qianfan, *System and Practice of Overseas Employment*, China Social Press, Beijing, 2007, p. 37-38, and Equal Workers, *Building London Creating Futures*.

evaluation and future development of anti-discrimination framework to citizens, experts, social groups, enterprises and governments of all states and regions.

During the same year, the commission set up groups of fundamental rights, anti-discrimination and equal opportunity. Chairman of the commission took the post of group leader, aiming to further promote the coordinative development of anti-discrimination policy<sup>91</sup>.

After that, based on the profound and wide changes of European society, two challenges were proposed towards the field of anti-discrimination law.

Firstly, it was the problem of the realization of principle and framework. There were a great many laws against gender discrimination in Europe and the concept was rather comprehensive and advanced. However, the progress of many of them still remained on the abstract terms, which made it hard for them to be realized to specific legal rights that could be implemented. Although various policies and documents of EU had reflected the affirmation of the mainstream principle since 2005, the wording was still rather macro and cautious. The realization of various kinds of principles into policies from employment to transportation demanded the united cooperation from all the organizations of committee to government officials of all the member states, requiring the participation of the whole society more.

Secondly, it was the problem of the integration and expansion of anti-discrimination law. On the one hand, the anti-discrimination view of EU seemed to include the current 7 discriminations only.

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<sup>91</sup> See re. Cai Dingjian, Zhang Qianfan, *System and Practice of Overseas Employment*, China Social Press, Beijing, 2007, p. 38 and *GREEN PAPER: Equality and non-discrimination in an enlarged European Union*.

On the other hand, currently, 7 discriminations listed in the three major directives of Europe belonged to the governance of different departments respectively. The contents in the directives were not completely coordinated. If the field of anti-discrimination continued to be divided into specialized discrimination and one law for one thing, it seemed unable to adapt to the development of the future social trend. Moreover, it was also inconvenient for the implementation of the court and governments at all levels.

The problem of legal integration focused on the dilemma of multiple discriminations. In European Union, the phenomenon of multiple discriminations was prominent in the female immigrants<sup>92</sup>. Moreover, it was similar to the experience of North America, of which there existed certain tension between the protection of the minority groups and the protection of the equality between men and women. Preface to *Racial Equality Directive* and *Employment Framework Directive* of EU also reiterated that the resolution of racial discrimination and other aspects of discriminations were closely related to the realization of equality between men and women. However, because of the compartmentalization situation of the current legislation, the problem of multiple discriminations was hard to obtain a satisfying solution in the specific cases<sup>93</sup>.

These two problems reflected the major trend of the increasingly diversified individual right appealing in the gradually open society of European Union. In June 2005, European Commission submitted *Non-discrimination and equal opportunities for all - A framework strategy* to the Council of Ministers, the European Parliament and the European Economic and Social Committee, and reaffirmed: "Indeed, it will be difficult

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<sup>92</sup> In the Case C-415/10, it related three discriminations, namely, gender, age and ethnic origin. However, due to the applicant claiming plausibly that she meets the requirements listed in a job advertisement, she was not entitling to achieve her requirements.

<sup>93</sup> Sandra Freedman, *Double Trouble: Multiple Discrimination and EU Law*, in the European Commission, *European Anti-Discrimination Law Review*: 2, 2005.

for the EU to achieve the ambitious targets that it has set itself for economic and employment growth if some people are excluded from jobs and higher achievement on the basis of gender, disability, race, age or other grounds”<sup>94</sup>.

“It is clear that the implementation and enforcement of anti-discrimination legislation on an individual level is not enough to tackle the multifaceted and deep-rooted patterns of inequality experienced by some groups. There is a need to go beyond anti-discrimination policies designed to prevent unequal treatment of individuals. The EU should reinforce its efforts to promote equal opportunities for all, in order to tackle the structural barriers faced by migrants, ethnic minorities, the disabled, older and younger workers and other vulnerable groups”<sup>95</sup>.

Moreover, EU considered that the experience of combating gender discrimination should be applied to other grounds of discrimination<sup>96</sup>.

The *Strategy* pointed that the emphasis in the field of European anti-discrimination in the future, as:

1. Ensuring effective legal protection against discrimination.
2. Assessing the need for further action to complement the current legal framework.

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<sup>94</sup> *Non-discrimination and equal opportunities for all - A framework strategy*, Brussels, 1.6.2005 COM(2005) 224, p.2.

<sup>95</sup> *Non-discrimination and equal opportunities for all - A framework strategy*, p. 2.

<sup>96</sup> *Non-discrimination and equal opportunities for all - A framework strategy*, p. 2: “In addition, the EU should consider how its experience of combating sex discrimination and promoting gender equality may be transferable to other grounds of discrimination. In line with the principle of gender mainstreaming, it should take into account the different ways in which women and men experience discrimination on grounds of racial or ethnic origin, religion or belief, disability, age and sexual orientation. In some areas, it may be appropriate to consider the development of an integrated approach to the promotion of non-discrimination and gender equality. This integrated approach should take into account the fact that some people may experience multiple discrimination on several grounds”.

3. Mainstreaming non-discrimination and equal opportunities for all.

4. Promoting and learning from innovation and good practice.

5. Raising awareness and cooperating with stakeholders. In order to drive forward the agenda outlined in this Communication for a more positive approach to equality, the Commission is proposing to designate 2007 as European Year of Equal Opportunities for All.

6. A special effort to tackle discrimination and social exclusion faced by disadvantaged ethnic minorities.

7. Enlargement, relations with third countries and international cooperation<sup>97</sup>.

Then in the same day, the European Commission confirmed 2007 as European Year of Equal Opportunities for All. The four core themes of the European Year proposed by the Commission are:

- Rights – raising awareness of the right to equality and non-discrimination;
- Representation – stimulating a debate on ways to increase the participation of under-represented groups in society;
- Recognition – celebrating and accommodating diversity;
- Respect and tolerance – promoting a more cohesive society<sup>98</sup>.

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<sup>97</sup> *Non-discrimination and equal opportunities for all - A framework strategy*, Brussels, 1.6.2005 COM(2005) 224 final, p. 4-11.

<sup>98</sup> *2007 to be “European Year of Equal Opportunities for All”*, Brussels, 1 June 2005.  
<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/05/647&format=HTML&aged=1&language=EN&guiLanguage=en>

In addition, the Commission proposed budget of €13.6 million which would use to actions in 2006 as well as the various activities taking place during the European Year itself in 2007.

In October, European Parliament and the Council of Europe adopted *Decision 1672/2006/EC of 24 October 2006 of the European Parliament and of the Council establishing a Community Programme for Employment and Social—PROGRESS(2007-2013)*. This progress is a brand new project about the employment and unity of European Union. It was initiated in 2007, and planned to be accomplished in 2013. After the initiation of this project, it had already taken the place of *Decision 2000/750/EC*. It continued to play an important role in aspects of anti-discrimination, equality of men and women, employment measures and anti-social exclusion, etc..

The Programme pursues the following general objectives:

1. To improve the knowledge and understanding of the situation prevailing in the Member States and in other participating countries through analysis, evaluation and close monitoring of policies.
2. To support the development of statistical tools and methods and common indicators, where appropriate broken down by gender and age group, in the areas covered by the Programme.
3. To support and monitor the implementation of Community law, where applicable, and Community policy objectives in the Member States, and assess their effectiveness and impact.

4. To promote networking, mutual learning, identification and dissemination of good practice and innovative approaches at European level.

5. To enhance awareness of the Community policies and objectives pursued under each of its five sections among stakeholders and the general public.

6. To boost the capacity of key European level networks to promote, support and further develop Community policies and objectives, where applicable<sup>99</sup>.

Moreover, the European Parliament and Council in 2006 established *Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)*. It broke the situation of emphasis on equal treatment only since 1957. The emphasis on equal opportunities signified a step to the real equality. It was also calling for the upcoming year of 2007, a year of equal opportunities. The effective implementation of all measures and the budgeting Commission spent on employment both achieved good effects. The year of 2006 was the year with best employment growth since the implementation of *Lisbon strategy*<sup>100</sup>.

In the year of 2007 besides relevant measures of the year of equal opportunities, what was worth mentioning was that *Employment in Europe 2007* put emphasis on the employment problem of youths. It could be seen that European Union was quite planned in the measures and emphases of discrimination and safeguarding employment. There was almost an obvious target and special protection group every year.

The global economic shock in 2008 exerted great influence on European Union. EU restarted *Lisbon Strategy* towards new challenges of employment. During the time

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<sup>99</sup> Art. 2.1 of *Decision 1672/2006/EC*.

<sup>100</sup> *Employment in Europe 2007*, p. 3.

of such a serious employment situation, European Union put the work emphasis of the employment field on the promotion of employment growth. Employment discrimination was one of the greatest resistances of the growth of employment. However, it did not put forward new and effective measures towards employment discrimination.

In 2009, the situation of European employment deteriorated. The *Employment in Europe* report of 2009, referred: “The Commission’s annual *Employment in Europe* report, the 21st in the series, comes against a backdrop this year of quite exceptional economic circumstances. Hot on the heels of last autumn’s global financial crisis, the worst economic downturn Europe has seen since World War II has brought several years of relatively high economic growth and job creation to an abrupt halt and thrown far too many businesses, households and workers into serious difficulties”<sup>101</sup>.

The Commission launched a new method to deal with the employment crisis. At the beginning of 2009 year it launched the monthly Labor Market Monitor, a new short-term monitoring tool that provides a useful guide for EU and Member State policy makers<sup>102</sup>.

The new short-term monitoring tool did not aim at employment discrimination directly, yet had much effect on grasping and controlling the situation of employment discrimination promptly.

#### **1.1.4 The forth phase: beginning of the new period**

In 2010, European Union regained the enthusiasm in the employment discrimination. In 3rd March 2010 in Brussels, the European Commission launched the

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<sup>101</sup> *Employment in Europe 2009*, p. 3.

<sup>102</sup> *Employment in Europe 2009*, p. 3.



Europe 2020 Strategy to go out of the crisis and prepare EU economy for the next decade. The first sentence of the preface of 2020 Strategy is: 2011 must mark a begging.

In the Europe 2020, fighting discrimination was referred: “To design and implement programmes to promote social innovation for the most vulnerable, in particular by providing innovative education, training, and employment opportunities for deprived communities, to fight discrimination (e.g. disabled), and to develop a new agenda for migrants’ integration to enable them to take full advantage of their potential”<sup>103</sup>.

Then March 8, the European Council revised the framework agreement on parental leave. European Council according to the stations in the nearly 10 years , established *Directive 2010/18/EU* to replace *Directive 96/34/EC* which were outdated. The *Directive* is one of the important directives about gender-equality.

In March 19, ESF put out the news to take actions to fighting discrimination and support to non-discrimination in recruitment and employment.

The ESF is supporting activities in the Member States that fight discrimination in access to employment and in the workplace, including projects that:

1. Create pathways to re-entry and reintegration into employment for groups suffering discrimination.
2. Build acceptance of diversity in the workplace to combat discrimination and raise awareness.
3. Encourage support for active aging and the reintegration of older workers.

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<sup>103</sup> *EUROPE 2020, A strategy for smart, sustainable and inclusive growth*, EUROPEAN COMMISSION, Brussels, 3.3.2010, COM(2010) 2020, p. 18.

4. Increase the participation of migrants in employment and thereby strengthen their social integration<sup>104</sup>.

### **1.2 Mechanism, organizations and procedures of EU anti-discrimination in employment**

Each member state has taken agreement with the regulations of EU in terms of anti-discrimination on employment, training, and work treatment. Different from other international anti-discrimination law system, not only the governments of EU member states must enact and adjust the domestic legislation according to the requirements of EU laws, and obey in indirect effect of EU; moreover, directives of EU can be applied to national court proceedings, and have direct force and effect. Every anti-discrimination instruction of EU is also suitable for the field of public (government) and private (non-government) of EU member states.

It could be said that anti-discrimination mechanism of EU establishes an overall framework for the anti-employment discrimination in all the member states. Moreover, it also plays an enlightening role in the legislation and judicial practice in other countries and regions.

EU demanded the member states to establish independent organizations to promote equal treatment. This kind of organizations should not only help individuals to put forward lawsuits, but also have the function of engagement in researches and the proposal of independent policy suggestions. A series of reforms of EU are developing towards the direction of the pursuit of “the concept of active equality”. This “concept of

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<sup>104</sup> *Fighting discrimination – ESF in action*, Features, 19/03/2010.  
<http://ec.europa.eu/social/main.jsp?catId=370&langId=en&featuresId=108&furtherFeatures=yes>

active equality” not only emphasizes the remedy on the victims, but also emphasizes how to promote the realization of employment equality right and the realistic effectiveness.

### 1.2.1 Mechanism of anti-discrimination

The mechanism of EU anti-discrimination includes written policies, case law, and tangible organization structuring; citizen’s daily participation as well as interactive gaming among various organizations is included in the mechanism too. The primary source of European Union law is the Treaty of European Union<sup>105</sup>. Generally speaking, the hardware elements of this mechanism are:

1. Description of anti-discrimination of *European Treaty* and *Treaty Establishing a Constitution for Europe*.
2. Aiming at employment discrimination in terms of gender, race and ethnicity, genetic characteristics, religion, disability, age and sexual orientation, the EU issues some directives; as well as protection instructions for part-time staff, and anti-discrimination and promotion of employment action plans of the European Commission and its subsidiary implementing bodies;
3. As the implementation sector, the European Commission adopts some programs to aim the irregularities of member state;
4. The European court makes explanations for anti-discrimination laws on member states of EU according to the system of preliminary ruling;
5. The participation of citizens, citizen associations and legal professionals in the

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<sup>105</sup> Tamara K Hervy, *Justification for Sex Discrimination in Employment*, London, Dublin, Edinburgh, Brussels, Butterworths Press, 1993, p. 49.

process of the formation, implementation and system operation of the above laws.

### 1.2.2 Organizations and procedures

1. The principal organs related to European Union's legislative process are European Commission, Council of Ministers and Parliament.

The legislation procedures are as follows:

The European Commission has the initiative right. After the discussion with other departments, governments of member states and stakeholders, administrative institutions subordinate to EU could put forward regulations, directives or resolution drafts to the Parliament and Council. In most fields, the draft needs the joint grievance of European Parliament and European Council of Ministers. Those who win the support of limited majority could pass it. They will be included in the national legal system by the member states and implemented by the Commission and member states<sup>106</sup>.

Focusing on anti-discrimination, in tradition the one who controls the legislative power is Council of Ministers, composing of ministers in charge of domestic affairs and social affairs.

In recent years, in order to respond to the criticism that decision-making within the EU was not transparent and democratic, the role of the European Parliament has been strengthened, and no just effected while the resolutions were reviewed. Its Gender Equality Commission and the Anti-Discrimination Committee are actively involved in drafting, investigating, and supervising anti-discrimination laws. The two departments are more and more important in European political and legal affairs.

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<sup>106</sup> See re. Cai Dingjian, Zhang Qianfan, *System and Practice of Overseas Employment*, China Social Press, Beijing, 2007, p. 28-34.

Directorate-General for Employment , Social Affairs and Inclusion in the European Commission is responsible for the drafting, implementation, and evaluation of anti-discrimination laws. Major work is divided into four parts:

A. Promote the coordination of employment policies of member states and take charge of the management of European social fund.

B. Coordinate with the member states of the labor market in legislation, promote the labor dialogue and increase the flow of labors.

C. Coordinate and draft laws and action plans about anti-discrimination and promote the social integration of the fundamental rights of the disabled.

D. Draft and promote various laws, regulations and policies of equality of men and women, and supervise the implementation in various jobs of EU<sup>107</sup>.

Focusing on both the social justice and the unified and open labor market, the various jobs of Directorate-General for Employment are more or less relevant to anti-employment discrimination. The closest sectors with anti-discrimination are Direction Equal Opportunities, which deals specifically with gender equality work, and Unit Anti-Discrimination and Relation with Civil Society and Direction Social Protection and Social Integration, which are attached to Direction Adaptability, Social Dialogue and Social Rights<sup>108</sup>.

According to the *Treaty of Amsterdam*<sup>109</sup>, each country needs to establish

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<sup>107</sup> <http://ec.europa.eu/social/main.jsp?langId=en&catId=656>

<sup>108</sup> See re. Sun Liang, *Legislation and Practice of Anti-discrimination of EU*, China Social Sciences Press, Beijing, June, 2007, the first edition, p. 31.

<sup>109</sup> It was first substituted by the *Lisbon Treaty*, but made minor modification regarding anti-discrimination.

specialized anti-discrimination agencies. And there is a coordinated organization among them, which is called as “Equinet”. All of these compose of an entire European anti-discrimination unified body. In addition in 1997 the European Commission has set up a European Center for the Monitoring of Racism and Xenophobia, which is engaged in data collection of racial and ethnic discrimination and policy monitoring.

2. Law enforcement is shared by the European Commission and European Court of justice respectively. Committee members’ legal binding force to member states is achieved by infringement procedure.

According to art. 226 of *European Union Treaty*, the major responsibility of the Commission is to supervise the member states to timely transpose directives related to anti-discrimination to domestic laws and regulations, and to guarantee the realization of legal binding of member states through infringement procedure. According to the art. 226, if the state members fail to transpose EU directives to the notice commission of national law or although the legal conversion is accomplished with wrong ways of actions, then the commission firstly issues the “letter of formal notice”, requiring the other party to give reply within two months. If the member state fails to give reply within the due period, or the reply fails to meet the satisfaction of the Commission, then EU will issue “reasoned opinion” and the period of reply is still two months. If it still could be solved, then the Commission could propose lawsuits to the European court, accusing that the member state government fails to undertake the legal responsibility prescribed in EU law. The latter could adopt punishment measures of legal effect towards the infringement states<sup>110</sup>.

In July 2004 and in December the European Commission took the five and six

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<sup>110</sup> See re. art. 226 of *The Treaty of European Union*, and *Infringements of EU law*.

major member states, including Germany, Austria, Belgium, Greece, Finland and Luxembourg to court on the grounds that they didn't transpose the anti-discrimination directives to the national legislation in time.

In addition to give support to European Commission, the European Court of Justice also assumes the task of crystallizing the instruction principle to the enforceable legal rights through legal interpretation<sup>111</sup>. The main tool that European Court of Justice exerts influence on anti-discrimination is "system of preliminary ruling"<sup>112</sup>.

Besides, Europe establishes some anti-discrimination non-governmental organizations with solid social basis and broad sphere of activities. Among them the one with the closest relation with Directorate-General for Employment is "The European Network of Independent Legal Experts in the Non-discrimination Field", which is organized by Directorate-General for Employment.

### 3. Non-governmental organization

Since 1980s, especially 1990s, with the emergence of the third wave of democracy worldwide<sup>113</sup>, the global civil society has gained rapid development. Non-governmental

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<sup>111</sup> See re. Sun Liang, *Legislation and Practice of Anti-discrimination of EU*, China Social Sciences Press, Beijing, June, 2007, p. 27-32.

<sup>112</sup> The original purpose of the preliminary determination system was set up to consider the great difference on macro-system and the implementation of specific laws between member countries. In order to ensure the consistency in the implementation of EU law, and to avoid the conflict of laws, the interactive relationship was established between the court of the Member States, the other institutions and departments of European Union and the European Court. When a court of the EU member states held that a specific interpretation of the EU Law had no substantive significance to a case, it could put forward the preliminary determination application on the legitimacy, scope and content of EU Law (a reference to preliminary ruling), and require the European Court to give interpretation. And other member governments and the European Commission could propose their own views according to preferences of their own policy (observation, intervention).

<sup>113</sup> According to the American scholar named Huntington, there have been three waves of democracy worldwide. The first started from 1820s and ended in 1920s. The second wave started from the year of 1943. The third wave started from 1974, and reached its climax during the 1990s, and lasts until now. Samuel Huntington; *The third wave: the wave of democracy during the late 20th century*, 1998 edition of Shanghai Sanlian Bookstore.

organizations, as civil, non-profit-seeking, autonomous, voluntary and neutral groups independent from the government and the enterprise, have steadily expanded under this wave. During this process, EU has already become a region in which the non-governmental organizational system (or the civil society) boasts a quite mature development. In the area of employment discrimination forbidden by EU, the actions and voice of non-governmental organizations play an active and effective role in protecting civil rights and promoting the policy formulation and development of EU and its member states<sup>114</sup>.

During the later 1970s, some active civil groups, unsatisfied with the equal treatment confined to the field of universal legislation, demanded to take actions to solve the problem of inequality between men and women fundamentally. The call and actions of the civil group promote the positive actions to become policies. Gender mainstreaming action that starts from the late 1980s and the early 1990s is also closely related to the non-governmental organizations, especially the increasingly active female group, as well as its focus on and promotion of the problem of gender discrimination. The Platform of European Social NGOs established in 1995 (hereafter referred to as PESN), however, became the main target of project funding of anti-discrimination action plan of EU.

In the “action plan” of 2001-2005, it was proposed that an equal network system among EU institutions, member state governments, social partners and non-governmental organizations on the level of the whole EU was established. Through the effective communication of anti-discrimination information and practical experience, the ability of relevant personnel was improved to make them participate in the work of

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<sup>114</sup> See re. Li Xingming, EU legislation and practice forbidding gender discrimination, Law Press, 2008, Beijing, p.117-119.



gender equality more effectively.

During the progress of 2007-2013, what is emphasized again is the establishment of a perfect anti-gender discrimination network on the level of the whole European Union, in order to enhance the ability of EU to promote gender equality.

The current non-governmental organizations of EU mainly demonstrate the following characteristics:

Firstly, members of the non-governmental organizations are large in amount and extensive in the scope. Through 39 middle organizations, PRSN covers more than 1700 volunteer groups engaged in social service and promotion work in member states, regions and the level of EU. The object of service and focus covers female, the elderly, the disabled, employment, immigration, children, and family, etc.. Through a comprehensive platform, various groups could have communication in information and experience, and could provide a good development and service platform for a certain field, especially the group in the field of anti-gender discrimination.

Secondly, EU government and the state member governments have a good communication and cooperation with non-governmental organizations in policy, legislation and finance. On the level of EU, it provides the daily operation of PESN with a subsidy of 600000 euro from 2004 to 2005 alone. EU anti-discrimination department and PESN holds a conference every two years, inviting various NGOs to discuss the important issue of focus and putting forward new policies of committee for the comments of the public. Meanwhile, the establishment of the equality network system among EU institutions, member state governments, social partners and non-governmental organizations is favorable for the non-governmental organizations to play a greater role through anti-gender discrimination information and the effective

communication of practical experience.

Thirdly, it is the independence of operation. Although the non-governmental organizations generally get subsidy from the government, they still boast their independence in the operation, which could raise independent opinions and criticisms against the government policies. It is also the important reason why non-governmental organizations could obtain the wide acceptance of the government, other profit groups and citizens in the field of anti-discrimination.

Its role in anti-discrimination finds its expression in mainly two aspects. One is to provide the discriminated with legal support and financial subsidy, help the victims gather data and support the victims to obtain relief. Another is mainly represented by social investigation and proof collection, so as to raise policy suggestions to the government and cooperate and compete with the government in view of the problem of discrimination.

#### 4. Social partner

“Social partners” is a term generally used in Europe to refer to representatives of management and labour (employers’ organizations and trade unions). The term “European social partners” specifically refers to those organizations at EU level which are engaged in the European social dialogue, as provided for under art. 154 and 155 of the *Treaty on the functioning of the European Union (TFEU)*. Primary Union law for the first time refers to the notion of “social partners” in art.152 *TFEU*:

“The Union recognizes and promotes the role of the social partners at its level, taking into account the diversity of national systems. It shall facilitate dialogue between the social partners, respecting their autonomy.”

Currently, Social partners include: general cross-industry organizations (CEEP, ETUC, Business Europe); cross-industry organizations representing certain categories of workers or undertakings (Eurocadres, UEAPME, CEC); specific organizations (Eurochambres); sectoral organizations representing employers (62 organizations); and sectoral European trade union organizations (17 organizations).

“Social partners” operates under art. 154 and 155 of the *TFEU*. The competences of organizations, as follows:

A. Social partners are procedurally involved in the genesis of any Commission initiative in the social policy field both in the direction and the content of a proposal<sup>115</sup>.

B. They may decide on how they wish to implement their agreements –“either in accordance with the procedures and practices specific to management and labor and the Member States or, in matters covered by art. 153, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission”<sup>116</sup>.

C. They may decide on autonomous agreements in all social policy fields – even those not falling under the competences of EU institutions as defined in art. 154 EC<sup>117</sup>.

It is a very important part in the field of anti-discrimination. The dialogue through the “social partners” is an important instrument of social policy. “Social partners” can come together to affect change across the whole of industry or within different

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<sup>115</sup> Art 154.2 and 154.3 of *Treaty on the Functioning of the European Union*, “To this end, before submitting proposals in the social policy field, the Commission shall consult management and labor on the possible direction of Union action. If, after such consultation, the Commission considers Union action advisable, it shall consult management and labor on the content of the envisaged proposal. Management and labor shall forward to the Commission an opinion or, where appropriate, a recommendation.”

<sup>116</sup> Art 155.2 of *TFEU*.

<sup>117</sup> Art 155.1 of *TFEU*, “Should management and labor so desire, the dialogue between them at Union level may lead to contractual relations, including agreements.”

economic sectors<sup>118</sup>. Although due to the difficulties in reconciling different interests when it comes to formulating joint agreements, “social partners” have not used their rights very extensively. But through a great deal effort of “social partners”, successfully some agreements were concluded. For example, on parental leave, part-time work, fixed-term work, telework, stress at work, harassment and violence and inclusive labor markets (EU1005011I)<sup>119</sup>.

### 1.3 Source of laws

Sovereign states often take the *Constitution* as the basis of legislation. As a supranational organization, the supreme law of EU and its predecessor European Community is *EU (EC) Treaty* that has been repeatedly revised since 1957. It is now *Lisbon Treaty*.

The representation of anti-discrimination principle in it, for many years, has been continuously enriched and modified in the social policies and judicial practices. The origin of law of the current anti-discrimination framework is the newly added term 6(a) in Amsterdam Conference in 1997. It stipulates “Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”<sup>120</sup>.

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<sup>118</sup> *Social dialogue -giving workers and employers a voice.*

<http://ec.europa.eu/social/main.jsp?catId=329&langId=en&furtherFeatures=yes>

<sup>119</sup> *European social partners.*

<http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/EUROPEANSOCIALPARTNERS.htm>

<sup>120</sup> Art. 6(a) of *Treaty of Amsterdam*.

Besides, *Treaty* has reiterated the principle of anti-gender discrimination in other terms. In Nice Conference in 1999, a second term was added to it, enabling the European the limited majority votes of Council to pass the above anti-discrimination action measures. It constitutes the legislation basis for the current European anti-discrimination legal system. Lisbon Treaty, the new European treaty boasts few changes in the contents of discrimination.

Since 2000, the European integration process has accelerated. In 2000, *Charter of Fundamental Rights of European Union* was passed. The third chapter is “equality”, which takes equality as an independent fundamental right. Besides forbidding the six discriminations provided in European Community Treaty, there are also other seven forbidden discrimination reasons. It states “Any discrimination based on any ground such as sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited”<sup>121</sup>. Although the charter boasts no legal effects, it represents the important efforts made by all the countries of Europe in defining a set of concepts of common values.

At the end of 2004, EU passed the draft of *Treaty establishing a Constitution for Europe*. The provisions of gender equality in the *Constitution* draft are similar to *European Community Treaty*, but it raises the equality and non-discrimination to the level of European universal values. The first section of *Constitution* states “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which

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<sup>121</sup> Art. 21 of *Charter of Fundamental Rights of European Union*.

pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”<sup>122</sup>.

*Charter of Fundamental Human Rights* becomes an attachment to the *Constitution* draft. However, *Charter* is only a macro representation of values. The relatively mature system construction of EU on anti-discrimination work still focuses on the seven fields put forward in *Amsterdam Treaty* specially, i.e. gender, race and ethnicity, genetic characteristics, religion, disability, age and sexual orientation.

Under the *Treaty*, according to the binding degree on the member states, the laws of EU could be divided into regulation, directive, decision and recommendation.

Among them, the directives are special forms, as well as the most important forms. Its feature is that EU only sets a legislation target, but not constrains the approaches and measures various member states have adopted to reach the goal. Therefore, different from directly becoming one part of the regulations of the domestic law, the terms of directives are more macro and simpler. After issuing, it should be transposed within the prescribed period of member states to become more detailed and specific domestic legislation.

There are mainly two reasons for anti-discrimination law to adopt the form of directive. Firstly, the disputes about the category of the definition and right of equality in academic circles of various states have been quite fierce from the beginning. When the anti-discrimination law design has certain constraints on citizens and social groups especially, it is easy to arouse the worryment about the conflicts of equality right and other individual rights. Secondly, the domestic social policy field is relevant to the voters' own welfare and political selection, which is quite sensitive. The member state

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<sup>122</sup> Art. 1.2 of *Treaty establishing a Constitution for Europe*.

governments tend to protect the sovereignty of this aspect, and endeavor to influence the decision of EU with its own legislation principle. Therefore, in the various fields driven by the principle of market integration, such as the strong technical fields such as transportation and hygiene, countries often adopt Council Regulation. This legal form is rather clear with strong binding, while it is totally different in the legislation field involving the principle of social justice. It generally appears in the form of macro treaty, convention, or abstract directive, or even intentional framework agreement.

The three major law against employment discrimination exist in the form of directive, including *Directive on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)* issued in 2006 that has jurisdictions over gender discrimination; *Directive of implementing the principle of equal treatment between persons irrespective of racial or ethnic origin* issued in 2000 that has jurisdictions over racial and ethnic discrimination; and *Directive of establishing a general framework for equal treatment in employment and occupation* issued in 2000 that that has jurisdictions over the religious belief, age and sexual orientation discrimination in the field of employment. Moreover, these three directives develop along with the legal explanation of these directives by the European court. All the various anti-discrimination action plans, social policies and projects issued by EU Commission that we have seen develop around these three directives.

Because of the characteristics of different discriminations, these three directives have different application scopes. *Equality Directive* and *Ethnic Directive* are applicable to a wide range of social fields with strict restrictions. However, the anti-discrimination directive in genetic characteristics, religious beliefs, age, disability and sexual orientation are confined to the employment field with various exceptions. However,

within their respective scopes, after the gradual revision and supplementation, the definition, constraint and relief of discrimination in all directives have a unified trend.

The fundamental principle of EU laws about anti-discrimination relief measures is “right accompanied by relief”. *Racial Equality Directive* and *Employment Framework Directive* issued in 2000 clearly pointed out “effective, proportionate and dissuasive”<sup>123</sup> sanctions are adopted against the discrimination behaviors.

EU legislation seldom gives concrete provisions about the specific relief methods and contents, but remains to the member state courts for discretion according to the situation of different cases.

Once the courts are convinced of the facts establishing a discriminatory act, they need adequate tools to sanction such behaviour. These sanctions—for example, payment of compensation to the victim—must be effective, proportionate and dissuasive. The various national provisions provide a variety of sanctions in all three areas of law: penal, civil and administrative. In penal law the traditional forms of imprisonment and fines are used; under civil law most countries opt for compensation and reintegration of the victim; administrative fines may be found in some countries. Other countries have adopted new forms of sanction, such as making the facts or legal proceedings public. In the majority of countries there is a mixture of different sanctions in different areas of law. While generally welcoming the contents of the new Irish legislation, a number of equality lobby groups have suggested that the new provisions do not go far enough, particularly in relation to the upper limits on sanctions. According to the Equality

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<sup>123</sup> See art. 15 of *Directive 2000/43/EC* and art. 17 of *Directive 2000/78/EC*.



Authority, the new law fails to ensure that the redress provided is genuinely dissuasive, and tougher sanctions are needed to serve as an adequate deterrent<sup>124</sup>.

Apart from the three major directives, EU has more and concrete directives to regulate the discrimination in employment, which will be expounded in details in the diversified discrimination in the next Part.

## **2. The system of China's anti-discrimination in employment**

### **2.1 The difficult beginning of anti-discrimination in employment in China**

The employment situation in China is quite severe. Hu Angang, an expert in national situation of China and professor in Tsinghua University said "China is faced with the worlds' largest employment war". It is not just a simple analogy to regard employment a war. Rather, there is based on the facts. According to his calculations, China creates employment opportunities for 26% of labor of the world population with 9.6% of the world's natural resources, 9.4% of the capital resources, 1.85% of the knowledge and technical resources, as well as 1.83% of the international resources<sup>125</sup>.

In other words, there is no other country in the worlds like China that provides more than 700 million posts. The western developed countries all together provide 430 million posts only. Therefore, it is quite accurate to say that China is faced with the worlds' largest employment war. In the following decade at least, Chinese population also has an increasing trend, and the contradiction of labor supply exceeding the demand will exist for quite a long period of time.

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<sup>124</sup> Wiebke Düvel, Isabelle Schömann, Stefan Clauwaert - European Trade Union Institute, *Non-discrimination in the European Union Implementation of Directives 2000/78/EC and 2000/43/EC PART III Awareness-raising, enforcement and litigation*, Brussels, 2004, Press ETUI, p. 15.

<sup>125</sup> *Issue of Employment in China: surpassing the overall challenge of economy*, Economic Observation Website. <http://www.eeo.com.cn/2007/0319/49854.shtml>

Under the background of such employment crisis, issues of discrimination in employment in China is more notable. As a matter of fact, the actual situation of anti-discrimination in employment in China is much worse than that in Europe. When the EU continue to establish and modify a variety of related protocols and directives in order to deal with increasingly complex employment discrimination, China do not have even one specific law and regulation to respond to employment discrimination. China mediated the discrimination that workers really could not tolerate from time to time just by the *Constitution*, *Labor Law*, *Law on the Protection of Rights and Interests of Women*, *Law on the Protection of the Disabled*, *Employment Promotion Act* and other laws with declarative nature. However, all of these laws still lack relevant relief mechanism. To some certain extent, employment discrimination in China still remains at “steps one” state.

A series of events that occurred in 2003:

- The murdering case committed by Zhou Yichao in province Zhejiang on April 3, 2003<sup>126</sup>.
- On November 20, *Proposal demanding the legislation protection of the recruitment limitations of civil servants of hepatitis B virus carriers in 3 lprovinces (cities) nationwide* with the joint signature of 1611 citizens was submitted to National

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<sup>126</sup> In January of 2003, Zhou Yichao, a student of a university in Zhejiang, participated in Civil Service Examination of people's government of Xiuzhou disctrict of the city of Jiaying. He also participated in the physical examination after he successfully passed the written examination and interview. On April 3, Zhou Yichao started to doubt the equality of the recruitment work as he did not receive the notice letter of examination qualification. He put the blame on Gan Genhua, the person responsible for recruitment work and made intentional revenge. At 3 o'clock that afternoon, Zhou Yichao came to the office of Gan Genhua. After inquiring Gan Genhua and checking the testing report, he got to know that he was unqualified in the physical examination because he had positive Hepatitis B. Then, Zhou Yichao came to the toilet to take out the knife he put in the briefcase in advance, and came back to the office of Gan Genhua with the knife. He stabbed and seriously wounded Gan Genhua, and killed Zhang Wenwei in the same office. After that, Zhou Yichao was sentenced to lethal injection because of crime of intentional homicide.

People's Congress Standing Committee, Ministry of Health and Legal Affair Office of the State Council;

- In December, Civil Court of employment discrimination suppression system research of the district of Xinwu in the city of Wuhu in Anhui Province in China officially accepted the first health discrimination case in China appealing to Wuhu Municipal Bureau of Personnel by the hepatitis B virus carriers. It is the striving for their own equality right and labor right from the hepatitis B virus carriers that take up 10% of the total population in China<sup>127</sup>.

The above events gradually bring the word “employment discrimination” to the view of the public, which at the same time arouses the extensive focus of experts and the social public. Chinese media called the year of 2003 as the “Anti-discrimination Year” for the hepatitis B virus carriers in China. At then, it had already been 46 years since the “anti-employment discrimination” of EU appeared in the *Treaty of Rome* in 1957.

In 2004, Chinese project group of Human Rights Research Centre (NCHR) at Oslo University in Norway carried out the research called “the employment discrimination of China's lower labor (laborer) group in China”. This project group interviewed some enterprises in China from June to mid-August 2004. The interviews mainly based on semi-structural questionnaires. The study showed that as a legal concept the word “discrimination” was not cognized by Chinese especially among low-level workers (labor groups most vulnerable to discrimination). Through this research, we can easily find that the project group encountered a series of methodological problems, which indicates the difficulties of understanding the term discrimination in the context of

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<sup>127</sup> See Ye Jingyi, Wei Qian, *Legal Issues of Health Employment Discrimination*, Human Right 2004(3).

Chinese culture<sup>128</sup>.

First of all, the word discrimination is too academic in China. Discrimination originates from the West, and belongs to the legal academic term. As to the Chinese experience, discrimination is unfamiliar; it can not directly correspond to the Chinese experience. Majority of Chinese people knew “discrimination” according to “racial discrimination”, and regarded it as a politic word, not a legal word. Workers have a wide variety of understanding and perception about discrimination, so it is hard to find out an explanation that people can reach consensus as well as is consistent with the legal interpretation of the concept.

Secondly, most of the interviewees have their own understanding of the word discrimination. These understanding are usually “look down”, “bias”, “unfair” and so on. For example, in an interview, a female welder of an enterprise's manufacturing workshop in Dalian was asked what discrimination is. She replied, “Discrimination seems to be, well, like that people quite look down on someone and isolate him”<sup>129</sup>. Such kind of understanding is greatly different from the concept of discrimination in the laws and in individual rights. In the author's opinion, the concept of discrimination in the sense of individual rights is primarily a sort of western context with a certain distance to Chinese culture. People do not seem to recognize discrimination at the abstract level. People seem to have no understanding of the abstract sense of discrimination. Most of them could understand what could be called discrimination only in the specific situation where the discrimination behaviors occur.

In such kind of context, there was almost no voice against the word “employment

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<sup>128</sup> See re. Li Weiwei, Lisa Sttearns, *Employment discrimination International Standards and National Practice*, Beijing, 2006, Law Press China, p. 80-p. 143.

<sup>129</sup> See Li Weiwei, Lisa Sttearns, *Employment discrimination International Standards and National Practice*, Beijing, 2006, Law Press China, p. 83.

discrimination” by 2004, which did not mean there was no existence of discriminatory behaviour. Due to the lack of legal norms, many types of discriminatory behaviour were not restricted and more serious. From “gender discrimination”, “appearance discrimination”, “Hepatitis B discrimination”, “household discrimination”, “criminal record discrimination” to “genetic discrimination”, the phenomena of discrimination never stop in the field of public employment. With the continuous development of economy and society, various new forms of discrimination constantly appear.

Chinese governments and scholars have made unremitting efforts confronted with the serious condition in employment discrimination in China. It is absolute that the construction and perfection of law could never be realized suddenly. It is not until January 12, 2006 that China officially approved *1958 treaty of removing employment and career discrimination* (No. 111 treaty).

In face of the serious condition of China’s employment discrimination, the Chinese government and scholars have made unremitting efforts, but certainly the construction and improvement of the law can not be achieved overnight. As China's largest anti-discrimination agency, Beijing Yi Renping Center is committed to provide legal assistance against employment discrimination. It has assisted several representative cases of employment discrimination, such as “China’s first case of appearance discrimination”<sup>130</sup>, “the first HBV discrimination case in Guangdong”<sup>131</sup>, “China’s first

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<sup>130</sup> China’s first case of appearance discrimination: Qiuzi was born in a common family in Shangqiu, Henan province. He graduated from the English major of Shangqiu Vocational Technical Institute on July, 2006 and obtained the teacher qualification certificate. On December 1, 2006, Qiuzi signed internship contract and assignment contract respectively with Shanghai Only Education Investment Management Advisory Co., Ltd. According to the prescriptions of the internship contract, Qiuzi had a one-month internship in teacher training department of North China area located in the city of Zhengzhou. On December 21, according to the prescriptions in the assignment contract, Qiuzi received the company notice, telling that her working location was the incorporated school of the company: Jiashan School of Zhejiang Provincial Only International Education. On 24th, Qiuzi arrived at school. On that day, she received the telephone notice of the person responsible in teacher training department of North China area, demanding her to return to Zhengzhou on that day for other work arrangements. Qiuzi returned to teacher training department of North China area located in the city of Zhengzhou on 26th, and the latter

case of genetic discrimination”<sup>132</sup>, and so on. Yu Fangqiang, the person who in charge of the public agency pointed out that the greatest difficulty of anti-discrimination in employment lies in the public. If the public does not change their view, discrimination will exist forever.

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refused to fulfill the labor contract according to the contract prescriptions with the excuse of poor appearance of Qiuzi. On February 5, 2007, Qiuzi went to Shanghai Labor Arbitration Department to safeguard her rights with the record evidence. This case was called China's first case of appearance discrimination. With the help of Beijing Yi Renping Center, on February 9, this “appearance discrimination case of big-head girl” that attracted so much attention achieved an agreement in Shanghai. After the mediation of Labor Department, this girl Qiuzi from Henan jointly published reconciliation statement with Shanghai Only Investment Advisory Co., Ltd that Qiuzi shall continue to hold a post in Only Company.

<sup>131</sup> The first HBV discrimination case in Guangdong: in July, 2006, Li Fei flew to Dongguan after graduation from the university and applied for a job in Hongkong enterprise V-tech Group located in the town of Liaobu in Dongguan. Both the interview and retest of Li Fei were successful. On July 18, 2006, V-tech Group handled commencement procedures for Li Fei, and made a copy of the graduation certificate and the degree certificate. They also reached an agreement on the salary. However, on July 19, Personnel Department of V-tech notice Li Fei that as he turned out to be a hepatitis B carrier in the physical examination, he was refused to work there. Later, Li Fei called their personnel supervisor and engineering supervisor of the job interview, explaining to them that hepatitis B carrier would not influence work or harm others' health. However, V-tech held a firm attitude and refused Li Fei to work there all along. On January 22, 2007, Li Fei prosecuted V-tech to Guangdong Dongguan People's Court. On January 26, 2007, Dongguan People's Court officially accepted this case. On January 3, 2008, with the mediation of Dongguan Court, the complaint and defendant of this case reached an agreement that the defendant Dongguan V-tech should pay a compensation of 24000 to the hepatitis B carrier Li Fei (pseudonym). It also promised that it would carry out fair employment policy as in the past, forbid any form of discrimination, strengthen and supervise the implementation force of non-discrimination personnel policy, and prevent and avoid any cases of refusing hepatitis B carriers. This sum of money was paid by the defendant to the complaint for once before January 9, 2008.

<sup>132</sup> China's first case of genetic discrimination: in April, 2009, Mr. Zhou, Mr. Xie and Mr. Tang participated in Foshan civil service examination. They successfully passed the written examination, the job interview and entered the link of physical examination. Just as they were close to the “destination”, they turned out to be detected as Thalassemia gene carriers and were regarded as unqualified in the physical examination. They thus lost the recruitment opportunity of civil servants. Lawyer of these three persons pointed out that “mean corpuscular volume” examination and “thalassemia gene analysis” that the candidates had participated in had already gone beyond the stipulated routine blood test projects in “Civil Service Recruitment Examination Standard (Trial)”. Moreover, there had never been any explanation about its necessity. This practice violated the relevant laws and regulations, as well as violated the candidates' “physical privacy”. Lawyer of Foshan Human Resources and Social Security Bureau responded that in the civil service recruitment process, commissioning the medical institution for the physical examination is abiding by law. The testing methods in the process of civil service examination, in accordance with the provisions by the project, should be determined by doctors according to needs. As the major recruitment department of civil servants, not to hire the three personnel above was in accordance with the law.

What the latter said won the support of the court of first instance of Foshan Chancheng People's Court. In the verdict of the first instance, the court rejected all the claims of the three participants. After the failure, these three participants appealed to Foshan Intermediate People's Court. After the second trial, the presiding judge did not pronounce judgment in court. On the morning of September 5, 2010, Foshan Intermediate People's Court made a final verdict of this “China's first case of genetic discrimination”, disallowed the appeal and upheld the conviction.

When some cases of discrimination gradually get into our vision, for the cognition of discrimination, the Chinese workers are no longer at a loss. The public has been aware that equal employment is a legal right.

## **2.2 Current situation of discrimination in employment in China**

In May and October, 2006, Constitutional institute of China University of Political Science organized an survey about China's employment discrimination situation in Beijing, Guangzhou, Nanjing, Wuhan, Shenyang, Xi'an, Chengdu, Zhengzhou, Yinchuan and Qingdao. The results indicate that the problem of employment discrimination in China is quite serious.

Besides, Chinese Academy of Social Sciences organized the task study of "go against employment discrimination and promote employment equality". This task group conducted questionnaire survey in four provinces of Sichuan and Xinjiang (autonomous region). These two authoritative questionnaires reflected that the problem of employment discrimination in China was quite serious.

### **2.2.1 Employment discrimination is very serious**

There is very serious Employment discrimination in China. Those shocking data in the survey is the best evidence. *Discrimination in Employment Status of China's Questionnaire Report* show:

When were asked "does discrimination exist in current employment field", the interviewees who answered yes cumulatively account to 85.5%, the ones that considered it is very serious and relatively serious take up 50.8%, those who thought that it does not exist occupy 6.6%<sup>133</sup>.

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<sup>133</sup> *Discrimination in Employment Status of China's Questionnaire Report.*

Besides, according to the statistical result from the 2240 effective copies of questionnaire of the task group of “go against employment discrimination and promote employment equality”:

More than half of the investigated believe the problem of employment discrimination to be serious. The statistical result of the questionnaire survey indicates that among the 2240 persons that have been investigated, those who believe the current employment discrimination to be “very serious” take up 10.9%. Those who believe it to be “serious” take up 40.7%. A total of them are 51.6%. It indicates that more than half of the people that have been investigated believe the problem of employment discrimination to be serious. At the same time, those who believe the problem of employment discrimination to be “not serious” take up only 6.4%<sup>134</sup>.

Although the data of these two investigation reports are not completely the same, the proportion of those who believe there to be employment discrimination exceeds 50%. More than half of the labors believe there to be employment discrimination, and have been harmed by different kinds of employment discriminations.

According to *Discrimination in Employment Status of China's Questionnaire Report*, the more detailed situation was known:

More than 70% of people believe that they were discriminated in employment. When were asked “what kind of discrimination have you ever met in employment”, 30.8% of people think that they have been discriminated in pay or benefits; 22.7% of people consider that they have been suffered discrimination in position arrangements; 21.3% of people believe that discrimination exists in judgment of promotion and

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<http://www.eeo.com.cn/2007/0630/73823.shtml>

<sup>134</sup> Zhang Shifei, Tang Jun, *Employment Discrimination in China: Fundamental Judgment*, Jiangsu Social Sciences, 2010 (2), p. 52.



professional title; 17.6% of people think discrimination happens in the course of employment (the above is multiple-choice). In other words, some people face multiple-discrimination.

When were asked about the extent of discrimination, 54.9% of people's opinion is different degrees of discrimination, 15.6% hold that they have suffered severe discrimination. To sum up, 71.1% of people get various forms of discrimination in employment and work.

In the cases of being rejected in employment, the highest proportion is due to disability. 21.8% of the disabled interviewees consider themselves been rejected because of disability. The second cause is low education, 18.7%; the third because of non-local residence, 18.5%; the lowest is political status, only 3.4%.

### **2.2.2 Multifform category of discrimination**

In the field of employment in China there is a lot of discrimination: Sex, age, disabilities, health, political affiliation, residence, height and appearance, released prisoners, ethnic, religious, sexual orientation, etc..

1. Among them, sex discrimination is the traditional type of discrimination, and is now still the major aspect of employment discrimination. Among the researches of sex discrimination, different investigations and researches should be carried out targeted at different industrial groups. What needs special attention is the sex discrimination targeted at specific groups, such as discrimination towards female university students, discrimination towards female technical personnel, as well as sex harassment in working locations. The author will have a detailed discussion about it in the diversified discrimination in the next chapter.

2. Age discrimination is also the traditional type of discrimination. Along with the development of social aging, it becomes more and more serious. Certainly, age discrimination is not confined to the middle-aged and the elderly only. It also included the discrimination towards the young. It will also be discussed in details in the next chapter.

3. The disability discrimination also has a long history. Apart from the discrimination towards those who have obvious physical disability, it extends to the discriminations towards health for the recent years, both physical health and mental health. Worse still, there have even been discriminations about the health condition of family members, as well as the discrimination towards family hereditary factors.

4. The discrimination towards political affiliation publicly appears in the recruitment and promotion of administrative institutions. So far, in the selection of the civil servant examination, there are quite a lot of posts requiring Party members, or a probationary member of the Party<sup>135</sup>. Moreover, the counselor recruitment of a lot of universities also asks for Party members. Of course, it is undeniable that this phenomenon is inseparable from China's one-party political situation. However, in today's development of the democratic rule of law and human rights, this special way of the selection of talents is no longer needed. Moreover, there is no study that suggests that being a Party member is certainly competent for the job requirement.

The discrimination problem of residence is mainly due to China's current population and census register system. In China, census registration is divided into agricultural and non-agricultural households, and each administrative division has its

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<sup>135</sup> Posts in National Civil Service Examination requiring party members in 2011 is as many as 9762. This is only the national civil service examination, the provincial and municipal civil service examinations excluded.

own residence. The state can have a quantitative management of its citizens according to the different census registrations. However, due to the different areas with different economic development levels, the opportunities of employment it can provide and the kind of workers it can attract are also different. Therefore, a large number of workers are flocking to Beijing, Shanghai and other economically developed areas. In addition, China is a country with a large population, and in the employment market of most large and medium-sized cities, supply is thus far greater than demand. In order to ensure the stable development, the local government usually sets up a series of measures firstly to meet the needs of the local population's employment<sup>136</sup>. In this case, it is not at all surprising that the employer will take residence as a condition to select workers, and this condition is prevalent.

6. Discrimination towards height and appearance. Appearance condition finds its origin from the social psychology of judging people by outward appearance. The employing units take it as a means of raising their social image. This trend, as an existence of the psychological state, will appear in the indirect discrimination. In China, however, in a lot of recruitment information, there is directly open request of height. In the recruitment site of Wannan Medical College, for example, there is a measurement of height. Boys less than 170cm and girls less than 160cm are excluded<sup>137</sup>. In Hainan Sanya People's Hospital, the recruitment requirements for nurses prescribe that those

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<sup>136</sup> In 2011, for example, the quota that Beijing gave to non-Beijing graduates to stay in Beijing had greatly declined. Zhang Zude, deputy director of Beijing Labor Social Security Bureau, said on June, 15 that Beijing would strictly control non-Beijing university graduates to stay in Beijing. Meanwhile, multiple measures would be introduced to make great efforts to make university graduate employment rate no less than 95%. Superficially, this policy of Beijing seems to be a model of population control and adaption to the economic development, which is favorable for the promotion of the employment situation of the city of Beijing. However, it is the direct discrimination of non-Beijing graduates. It is widely known that the capital boasts a developed economy and more employment opportunities. This policy of Beijing obviously starts from the occupational demand. Rather, it takes residence as the object of discrimination, compulsorily compelling the employing unit unable to employ these who are obviously competent but lack the residence of Beijing.

<sup>137</sup> *Unequal right of speech is one of reasons of height discrimination*, 15/03/2011.  
[http://news.ifeng.com/opinion/gundong/detail\\_2011\\_03/15/5158274\\_0.shtml](http://news.ifeng.com/opinion/gundong/detail_2011_03/15/5158274_0.shtml)

who apply for nurses should not be less than 158 cm<sup>138</sup>. In the recruitment, the information clearly asking for appearance is also everywhere. There is the most basic requirement of “handsome” and stricter requirements of “good image and temperament”. There are even requirements asking for “a slim figure” and “a sweet face”.

Moreover, with the continuous development of the society, there appear a lot of types of discriminations that are beyond imagination apart from the extensive types of discriminations that have been mentioned above:

1. Discrimination towards blood types. A car sales company in Hangzhou only recruits people with a blood type of B in the recruitment of marketing personnel. Mr. Chen, marketing manager of this car sales company said that now, many sales companies including their company, tend to select people with a blood type of B to work for the company in the recruitment of marketing personnel. The reason is that people with blood type B are best suitable in the marketing work, which has already become an unwritten rule. According to staffs of Hangzhou talent market, in Hangzhou, there already exist some enterprises that add the blood type requirement in the conditions of employment. However, it is the usual case that the employing units do more than they say. They usually do not write out the requirement of blood type while posting the recruitment information, but in the actual operation, they take blood type as a standard to hire people. This phenomenon appeared in talent markets like Shenzhen. Some enterprises clearly wrote down the blood type requirement in the advertisement, which was called “blood type discrimination” at that time<sup>139</sup>.

2. Discrimination towards zodiac. On August 13, 2007, while reading the

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<sup>138</sup> <http://www.zptv.com.cn/zpnews/jdxw/2006/6/j063004.htm>

<sup>139</sup> *Discrimination of blood type*, 02/03/2009. [http://www.cctv.com/life/baike/090302\\_1559.html](http://www.cctv.com/life/baike/090302_1559.html)

newspaper, Mr. Liao saw the employment information of “high-salary employment of shop sales personnel” and felt quite surprised as he was quite appropriate for the employment requirements. Then, Mr. Liao immediately dialed the contact telephone number on the employment information. On August 14, Mr. Liao came to the sales department of a certain garden of Longhua for the interview. “You are born in 1982, the year of dog, right?” The marketing center manager of ×× sales department of Longhua read the birth date of Mr. Liao’s resume and handed it over back to him. “Sorry, we do not employ personnel born in the year of dog.” The marketing manager told Mr. Liao that any one born in the year of dog or tiger would not be taken into consideration. Contrary to the deeds in the employment of this real estate company, the boss of a private enterprise clearly demanded in its employment that they would only employ personnel born in the year of dog. This boss was quite superstitious and firmly believed in what a “fortune teller master” said, claiming that dog could bring him good luck. In the employment of some other enterprises, however, they stipulate not to employ people born in the year of rooster. It is because that the boss is born in the year of dog, and the employment of personnel born in the year of rooster may lead to the situation of “setting cat among the pigeons” and “a scene of turmoil”, which will block his wealth. Therefore, applicants born in the year of rooster have been refused.

3. Discrimination towards constellation. A well-known insurance company in China had a recruitment fair in Huazhong University of Science and Technology. According to the introduction of the lecturer of the employing side, they would take constellation and blood type into consideration in the recruitment. He specially emphasized that they would not employ people of Aquarius, Taurus and blood type of A. It was because that people of Aquarius are quite “strange” and “abnormal”, whose deeds could not be understood by people around generally. People of Taurus were quite

passive, who were slow even in the love affair<sup>140</sup>. Xu Qin, a student from the major of packaging engineering of Tianjin University of Science and Technology, found a planning post recruitment of a wedding company in Tianjin to be quite “astonishing” when he participated in a recruitment fair at the end of November, 2010. Besides the requirements of educational background and major, an additional requirement was that the applier should belong to the six constellations of “Leo, Virgo”, etc. Faced with this nearly ridiculous demand, Xu Qin felt quite curious and asked the recruitment personnel about the reason. The reply of them made Xu Qin feel quite ironic, it is “through scientific verification, people of these constellations are appropriate for our working requirements”<sup>141</sup>.

4. Employment of medium performance rather than the top ten. A well-known foreign company in Shenzhen producing semiconductors, while holding a recruitment in Xi'an, said to the students at the recruitment scene “all the students present here, if you rank top 10% or bottom 10% in your class, then please leave here, as we don't want to waste your time and we don't need this kind of talents”. In response to this recruitment regulation, students wondered about it. The responsible person for the recruitment explained that the company mainly recruited equipment engineer, and the job of equipment engineer was the routine maintenance of main production equipments, which could be said to be simple and boring. However, this university of on-site recruitment is a famous university in China. He believed that the top 10% students to be absolutely excellent. If they entered the company, most of them would not adapt to the boring work environment and would seek greater development, or in other words, they would be job

<sup>140</sup> A Disguised Form of “Employment Discrimination”: Zodiac, Constellation and Blood Type Differ, Guangzhou Daily, 17/08/2007. <http://view.news.qq.com/a/20070831/000045.htm>

<sup>141</sup> Xing Shan, Li Haiyan, *University Graduates are Confronted with Discriminations of Height and Constellation*, 05/122010. [http://www.tianjinwe.com/tianjin/tjjy/201012/t20101205\\_2734179.html](http://www.tianjinwe.com/tianjin/tjjy/201012/t20101205_2734179.html)

hoppers. The company spent huge initial investment on each employee and job hopping for the company was a very serious loss. Therefore, this part of students won't be hired. The company's production equipment is most advanced in the world, and they have enough reasons to believe that the bottom 10% students are absolutely not qualified enough for this job. Therefore, they do not recruit the best or the worst, but the average<sup>142</sup>.

5. Discrimination towards drinking ability. "Are you a deep drinker?" On the recruitment fair, many posts of public relation personnel, sales personnel and secretary clearly require "a certain degree of drinking ability". What's more, the job interview of some companies is carried out on the table. Xiaoqi, a student from the major of marketing of Capital University of Economics and Business applied for the marketing representative of a company. The manager Mr. Chen of the marketing department firstly led more than ten persons for the interview to the restaurant downstairs. While dinning, the attendant brought two bottles of Erguotou and filled each of their cups with liquor. The person in charge of the interview of the company said that social intercourse on table was inevitable in doing sales. Therefore, the drinking ability became an important standard for the company to select staffs. Two "outstanding" boys on the table of liquor were selected, while Xiaoqi was eliminated because of poor drinking ability. Why are the appliers demanded to have a good drinking ability? The person in charge of this company said "nowadays, many businesses talk are accomplished on table. An important task of our sales personnel is to have an emotional contact with our clients. How would it be possible without drinking? All the sales personnel with good performance in our company have a good drinking ability." "There is no other way.

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<sup>142</sup> A Disguised Form of "Employment Discrimination": Zodiac, Constellation and Blood Type Differ, Guangzhou Daily, 17/08/2007. <http://view.news.qq.com/a/20070831/000045.htm>

Even if one passes the recruitment, troubles will come in working without a good drinking ability”<sup>143</sup>.

6. Discrimination towards name is more ridiculous. In the recruitment, some enterprises refuse to recruit people whose names include words like Pei, Mei, Huang, etc. It is because that they believe Pei is the homophone of loss, Mei is the homophone of bad luck, and Huang indicates failure. The recruitment of personnel with such surnames is inauspicious. This superstitious deed is really ridiculous. Liu Meng of an age of 35 is a driver with more than ten years’ of driving experience. He lost his working opportunity because of his name. At the end of October, 2006, he applied to work in an enterprise as a driver for the leader. At that time, there were two applicants for the job. However, Liu Meng failed in spite of his advantages in both working experience and driving skills. The recruitment personnel told him that according to the survey, drivers with the words of “Chong” and “Meng” in their names had a quick temper and they tended to have accidents in driving. Therefore, the company decided not to employ him<sup>144</sup>.

Types and manifestation of current employment discrimination in China			
	Discrimination types	Definition	Main manifestation
The first	Age	Setting irrational age	“Below 35” is a usual age limit

<sup>143</sup> *College Students are Forced to Drink in the Job Interview and the Female Applicants Cultivate Their Drinking Ability*, Beijing Morning News.  
<http://news.sina.com.cn/s/2006-12-21/034011846062.shtml>

<sup>144</sup> *80% of Applicants Suffer from Employment Discrimination: The Surname Should be Auspicious and The Zodiac Asks for Matching*. <http://news.cntv.cn/society/20110607/107478.shtml>



level of employe nt discriminat ion type	discriminati on	limits to labors regardless of the actual requirements of the post	set, leading to employment difficulty of people of ages between “40 and 50” and “the generation after 80s”
	Gender discriminati on	setting constraint on workers’ gender directly or indirectly regardless of the actual requirements of the post	Refusal of employment explicitly with the excuse of gender; enhancing the employment standard of females; additional conditions in employment, like females are not allowed to marry in the contract period
	Ethnic discriminati on	Refusal of employment with the excuse of ethnicity of workers regardless of the actual requirements of the post	Great bias towards minority workers

	Experience discrimination	Setting irrational limits on working experience of workers regardless of the actual requirements of the post	The recruitment advertisements are filled with conditions of “more than two years’ experience of relevant work” and “relevant working experience”.
	Educational discrimination	Setting irrational educational or degree limit on workers regardless of the actual requirements of the post	The recruitment advertisements are filled with conditions of “people with insufficient educational background excluded” and “people with postgraduate education excluded”, etc.
	Residence discrimination	Taking workers’ residence as the condition regardless of the actual requirements of the post	Restricting that workers should have “local residence” or “urban residence”. Local people and outsiders, urban people and rural people differ in their welfare and treatment.
	Geographic al discrimination	Refusal of employment with the geographical excuse	A public promotion of “poor image of Henan people”, “disorderly northeasterners”

	on	of workers regardless of the actual requirements of the post	and “Beijing master”, etc.
The second level of employment discrimination type	Health discrimination	Refusal of employment with the health excuse of workers regardless of the actual requirements of the post	Disability discrimination and HBV discrimination, etc.
	Appearance discrimination	Judging people by the appearance regardless of the actual requirements of the post	Demanding workers to be “handsome” , “good appearance and temperament”, etc.
	Zodiac discrimination	Refusal of employment with the excuse of zodiac of workers regardless of the actual requirements of the post	Believing that people born in the year of ram should not employ people born in the year of tiger and people born in the year of rooster should not employ people born in the year of rabbit as they are restricting

			each other
	Surname discrimination	Refusal or preference of employment with the excuse of surname of workers regardless of the actual requirements of the post	Unwilling to have words like “Pei (loss)”, “Mei (bad luck)” and “Shu (failure)” in workers’ surnames, believing them to be inauspicious
	Blood type discrimination	Taking the workers’ blood type as the condition regardless of the actual requirements of the post	Workers’ blood type should be O or B, rather than AB.
	Height discrimination	Taking the workers’ height as a condition regardless of the actual requirements of the post	Demands like “boys no less than 1.7 meters and girls no less than 1.6 meters”, etc.
	Drinking ability discrimination	Taking the drinking ability as a condition regardless of the actual requirements	Demands like drinking ability and “no less than half a kilo a meal”

	on	of the post	
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In the investigation report of the task group of “go against employment discrimination and promote employment equality”, a simple table (as follows) is adopted to conclude the types of discriminations they have encountered in the survey questionnaire<sup>145</sup>.

There are a great many types involved in both the traditional employment discriminations and the ridiculous new employment discriminations. While differentiating the employment access or the promotion condition, it needs explicit judgment about what are discriminations and what are career requirements.

### **2.2.3 Employment discrimination is quite open**

The *Report*<sup>146</sup> shows that employment discrimination is very open and direct. And it is around us. The author has subscribed *Peninsula City News*. There were altogether 339 employment messages from B38 to B43 on August 11, 2011. Among these employment messages, there were more than 300 messages that publicly required the applicants’ age, gender, working experience, and appearance. In other words, nearly every employment message implied different kinds of discrimination contents more or less.

Then, the author conducted a telephone consultation on about 30 companies. They invariably did not think that their information contents carried with discrimination,

<sup>145</sup> Zhang Shifei, Tang Jun, *Employment Discrimination in China: Fundamental Judgment*, Jiangsu Social Sciences, 2010 (2), p. 52.

<sup>146</sup> *Discrimination in Employment Status of China's Questionnaire Report*.

believing it to be an industry practice. When the author asked one of the five-star hotel employing chef about why they had height requirement on the candidates, the company's human resource department staff told the author that those who had reached this required height were often more confident. A confident person generally made delicious food. The public requirement of the height of chef because of this reason and the discrimination towards women under 1.65 and men under 1.75 were really ridiculous.

Besides the open discrimination contents in the employment information, there is also quite open discrimination after the workers start working. The *Report* shows, for example, when were asked, "whether inform the reason if was fired because of illness", 51.3 percent of employers answered yes. Most employers do not think that this is not correct, and openly dismiss employees taking the departmental and social benefits as an excuse. The indifference of their social responsibility is so sorrowful

In China, employer's social responsibility is relatively weak. Few companies even public service units are able to bear the cost for developing social democracy and popularizing equality. Moreover, none of Chinese law has regulatory standards.

The employers often adopt the direct interest of the company as the evaluation object to attract talents. There are even many enterprise managers who believe that helping vulnerable groups with employment is the responsibility of the government, and the enterprise is for the purpose of making a profit. Some enterprise owners believe that the so-called social responsibility of the enterprise is the taxation, or a certain amount of donation activities for the occasional natural disasters. Moreover, Chinese laws have no requirements on what social responsibility the enterprise should undertake. At the same time, the government also lacks the related guiding measures and the appropriate

understanding of the social responsibility of the enterprises.

#### **2.2.4 The discriminatory behaviour of government**

This is also the most painful point to the author. As the defenders of people's rights, the government takes initiative to discriminate workers, then how should workers defend their rights? The discriminatory behaviour of the government also indirectly shows how indifferent people's recognition of discrimination in China. How difficult to across the threshold of long history and traditional culture against employment discrimination.

From the survey, we find that there is severe discrimination in recruiting and the career of public official of state organ. 65.9% of the interviewees believe that different treatments do exist:

1. There are three kinds of discrimination in recruitment of public official: domicile, the disabled and health conditions. In the recruitment, the subjects believe the situation of exclusion is: the first, low qualifications account for 45%; the second, non-local residence takes up 43%, which is the most serious discrimination; disabilities (40.9%) and health reasons (40.7%) are respectively ranked at the third and fourth place. Since not all the cases of academic requirements are discrimination, so the above three are the most important discrimination.

2. Age discrimination and gender discrimination are also considerably serious. Age discrimination in recruitment of public official is extremely prominent. In the recruitment, public officials who are less than 30 years of age occupied 42.0%, and those under 35 years of age accounted for 58.0%. 32% of people suffered gender discrimination. Since only women have this problem, so the ratio is very high.

3. Discrimination mainly occurs in the final examination stage. Which stage does discrimination in state organs mainly happen? 66% of people think that discrimination exists in the final examination stage; 35.8% of people believe that discrimination exists in the promotion stage; 29.4% of people consider that there is discrimination in physical examination stage; 27% of people hold that there is discrimination in written examination stage. It shows that most people do not have confidence in the final examination of recruiting public official.

4. The interviewees think that in recruiting public official, the requirements of gender, domicile, height and appearance do not make sense at all. Respondents believe that the most unreasonable conditions in the recruitment of public official are as follows: the first is gender, 67.7%; the second is domicile, 66.3%; the third is height, 59.8%; the fourth is appearance, 47.4%; the fifth is political status, 41.6%. The opinion of recruitment conditions in enterprises and public institutions is different from the above. Interviewees think that the enterprises and public institutions should not set up these conditions: the first is domicile, accounting for 67.2%; followed by gender, 63%; the third is height, 54.5%; political status is ranked the fourth, 53.4%. This shows the public agree that the most unreasonable demands are gender requirement in the state organs as well as residence requirement in enterprises and public institutions. Besides, the public are even more opposed to political demands in the recruitment of enterprises and institutions. The ratio is nearly 12% higher than that in the recruitment of public official.

The respondents consider that the reasonable conditions in the recruitment of public official and enterprises are: education is ranked the first, 80.7%; in the second place is health, 59.8%; in the third place is age, accounting for 47.9%. It is evident that the public approve to select candidates through their educational background in the recruitment. Over half of people think that health condition is reasonable, and nearly



half of people think that age is reasonable, which indicates that many people lack the awareness of health and age discrimination<sup>147</sup>.

Moreover, they almost always end in failure in cases of “civilian suing government” (see the table below).

Cases	
HIV carrier discriminati on case	<p>The graduate Xiaowu participated in the governmental school teacher employment examination of the city of Anqing, Anhui province. He passed the written examination and the interview, but was refused to be employed as the “AIDS examination is positive” in the physical examination.</p> <p>In October, 2010, Xiaowu took Anqing Municipal Education Bureau to the court.</p> <p>In November, 2010, the first instance of Anqing Yingjiang Court judged against the plaintiff and the plaintiff filed an appeal.</p> <p>In January, 2011, Anqing Intermediate Court rejected the appeal and upheld the conviction.</p>
HIV	Xiaojun participated in Sichuan Yanbian County Public Institutional

<sup>147</sup> See re. *Discrimination in Employment Status of China's Questionnaire Report*.

<p>infection discriminati on case</p>	<p>Recruitment Examination, and was refused to be employed as he was found to have positive HIV in the physical examination.</p> <p>In October, 2010, Xiaojun made administrative prosecution to Yanbian County Court. The first instance judged against the plaintiff and Xiaojun filed an appeal later.</p> <p>In June, 2011, Panzihua Municipal Intermediate People’s Court judged against Xiaojun in the final judgment.</p>
<p>Case of “being regarded to have HBV ”</p>	<p>Li Feng participated in Shaanxi Xi’an Civil Servant Examination, and passed the written examination and interview. The physical examination found the second and fifth terms of the five indexes of hepatitis B to be positive. He was thus regarded to have “chronic liver disease” and the admission was cancelled.</p> <p>In October, 2010, Li Feng took Xi’an Civil Servant Bureau to the court.</p> <p>In March, 2011, the first instance of Xi’an Lianhu Court pronounced to maintain the administrative decision of the defendant.</p>
<p>Generic discriminati on case</p>	<p>Xiaoxie and other two participants in civil servant examination organized by Guangdong Foshan Human Resources and Social Security Bureau and successfully passed the written examination and interview.</p> <p>The physical examination regarded them as thalassemia gene carriers and they were refused to be employed.</p> <p>In January, 2010, the three persons took Foshan Human Resources and</p>

	<p>Social Security Bureau to the court.</p> <p>In June, 2010, the first instance of Foshan Chancheng Court pronounced to dismiss the plaintiff's appeal.</p> <p>In September, 2010, the final instance of Foshan Intermediate Court rejected the appeal and upheld the conviction.</p>
<p>Height discriminati on case</p>	<p>Xiaomao and other three participants were refused to be employed in Hunan Wugang Middle and Primary School Teacher Recruitment in 2009 because of height.</p> <p>In November, 2009, these four participants lodged an administrative complaint to Wugang People's Court, complaining Wugang Education Bureau broke the law in administration and violated their legal rights and interests. They also required Education Bureau to employ them according to the legal procedures.</p> <p>In March, 2010, the first instance of Wugang People's Court maintained Wugang Education Bureau's specific administrative behavior of not hiring the plaintiffs and dismissed the plaintiffs' appeals.</p> <p>On March 18, 2010, the second instance of Hunan Shaoyang Intermediate People's Court judged against the plaintiffs.</p>
<p>The case of civil servant being</p>	<p>Xiaowang participated in civil servant examination of Jiangsu Xuzhou Tongshan People's Procuratorate. He passed the written examination, the interview and entered the political examination.</p>

<p>refused in the political examination because of “pregnancy before marriage”</p>	<p>In July, 2009, Tongshan Organization Department gave Xiaowang a written notice that she would not be recruited as she violated the birth control policy, leading to unqualified political examination.</p> <p>In October, 2009, Xiaowang appealed to Xuzhou Yunlong People’s Court, demanding Xuzhou Bureau of Personnel to withdraw the administrative behavior of cancelling the recruitment civil servant qualification of Xiaowang. The court decided to reject the complaint.</p> <p>Xiaowang did not subject and appealed to the court. The second instance of the court maintained the verdict of the first instance.</p>
<p>The case of HBV carrier being refused in handling the health certificate</p>	<p>Xiaoyu, a HBV carrier in Changsha, was refused by Changsha Disease Control Center while applying for food service health certificate.</p> <p>According to <i>Food Safety Law</i> and <i>Enforcement Regulations of Food Safety Law</i> implemented in 2009, HBV carriers have not been forbidden to engage in food and drink industry. However, Disease Control Center still refused to issue health certificates to HBV carriers.</p> <p>After that, Xiaoyu appealed to Changsha Health Bureau for 8 times altogether without any achievements.</p> <p>In September, 2009, Xiaoyu took Changsha Health Bureau to the court.</p> <p>On January 22, 2010, Changsha Yuelu Court judged against the plaintiff.</p>

China’s society is seriously lack of equal awareness toward employment. Opposing

discrimination and promoting equal opportunity in employment is current China's urgent, long-term and arduous task. But it is the only way that leads China toward social justice and harmony.

### 2.3 Sources of law

China has no specific anti-employment discrimination law, but the Chinese government attaches great importance to the protection of equal rights for workers. In view of the current discrimination phenomenon in employment, the Chinese government and the departments concerned have formulated many normative documents to reduce and eliminate employment discrimination. Sources of law concerned with employment discrimination include:

#### 2.3.1 *Constitution of the People's Republic of China*

Provisions concerning labor equality in *Constitution of the People's Republic of China*: the *Constitution* provides that: "...all citizens of the People's Republic of China are equal before the law"<sup>148</sup>, citizens have the right as well as the duty to work<sup>149</sup>. Although the *Constitution* does not point out the anti-discrimination in employment explicitly, it's clear given the above provisions that the constitution establishes citizen's existing equal labor rights.

These terms in the Constitution are more like declarative terms, stating the positive attitude the state holds towards citizens' equality. There are no concrete measures or punishment responsibilities. Moreover, in China, the *Constitution* has not entered the judicial process, or there is no relief approach to the unconstitutional acts. Therefore, these provisions in the *Constitution* about equal labor rights can only serve as a guiding

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<sup>148</sup> Art. 33.2 of *Constitution of the People's Republic of China*.

<sup>149</sup> See art. 42.1 of *Constitution*.

principle to guide the formulation of all the department laws.

### 2.3.2 The basic laws concerning with prohibiting discrimination in employment:

#### 1. *Labor Law of the People's Republic of China* :

*Labor Law* provides that: “laborers shall have the right to be employed on an equal basis, choose occupations, obtain remuneration for their labor, take rest, have holidays and leaves, obtain protection of occupational safety and health, receive training vocational skills, enjoy social insurance and welfare, and submit applications for settlement of labor disputes, and other rights relating to labor as stipulated by law”<sup>150</sup>. This provision defines the scope of labor rights, and covers the labor equal rights protected by the *Constitution* to all aspects of the labor process. In addition, *Labor Law* also made specific provisions to prohibit employment discrimination from the following aspects.

A. The employment opportunity discrimination is prohibited to guarantee the employment equal rights for laborers. According to *Labor Law*, laborers shall not be discriminated against in employment, regardless of their ethnic community, race, sex, or religious belief<sup>151</sup>. The provision clarifies the basic principles against employment discrimination.

B. The employment treatment discrimination is prohibited to guarantee the right of equal pay for equal work for laborers. According to *Labor Law*, payroll distribution should follow the principle of equal pay for equal work on the basis of work<sup>152</sup>. The country adopts the minimum wage guarantee system; the specific standard of which is

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<sup>150</sup> Art. 3 of *Labor Law of the People's Republic of China*.

<sup>151</sup> See art. 12 of *Labor law*.

<sup>152</sup> See art. 46 of *Labor law*.

provided by governments of province, autonomous region and municipality directly under the Central Government and then was reported to the State Council's to establish files. The employers shall not pay the laborers under the local minimum wage standard<sup>153</sup>.

C. The employment service and employment safety discrimination is prohibited to guarantee laborers have the rights to participate in occupational training, sign valid labor contract and have social insurances. The Eighth Chapter of *Labor Law* has specific provision of occupational training. The country develops the occupational training career, improve laborers' occupational skills and qualities to enhance their employment and work capability<sup>154</sup>. Government at all levels, using different methods and measures, bring occupational training development into socio-economic development plan, and encourage and support qualified enterprises, institutions, social organizations and individuals to implement all forms of occupational training<sup>155</sup>. The employers should establish occupational training system to train laborers systematically<sup>156</sup>.

According to the Ninth Chapter of *Labor Law*, the country establishes social security system and social security fund to help and compensate laborers in case of old age, illness, industrial injury, unemployed and maternity, etc.<sup>157</sup>.

## 2. *Employment Promotion Act of the People's Republic of China*

Art. 3 in *Employment Promotion Act* provides: "Laborers shall have the right to be

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<sup>153</sup> See art. 48 of *Labor law*.

<sup>154</sup> See art. 66 of *Labor law*.

<sup>155</sup> See art. 67 of *Labor law*.

<sup>156</sup> See art. 68 of *Labor law*.

<sup>157</sup> See art. 70 of *Labor law*.

employed and choose occupations on an equal basis. Laborers shall not be discriminated against in employment, regardless of their ethnic community, race, sex, or religious belief<sup>158</sup>.

Moreover, the third chapter of the *Act* is fair employment. From art. 25 to art. 31, the *Act* provides that the country must create the fair environment for employment, and eliminate employment discrimination. The country should take measures to give support and aid to the persons who have difficulties in employment; the employers should provide equal employment opportunity and fair employment condition to laborers, and no employment discrimination is allowed. Discriminations on gender, nationality, disability, health, and residence are stressed respectively.

*3. Law of the People's Republic of China on the Protection of Rights and Interests of Women:*

A specific chapter provides equal employment rights for women. The Chinese government pays attention to protecting equal employment for women. In the current circumstance of high level unemployment, it is more crucial for women employment. The occupational protection for women will be elaborated in the follow legal analysis of Chinese employment gender discrimination.

*4. Law of the People's Republic of China on the Protection of Disabled Persons.*

The Chinese law clearly prohibits employment disability discrimination and provides basic principles on disability discrimination prohibition. According to *Law on Protection of Disabled Persons*, disabled discrimination is prohibited in the aspects of employment recruitment, appointment, regularization, promotion, professional title

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<sup>158</sup> Art .3 of *Employment Promotion Act of the People's Republic of China*



evaluation, payment, welfare and labor security, etc. The division where disabled persons are should provide suitable labor conditions and labor protection for them.

### **2.3.3 Administrative regulations against discrimination enacted by the State Council**

The State Council is the highest executive organization of China. It has the right to provide and issue administrative regulations according to the *Constitute* and laws, including regulations, provisions, decisions, orders, procedures and implement rules, etc. the contents of which have universal legal effect on the basis of not in conflict with the *Constitute* and laws. In lots of administrative regulations on labor employment and social security provided by the State Council, many provisions are related to employment discrimination prohibition issues directly or indirectly. For example: *Female Employee Protection Regulations*, *Disabled Education Ordinance*, *Work Injury Insurance Regulations*, and *Regulations on Labor Security Supervision*, etc..

China has established the labor security supervision system through *Labor Security Supervision Regulations*, supervising the laws relevant to the implementation and prohibition of employing units on employment discrimination. Art. 85 of *Labor Law* provides “labor administrative departments of local people’s governments at the county level and above supervise and check the employing units’ compliance with labor laws and regulations. For the violation of labor laws and regulations, they have the right to stop their actions and command a correction.” Based on this, art. 3 of *Labor Security Supervision Regulations* provides “labor security administrative department of State Council is in charge of the labor security supervision work nationwide. Labor security administrative departments of local people’s governments at the county level and above are in charge of the labor security supervision work of this administrative region.

Relevant departments of local people's governments at the county level and above support and coordinate with the labor security supervision work of labor security administrative departments according to their own responsibilities". The above provisions clearly define the subject status of all levels of labor administrative departments in labor supervision.

According to these provisions, various governments have established labor security supervision system appropriate for the local situation and set up specialized labor security supervision institutions to check the employing units' compliance with labor and social security laws and regulations and to punish illegal behaviors, including checking and supervision of the implementation status of relevant laws forbidding employment discrimination.

#### **2.3.4 Rules and regulations about anti-discrimination laid down by Ministries and Commissions of the State Council department**

The ministries belonging to the State Council have rights to provide orders, directives and regulations in their own ministry according to laws, administrative regulations, orders and directives, among which many regulations are related to employment discrimination and are also the legal origin to prohibit employment discrimination.

For example: *Regulations on the Working Scope Banned for Female Employees*, *Regulations on Labor Market Administration*, *Strategy of development of Chinese Women*, *Fertility Insurance for Enterprise Employees*, *Trial Procedures for Industrial Injury Insurance for Enterprise Employees*, and *Maternity Insurance Plans*. All of them are formulated by the Ministry of Labor; *Provisional Regulations of Social Welfare Enterprises Recruit Employees with Disabilities* jointly published by Ministry of Civil

Affairs, Ministry of Labor, Ministry of Health, and Federation of the Disabled; *Regulations on Female Workers' Health Care* jointly published by Ministry of Health, Ministry of Labor, All-China Federation of Trade Unions, and All-China Women's Federation; *Provisional Regulations on Disabled Employment Security Fund* published by Ministry of Finance; *General Physical Examination Standards of Civil Servants* published by Ministry of Health and the Ministry of Personnel, etc..

Art. 7 of *Regulations on Labor Market Administration*, for example, stipulates “employing units shall face to the society and have an open recruitment and competition on the basis of competitive selection while recruiting personnel”. Art. 11 provides “while recruiting personnel, the employing units shall not refuse to employ or increase the employment standard with excuses like gender, ethnicity, race and religious belief, except unsuitable jobs or posts the state has provided”.

*Implementation Plan of Labor Department on 'Program for the Chinese Women's Development' (1995—2000)* provides the major target as “to adopt powerful measures to eliminate employment discrimination on women and guarantee equal employment rights of women and men”. The policy measure is “to strengthen law enforcement and supervision, protect women's employment rights and interests and prevent from employment discrimination on women. We shall seriously carry out provisions about protecting women's equal employment rights and equal pay for men and women in *Labor Law* and *Law on the Protection of Women's Rights and Interests*. Through strengthening law enforcement supervision, we shall standardize employing actions of the employing units, supervise various kinds of employing units not to refuse to employ women or increase the employment standard of women with the excuse of gender, and strictly forbid the employing units from employing females under the age of 16. Combined with the regular labor supervision, a special inspection shall be carried out

every year to correct the illegal behaviors of the employing units in employment (especially when female workers are involved)”, etc..

### **2.3.5 Local laws and regulations relating to employment discrimination**

Chinese provinces, municipalities and the standing committee of the National People’s Congress may formulate and issue the suitable local laws and regulations under the premise of not contrary to *Constitution*, laws, and administrative regulations. Report the Standing Committee of the National People’s Congress to establish files; local People’s Congresses at different levels, the Standing Committee of local People’s Congresses at different levels, and government at different levels above county-level provide decisions and orders according to the legal authority. Many of the locally suitable regulations are related to employment discrimination.

For example: *Regulations for Employment Arrangement in Proportion of Disabled Persons in Beijing* and *Interim Procedures of Shanghai Municipality on the Comprehensive Insurance for Out-of-town Employees*, *Regulations for Implementation of Law on the Protection of Women’s Rights and Interests of People’s Republic of China in Beijing*, *Shanghai Women and Children Protection Ordinance*, *Shandong Province Employment Promotion Ordinance* and *Shenzhen Resident Employment Promotion Ordinance*. It is about the implementation of provisions concerning equal employment in various places.

What needs special attention is the provision about the prohibition of women’s employment rights in *Regulations for Implementation of Law on the Protection of Women’s Rights and Interests of People’s Republic of China in Beijing* and *Shenzhen Resident Employment Promotion Ordinance*. *Regulations for Implementation of Law on the Protection of Women’s Rights and Interests of People’s Republic of China in Beijing*

was passed and publicly implemented by the standing committee of people's congress in Beijing in 1994. Art. 20 provides "while recruiting staffs, all the employing units shall not refuse women or increase the employment standard of women with the excuse of gender, except jobs or posts unsuitable to women. An enterprise shall not discriminate or exclude female staffs with the excuse of gender in the process of transforming the operational mechanism and reforming the labor system". Art. 21 provides "all the employing units shall not reduce female staffs' salary and welfare or have a unilateral termination of labor contract with the excuse of marriage, pregnancy, maternity leave and lactation." Art. 22 provides "all the employing units shall strictly carry out laws and regulation related to female staffs' labor protection to protect the female staffs' security and health." Art. 23 provides "female staffs enjoy special protection during the menstrual period, pregnancy, perinatal period and lactation period. All the units and individuals shall implement the provisions of the country and the city and shall not arbitrarily reduce female staffs' maternity leave or lactation period. Female staffs' promotion and professional technical position evaluation shall not be influenced during the pregnancy period, legal perinatal period and lactation period." Art. 24 provides "all the units shall stick to the principle of equal pay for men and women and equal treatment for male and female staffs. While distributing or selling welfare housing, all the employing units shall stick to the principle of equality between men and women, and shall not make "provisions giving priority to men or other provisions discriminating women." It could thus be seen that the provision of Beijing is quite concrete, explicit and operable. However, the lack of punishment measures makes its relief strength greatly reduced.

*Shenzhen Resident Employment Promotion Ordinance* was passed and publicly implemented by the standing committee of people's congress in Shenzhen in 2001. Art.

26 explicitly provides “the employing units shall not have gender, age or marital status discrimination while employing staffs.” Art. 39 provides “all the employing units in violation of art. 26 that refuse to correct after the labor department’s charge shall be fined with a penalty between 5000 and 20000”. This article explicitly makes provisions of the administrative responsibility of employment discrimination, as well as the punishment strength. However, as the amount of fine involved is rather low, it lacks enough engagement.

### **2.3.6 International conventions and documents ratified by Chinese government**

The international conventions and files on labor employment belong to the scope of International Labor Law, among which the conventions and recommendations approved by the Chinese government have legal force in China. Therefore it is also a component of Chinese laws against employment discrimination. For example:

*1. Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value which ratified by Chinese government in 1990.*

*2. Convention on the Elimination of All Forms of Discrimination against Women which ratified in 1980.*

*3. International Convention on the Elimination of All forms of Racial Discrimination which ratified in 1981.*

*4. Convention Concerning the Vocational Rehabilitation and Employment of Disabled Persons (ILO 159) which ratified in 1987.*

*5. Employment Policy Convention which ratified in 1997.*

*6. International Covenant on Economic, Social and Cultural Rights which ratified*

in 1997.

*7. Discrimination (Employment and Occupation) Convention, which ratified in 2005.*

From the international conventions that have been approved by the Chinese government above, China is quite passive in the work of anti-discrimination. Most of these agreements that have been approved are 20, 30 or even 50 years after the time when the international agreement takes effect. Moreover, to approve these agreements is for the purpose of human rights, rather than employment.

### **2.3.7 Policy documents of Central Government's**

Now China is in the social and economic transition period. In order to solve the problems in the transition proves, the Central Government, all ministries and local government at different levels provided quite a few political files, which greatly affected labor employment and social security for laborers in the practice. Many of them are related to employment discrimination prohibition issue directly or indirectly. For example: *Notice of Migrant Workers Involving in Injury Insurance*, *Notice of Further Promotion of Women's Enterprise and the Second Enterprise*, and *Notice on the Issuance of Management Documents of HIV Infected Persons and AIDS Patients*, etc..

## **3. Comparison between Europe and China**

### **3.1 Shortcomings of anti-employment discrimination legislation in China compared to anti-employment discrimination of EU**

Structural adjustment of social stratification resulting from the development of market economy makes the employment discrimination more and more outstanding.

However, the reform of social superstructure like law lags far behind the reform of the economic system itself. Currently, the legislation of anti-employment discrimination in China seems to be too principled, which lacks operability. At the same time, theoretical research about employment discrimination among the domestic scholars has just started with a limited degree of attention. It has not formed an independent system and mature theories, which fail to provide legislation and practice with necessary support.

### **3.1.1 The lack of an explicit definition of employment discrimination**

In anti-employment discrimination, a key and fundamental problem is firstly the definition of the “employment gender discrimination”. It is the premise and foundation for the legal regulation. Without a unified and clear standard, it is impossible to identify what behaviors constitute employment gender discrimination.

The current laws and regulations in China have not made a clear definition about “employment discrimination”, as well as the judgment of what belong to employment discrimination. Therefore, its connotation and denotation are both unclear. It makes it hard to protect the legal rights of those who are discriminated in the practice, not to mention to provide them with appropriate support and relief.

While making a definition of employment discrimination, Chinese scholars either blindly borrow the relevant definition abroad or make a definition and judgment by divorcing from the actual conditions in China according to their partial understanding. It is hard for them to provide a good theoretical basis for the definition of employment discrimination.



### 3.1.2 The legislation system is imperfect and legal provision of employment discrimination lacks operability

The relevant provisions are too principled, which lacks the concrete and complete set of standards. It makes it impossible for the discriminated laborers to advocate rights and obtain relief according to these provisions.

1. Lack of unified and effective legislation: The current anti-discrimination provisions are scattered in laws and regulations like *Law on the Protection of Rights and Interests of Women*, *Disability Protection Law*, *Labor Law* and *Employment Promotion Law*. There is no unified law of anti-employment discrimination.

2. Level legislative of lots government rules, regulations and the local laws is low, which include provisions of anti-discrimination employment: other than individual provisions in the *Constitution*, *Law on the Protection of Rights and Interests of Women*, and *Law on the Protection of Disabled Persons*, the provisions on anti-discrimination in employment of China almost are government rules and regulations, the local laws and regulations, and policy documents. All of them belong to advisory documents without coercive power to employers.

3. The provisions of legal judgment and punishment of employment discrimination boast shortcomings<sup>159</sup>. Although relevant laws and regulations explicitly forbid various discrimination phenomena in employment, there is no provision about the responsibility the employing units in violation of the provisions should undertake<sup>160</sup>. Art. 3 of *Employment Promotion Law* provides “laborers legally enjoy the right of equal

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<sup>159</sup> Ye Jingyi, Zhou Changzheng, *Decennary Discovery of Social Justice*, Pekin University Press, 2007, p.43.

<sup>160</sup> Wei Huaian, *Legislation Analysis of Prohibit Employment Discrimination*, Academic Journal of Heyang Normal University, 2004IV.

employment and independent job choosing. Laborers shall not be discriminated in the employment in spite of different ethnicity, race, gender and religious beliefs.” However, its chapters below do not give the provisions of relevant legal responsibility. Therefore, within the current legal framework, the problem of employment discrimination could not be effectively relieved.

Another example is the provision in art. 52 of *Law on the Protection of Rights and Interests of Women of People’s Republic of China* “when the legal rights and interests of women are infringed, the infringed people shall have the right of demanding the relevant department in charge for processing, or commence a lawsuit in the people’s court according to law”. It also only provides the right of suing, rather than giving a concrete provision of what legal responsibilities the employing units should undertake. Therefore, even if the lawsuit is realized and the laborers succeed, the court has no law to refer to in judging what legal responsibilities the enterprise should undertake.

### **3.1.3 The lack of corresponding approach of relief**

1. According to Chinese laws, the way to solve labor disputes includes negotiation, mediation, arbitration and litigation. According to relevant provisions in *Regulations on Enterprise Labor Disputes*, *Labor Law*, *Civil Servant Law*, *National Civil Servant Regulations* and *Personnel Dispute Settlement Provisions* in China, only when both parties have already established labor relation or personnel relation can the relevant disputes enter the scope of acceptance of labor arbitration department, civil servant administrative department, personnel arbitration department, etc. “the acceptance scope of labor disputes provided in the law takes the signing of written labor contract or the establishment of actual labor relation as its fundamental premise, which thus excludes

employment disputes”<sup>161</sup>.

Therefore, at least the employment discrimination in the job hunting process is hard to be included in obtaining relief through administrative relief approaches of labor disputes and personnel disputes (including mediation, arbitration and labor protection supervision) in China. Not to mention investigating the relevant responsible persons and compensating for the victims’ damage.

2. Judging from China’s current civil laws and regulations, there is no specific provision about the litigation right of employment discrimination disputes. Discriminated workers could not institute legal proceedings to people’s court according to the relevant provisions of the civil law standard, requesting the employing units to undertake the corresponding liability. Similarly, the employment discrimination is not in the litigation scope of administrative lawsuits in China.

It is not until the year of 2008 when *Employment Promotion Law* is issued that employment discrimination litigation right (civil litigation right and administrative litigation right) could be considered to be established according to the principle of “priority of special law over common law”. However, it fails to establish public interest litigation system, which restricts the judicial relief effect of anti-employment discrimination to a certain extent. Art. 62 of *Employment Promotion Law* provides “laborers could commence a lawsuit in the people’s court towards the violation of the provision in the law to have employment discrimination”.

3. The proofing responsibility distribution is unequal. In view of the reality of “strong capital and weak laborer” in the distance of evidence, in order to fully protect

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<sup>161</sup> Zhang Wenshan, *International Labor Standards and Modification of Labor Law of China*, Symposium on Reform of Labor Law, 2003I.

the legal rights and interests of the laborers, most laws and regulations of employment discrimination in various countries have adopted onus proof conversion. In China, however, according to the current evidence rule in the civil action, even if the laborer boasts the employment discrimination litigation right, he must give evidence to prove that the employing units have the deeds of employment discrimination in the employment process. If he fails, he will lose the appeal and fail to get protection. Obviously, laborers in the absolute underprivileged position in the labor relation are hard to find the relevant evidence. To make them undertake the corresponding proofing responsibility equals to declaring their failure.

4. Constitution has not been completely judicialized, and the corresponding litigation system has not been established. Laborers suffering from employment discrimination, especially those laborers suffering from systematic employment discrimination could not propose constitutional litigation according to the relevant provisions of the *Constitution*, in order to realize the deserved protection of equal rights of *Constitution* in China.

5. The defined scope of employment discrimination is too narrow and single in types, which fails to cover various different kinds of employment discrimination phenomena in the practical life. Meanwhile, the application scope of relevant provisions forbidding employment discrimination is limited, and many laborers suffering from discrimination could not obtain protection.

6. The existing security supervision system is not perfect. From the nine duties of labor administrative department defined in art. 11 of China's *Labor Security Supervision Regulations*, it can be drawn that anti-employment discrimination has not been explicitly incorporated into the labor security supervision scope. At least, the

problem of anti-employment discrimination has not aroused enough attention. Moreover, at the present stage, China does not pay special attention to the construction of labor security supervision system, and the investment is limited. The funds of many local labor supervision organizations cannot be guaranteed. The understaffed problem and poor hardware facilities make it hard for the effective implementation of the labor security supervision work of anti-employment discrimination in China.

### **3.1.4 The lack of the specialized agencies of equal opportunities**

Specialized agency of anti-employment discrimination is an important content of the legal regulation of anti-employment discrimination. Many countries in the world have established various different kinds of specialized agencies of anti-employment discrimination and have achieved good effects, such as Equal Employment Opportunity Committee in America, Equal Affair Officer of Men and Women and Equal Appeal Committee of Men and Women in Norway, as well Equal Opportunity Officer and Equal Opportunity Committee in Sweden, etc.<sup>162</sup>. Equal Treatment Committee and the court system are just like two neck-and-neck carts, which play an effective role in solving employment and other discriminations in their respective scopes of rights.

In contrast, China does not have specialized organizations to be responsible for anti-employment gender discrimination law to protect the laborers from suffering from employment gender discrimination as anti-employment discrimination is involved. There are only organizations like labor administrative department, labor union, court and arbitration organization to be responsible for handling labor disputes, as well as other unknown “relevant departments in charge” and “higher authorities”, etc..

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<sup>162</sup> James E. Jones Jr, William P. Murphy, Robert Belton, *Discrimination Employment*, WestPublishingCo1987.

From a long-term point of view, it will restrict greater progress made in anti-employment discrimination in China. Moreover, NGO and social dialogists in China in anti-employment discrimination are not advanced. Judging from the experience both at home and abroad, the relevant role of NGO and social dialogists should be reckoned with.

### 3.1.5 The lack of positive safeguard measures

China has adopted a great many measures in view of the various phenomena of employment discrimination of laborers. However, there are still some shortcomings, such as the lack of corresponding provision of working experience accumulation and treatment that women enjoy in the period of pregnancy and confinement<sup>163</sup>.

Moreover, the implementation result of some positive measures not only not only fails to achieve the anticipated result, but also further aggravates the discrimination<sup>164</sup>. *Interim Provisional Rules of Maternity Insurance for Enterprise Staffs* of the labor department, for example, demands enterprises to pay maternity insurance expenses and to build up maternity insurance funds for female staffs<sup>165</sup>. This provision originally aims

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<sup>163</sup> Yuan Jinxiu, *Research of Legislation of Protection of Rights and Interests of Women*, Peoples Press, Beijing, 2006, p. 170.

<sup>164</sup> Some scholars have proposed that the mandatory provisions of China's Labor Law on the taboo labor scope of female workers have deprived employment options of part of women. They propose to set differentiated taboo labor scope of women and to give the selection right with no special protection to women to enter male occupations.

See Liu Minghui: *Philosophical Thinking on Field of Labor Law*.  
<http://www.lzbzfx.org/lunwen/34.htm>.

<sup>165</sup> Maternity insurance system in China has the following shortcomings. (1) The coverage is small and the implementation scope is narrow. Maternity insurance social pool only covers town enterprises and their workers, and the implementation mainly focuses on public enterprises and large collective enterprises above the urban districts. (2) The pooling level is low and social adjustability is limited. The maternity insurance adopts municipal (local) or county pooling. In places where there are a great many maternal female workers, the fund is hard to make ends meet. In the places where there are few maternal female workers, the fund balance is great and the low level of pooling restricts the adjustability function of maternity insurance fund in a certain scope. (3) Enterprise expense and staff treatment lack legal guarantee. The collection, payment and distribution of maternity insurance costs are not incorporated into *Interim Regulations on Collection and Payment of Social Insurance Premium* without the corresponding legal supervision and arbitration. There are often some enterprises that are unwilling to pay for it, or do

to give special protection to female staffs. However, since the socialization degree of maternity insurance is not high, it increases the enterprises' burden in employing female staffs, which becomes one of the important reasons for the enterprises' reluctance to employ female staffs. Meanwhile, the country lacks relevant enforcement measures and incentive mechanism in the employing units' employment of female staffs. In the market economy mechanism, for the survival and development, enterprises are absolutely unwilling to employ females.

### 3.1.6 Others

1. Temporariness: Most of the government regulations, local laws and regulations, policy documents are temporary with poor stability. They've been modified and changed frequently<sup>166</sup>.

2. Regional disparity is obvious. Because there are too many local laws and regulations, it lacks of a uniform standards of opposing employment discrimination<sup>167</sup>.

3. Discriminations exist in the legislation. For example, the provisions of the retirement age for men and women are different. Also different occupation's retirement age is of great difference.

4. The government itself take discrimination behaviors. For example, in the process of recruitment of civil servants, many positions require male or party members, and this

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not implement it strictly according to the law while granting insurance treatment.

<sup>166</sup> See re. Employment Discrimination Regulation Issue Group of Renmin University of China, *Laws and Regulations of China against Employment Discrimination*, and Li Weiwei, Lisa Stearns, *Employment discrimination International Standards and National Practice*, Beijing, 2006, Law Press China, p. 224.

<sup>167</sup> See re. Employment Discrimination Regulation Issue Group of Renmin University of China, *Laws and Regulations of China against Employment Discrimination*, and Li Weiwei, Lisa Stearns, *Employment discrimination International Standards and National Practice*, Beijing, 2006, Law Press China, p. 225.

is not out of occupation need. So this is discrimination to females and non-party members.

5. Workers have not enough awareness or notion of protection with law. Many workers are being too tolerant, when they are discriminated. They seldom put it to the lawsuit. Even some workers don't consider that some discriminatory actions are discrimination.

Through years of the practical operation of anti-discrimination, the greatest difficulty of anti-discrimination rests with the public. Once the opinions of the social public do not change, the discrimination will exist for ever. Anti-employment discrimination is protecting rights and interests of some part of people, while this part of people brings no influence to the life of the public. The public should not be scared, and the public does not have the right to disallow this part of people to work because of the existence of potential influence. Anti-employment discrimination legislation needs to guide the public opinion and standardize this kind of consciousness on the basis of the absorption of public opinions.

Various problems above exist in the anti-employment discrimination status of China. We should draw experience from the deeds of anti-employment discrimination of EU and the provision of relevant laws to correct it to gradually form a perfect system of anti-employment discrimination.



## **3.2 Reference and enlightenment of legislation and practice of EU in forbidding discrimination**

### **3.2.1 Reference--Advantages and disadvantages**

#### **3.2.1.1 Advantages of EU in anti-employment discrimination**

1. A fine legal system of anti-employment discrimination and explicit fundamental principles in legislation and practice. The three fundamental principles of equal treatment, positive actions and mainstreaming develop from the initial social need or theory to the adoption and application by decision makers, which defines clearly the major development direction of forbidding employment discrimination during different periods. It plays a comprehensive guiding role in legislation, practice and policy.

Guided by the advanced concept of anti-employment discrimination during different periods, EU has gradually established a set of legal system from the fundamental law to the mature specialized legislation. Meanwhile, it also employs the preliminary ruling of the European court to continuously promote the development of anti-discrimination legal system. It applies the theories of anti-employment discrimination into practice, and finds problems and concludes experience from the practice. Moreover, it upgrades them to legal documents. Along this road of development, EU has established a set of legal system to abide by on every aspect, and has given the vulnerable group overall protection.

2. An overall and thorough law and regulation of anti-employment discrimination.

In view of the content of legal documents of anti-employment discrimination, EU has also provided a paradigm for other countries in the world with its thorough comprehensiveness.

First of all, EU initiates in putting forward the concept of “indirect discrimination” in the legal documents of anti-employment discrimination. Therefore, it incorporates those seemingly neutral regulations, standards and practices which are actually indirect discrimination behaviors that make a certain social group in the extremely adverse position into the category of employment discrimination. It effectively curbs the phenomenon of the employers’ disguised discrimination, which gives a fatal blow to the hidden potential employment discrimination. Since then, EU has expanded the types of discrimination to four types, i.e. direct discrimination, indirect discrimination, harassment and instigation of harassment.

Secondly, EU has made clear criteria evaluating discrimination, and it thus distinguishes the discrimination and the reasonable distinction. While defining what discrimination is, EU also gives a description of exceptions of the discrimination at the same time. If there are real and decisive occupational requirements, the protective measures and positive actions towards pregnant women do not constitute discrimination.

Lastly, EU does not only remain on the level of equality in form, and rather, it has started to pay attention to the issue of substantive equality. In order to correct the

vulnerable position of women formed in history, for example, EU has put forward “positive actions”, in the hope of enabling all of people in the same starting line through the appropriate preference for vulnerable groups. Moreover, in order to better carry out the principle of employment equality, EU even puts forward the mainstreaming requirements. The key government agencies should evaluate the policy formulation and implementation at all times with the perspective of employment equality. Thereby, the employment equality perspective is integrated into the process of legislation and policy making, which prevents extremely adverse effects to any groups.

3. A rational and effective relief system. The relief system of anti-employment discrimination of EU should be said to be rational and effective.

Firstly, It guarantees that member states of EU could timely convert EU laws of anti-employment discrimination to the domestic legislation through the direct effect of EU laws. It also ensures the implementation according to the requirements of EU. At the same time, the horizontal direct effects of EU law give effective restriction to enterprises in the member states.

Secondly, the reasonable burden of proof system reduces the burden of proof of discriminated persons, making them brave enough to revolt in the face of discriminations. It is conducive to the protection of the equal employment rights of the vulnerable groups. At the same time, it also enables judicial relief to play a more active role. What EU adopts is the onus of proof transition. In other words, the possible

discriminated only need to prove to have been infringed. If the other party cannot prove that discrimination does not exist, it can be presumed to constitute discrimination in general. The allocation of the burden of proof is conducive to better safeguarding the rights and interests of workers (relative vulnerable groups).

Lastly, EU has provided effective means of judicial relief, and gives restrictions and bindings to the relief institutions, procedures, conditions and methods of compensation in the member states through some instructions. It thus guarantees that the victims could timely conduct complaints and litigations to the relevant agencies when they suffer from the discrimination. They could get the fair treatment in accordance with the proper legal procedure. Moreover, it ensures that the victims could receive full compensation.

#### 4. Non-governmental organizations, citizens and society partner participation in EU anti-employment discrimination

Although anti-employment discrimination law of EU has already been very comprehensive and perfect, there are still some mandatory provisions. However, EU gradually becomes aware of the fact that the legal system of anti-discrimination employment itself is a kind of social legislation, with certain features of “soft law”. There is certain irreversible discrimination, and the law cannot force the employers to hire a certain member of the society. Even when employees are given a series of litigation rights when suffering from discrimination, it will affect the relationship between employers and employees whatever the outcome is. Therefore, it is quite

possible that some employees choose not to take legal measures when their rights have been violated. Therefore, EU attaches more attention to the encouraging the parties to voluntarily realize anti-employment discrimination law, instead of taking compulsory measures after it.

For the recent years, EU has been committed to creating a good social environment for the implementation of anti-discrimination laws through the establishment of social dialogue, legislative advocacy, as well as the participation of non-governmental organizations, experts and scholars, making all circles of the society pay active attention to employment discrimination. Facts have proved that certain effects have really been achieved through such measures of EU.

There is seldom the phenonmon of direct discrimination in domestic enterprises of member states of EU, because the workers in these countries will not hesitate to take legal weapons to safeguard their legitimate rights and interests once they suffer from employment discrimination. Moreover, the employers are aware that if they take this direct explicit discrimination, it will inevitably lead to the criticism and resistance of the social public opinions, which will then bring extremely bad influence to the enterprises. Moreover, it is quite likely that they will be faced with fine. These are all the non-exhaustive motivations promoting the development of EU anti-discrimination legislation and practice.

### 3.2.1.2 Shortcomings of anti-discrimination legislation of EU

1. The legal documents of anti-employment-discrimination are too dispersive and complex, and some have already been outdated. As anti-employment-discrimination of EU is the field where the anti-discrimination is longest in history and most dense in contents, EU has most legal provisions of anti-employment-discrimination. However, with the continuous development of the society, some provisions of the law are not in line with the reality of the situation. Moreover, along with the constant modification and supplementation of some legal documents, the legal documents of anti-discrimination in employment become more dispersed and complex, which are not conducive to the practical application. Therefore, EU should further cut and integrate legal documents of anti-employment-discrimination, in order to ensure that it can produce due effects in practice.

2. It is indecisive between the “positive action” and balance between the interests of employers and employees. Although EU has long proposed the theory of “positive action”, countries and different schools have great disputes in the understanding of “equality” and “right”. The positive action is often questioned by the liberals. They think that it actually destroys the principle of “equality before the law” and may damage the legal rights of some individuals who do not directly cause discrimination on their own. The European court also swings around on this issue, and makes an inconsistent decision of the preliminary jurisdiction of this kind of case. The argument is vague,

which also embodies the profound differences of judges on this issue<sup>168</sup>.

In addition, EU also has this kind of problems in balancing the rights and interests of the employers and employees. There are inevitably some intense conflicts between the comprehensive protection of pregnant women and the protection of employers' rights and interests. However, EU often has equivocal attitude between the two, which is remarkable in the judgement of the European Court. The ambiguous attitude of EU on these questions makes it hard for the problems of this type to be solved well, which is at the same time not conducive to the implementation of EU law in various countries.

3. The separate legislation of anti-discrimination in employment is not conducive to solving the problem of multiple discrimination. With the continuous development of the society, the phenomenon of discrimination is also more complex in forms and types. A person may suffer from multiple discriminations of gender discrimination, racial discrimination and age discrimination at the same time. This phenomenon appears more in EU, because there are a large number of female migrants. In order to deal with multiple discriminations, the current one law for one thing that gives an independent legislation of all kinds of discriminations does not work. In contrast, to unify all kinds of discrimination problems into one legal document for adjustment seems to be more reasonable.

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<sup>168</sup> Sun Liang, *Legislation and Practice of Anti-discrimination of EU*, China Social Sciences Press, Beijing, June 2007, p. 57.

### 3.2.2 Inspiration of EU discrimination legislation

In view of the serious problems and shortcomings existing in anti-employment discrimination in China and combined with the advanced experience of EU anti-employment discrimination, the corresponding legal countermeasures are put forward below:

1. Add, delete and integrate the corresponding legal documents to further establish and improve China's legal system of anti-employment discrimination.

First of all, it is the deletion and modification of provisions concerning discrimination in the existing laws and policy documents. The existing laws and policy documents themselves in China contain some discriminatory terms, and “the systematic discrimination” exists in a considerable range. Chinese law, for example, out of the special protection for women, provides that women's retirement age should be five years earlier than that of men. However, in the current social conditions, it actually constitutes gender discrimination and has already infringed the legitimate rights and interests of females. Therefore, the perspective of employment equality should be adopted to re-examine the existing legal and policy documents. The discriminatory terms should be amended and removed, the origin of gender discrimination should be cleared, and contents of “systematic discrimination” should be avoided in the future law and policy making.

Secondly, *Law on the Protection of Rights and Interests of Women, Labor Law,*



*Employment Promotion Law*, *Labor Contract Law* and *Law on the Protection of Rights and Interests of the Disabled* should be further refined and improved. The provisions in these laws to prohibit discrimination in employment and to protect the rights and interests of the disadvantaged groups are too principled and abstract, which lack operability in the real life. When were discriminated, the victims cannot relieve their rights through these legal documents. Therefore, the main legislations of anti-discrimination employment of EU should be drawn lessons from. The existing legislations should be refined and improved to bring it operability.

Thirdly, it is the formulation of a specialized *Anti-employment Discrimination Law*. There are some scholars who believe that the existing legal documents in China could be refined and improved to achieve the purpose of inhibiting employment discrimination. However, the author believes that we should draw experience from EU. It is of great importance to formulate a unified anti-discrimination legislation in order to better handle the possible complicated and varying phenomenon of discrimination that may appear in the future. In this way, it could prohibit the phenomenon of discrimination on the one hand. On the other hand, it could effectively handle the problem of multiple discriminations. Moreover, it could prevent from the situation of one law for one thing in the anti-employment discrimination and the intense conflicts of various specialized legislations.

In 2004, “Anti-discrimination employment research group” constituted by 24 scholars was established to participate in the completion of *Anti-employment*

*Discrimination Law (proposed draft by experts)* together with this organization. After four years of discussion and research, they began to draft a special act of anti-employment discrimination in 2008. During the period of China's two sessions (NPC and CPPCC meeting) in 2009, *Anti-employment Discrimination Law (proposed draft by experts)* was submitted to the National People's Congress. It is believed that in the near future, China will have a system of law of anti-employment discrimination of its own.

Make the Well-directed and staged policies. EU pays full attention to policy making. Since 1980s, nearly every 4.5 years EU will make a staged program to guide the non-discrimination work. The staged policy will improve the shortcomings of the previous work and adopt a well-directed direction or measures toward the conditions of discrimination in a particular time. The discrimination problem cannot be solved in one day. We have to adopt well-directed and staged policy guidelines to gradually advance the goal of employment equality.

2. Draw experience from EU, reasonably determine the main contents of anti-employment discrimination and clearly define the related concepts and standards.

Firstly, by drawing experience from EU, the behaviors of discrimination could be divided into direct discrimination, indirect discrimination, harassment and instruction to discriminate against persons. Although there are mainly direct discriminations in China, the legislation should still be somewhat forward-looking. There should be

regulation on the more concealed indirect discrimination in the labor market, so as to really protect the right of equal employment of all workers and to avoid the employers' covert discrimination.

Secondly, in the legislation of anti-employment discrimination, discrimination criteria should be explicitly stipulated. Only by clearly stipulating the discrimination criteria can we determine whether the employers' behavior really constitutes employment discrimination and can we distinguish discrimination from the treatment of reasonable distinction.

Thirdly, a reasonable and effective legal responsibility mechanism should be established. The establishment of the appropriate and effective legal responsibility mechanism can have a deterrent and restrictive function on the employing units to effectively prevent from the occurrence of discrimination. On the legal liability, special organs could be designated to supervise employing units, and the corresponding compensation and compensation system could be established. If possible, the system of punitive compensation could be introduced to increase the law violation costs of the employing units.

### 3. Effective relief approach

There are no rights without reliefs. The lack of effective relief approaches is the major problem existing in the current discrimination in China. In order to solve this problem, the following measures could be adopted:

Firstly, the experience of EU could be drawn from. Special anti-employment discrimination organizations could be set up, added with the public interest litigation. In China, the protective function of rights of labors could be offered to labor security department and social security department of the protection of women's rights and interests. These departments can set up corresponding anti-gender employment discrimination offices to exclusively deal with gender discrimination complaints that women suffer in employment. In the case of so many victims, failure to sue or the victims' authorization, the organization can lodge complaints on behalf of victims to help the victims realize the equal employment right<sup>169</sup>.

Secondly, there should be clear provisions defining that when the laborers' equal employment rights are violated, they can realize judicial relief through the lawsuit, rather than the labor arbitration. Judicial relief is the last and most powerful defense guaranteeing the civil rights. When the laborers suffer from discrimination in employment, they have the right of filing civil lawsuits in order to achieve the equal employment right. The judge could decide the illegal behaviors of the employers and give appropriate compensation to the victims according to the requirements of the party involved, as well as the practical situation. They can also be ordered to pay punitive compensation when necessary.

Thirdly is inversion of burden of proof. We can draw from the experience of EU to define that in the employment discrimination lawsuits, onus proof conversion shall be

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<sup>169</sup> See re. Liu Ying, *Shortcoming of the Relief of Women's Equal Right in Employment and Improvemen*, Academic Journal of Northwestern University, 2007V.

adopted. If the plaintiff has proved himself to suffer from discrimination in employment, then the proof liability moves to the defendant. The defendant has to prove that their behavior does not constitute discrimination. In the face of the strong employing unit, the infringed workers are often in a vulnerable position, and it is generally very difficult to get evidence of employment discrimination. In accordance with the general rules of civil litigation, it is very difficult to win, which makes it become the reason why a lot of female workers do not want to file the lawsuits. However, the rule of onus proof conversion makes workers brave enough to file a lawsuit in the face of employment discrimination, which has become the powerful weapon of anti-employment discrimination.

4. Encourage citizen participation in anti-employment-discrimination and arouse citizens' consciousness of rights.

First of all, legislation could be adopted to strengthen the guidance of the public to change ideas. Publicity and education efforts could be strengthened through various forms to arouse the public consciousness to pursue fairness against discrimination. A social environment of equality pursued by everyone should be created to make the employing units have no place to hide their discrimination behaviors.

Secondly, we should develop the initiative of non-governmental organizations. The state should allow the establishment of all kinds of non-governmental organizations committed to anti-discrimination. The third party position and non-profit nature of

non-governmental organizations determine that it could play an active role both in the anti-gender employment discrimination or other fields of anti-employment discrimination. At the appropriate time, equal opportunities could be established to strengthen the supervision and evaluation on employment.

It should realize the organized interaction and competition of a variety of institutions, social groups and organizations. In addition to various government agencies responsible for the implementation of employment equality set up by EU, non-governmental organizations also play a positive role in the process of promoting the development of employment equality. At the same time, from a part of the cases above, it could be seen that all kinds of trade union organizations play an important role in the process of guaranteeing employment equality. These institutions, social groups and organizations are not isolated. Rather, in the process promoting employment equality, they have constant competition and interaction. NGOs of China have a late start and poor development, and the same is true for trade unions and other organizations. To eliminate discrimination and achieve equality in employment can not be realized by the government alone. A healthy modern civil society is needed, which is also the direction of reference and efforts of China.

## PART III MULTIFARIOUS EMPLOYMENT DISCRIMINATION

### 1. Gender discrimination:

#### 1.1 Analysis and legislation of anti-gender discrimination in employment in EU:

Like most countries and areas, in Europe women are put in a subsidiary or an unequal position in all aspects of social life for a long time<sup>170</sup>. The pursuit of gender equality has always been the central pillar that the social policies of European Community stick to develop. For European Committee, equal opportunity is “the reflection of European social policies as the legal framework of revolution catalyst of member states”<sup>171</sup>. The legal practice of anti-gender discrimination has the longest history and richest content in EU existing anti-discrimination frame. It exerts deepest and broadest influence to the building of anti-discrimination system in EU<sup>172</sup>.

Since EU has signed *Treaty establishing the European Community* in 1957, it started to focus on anti-gender discrimination. From now on, it has gone through three phases, namely: Equal Treatment, Positive action, Mainstreaming stage<sup>173</sup>. EU anti-employment discrimination mechanism covers the legal patterns that are complementary and interwoven with each other, like treaty, directive, recommendation,

<sup>170</sup> See re. Sandra Fredman, *Discrimination Law*, Oxford University Press, 2002, p. 28-30.

<sup>171</sup> *White Paper on Social Policy COM (94) 333, 41.*

<sup>172</sup> Yolanda Cano Galán, Teresa M.G. Da Cunha Lopes, Risa L.Lieberwitz, Giampaolo Loy, Rolando Murgas Torrazza, Ana I. Pérez Campos, Maria Redinha, Carolina San Martín Mazzucconi, Lucia Villalón Alejo, *Discriminación por Razón de Sexo y Acoso Desde una Perspectiva Laboral Comparada*, Universidad Rey Juan Carlos, Madrid, 2009, p. 69: “La igualdad de trato entre hombres y mujeres y la prohibición de discriminación es uno de los aspectos más característicos del Derecho Social Comunitario y donde ha desempeñado una labor primordial el Tribunal de Justicia de las Comunidades Europeas en el desarrollo e interpretación de la normativa existente en la materia. Como señala la doctrina científica ‘el principio de igualdad en el trabajo de los hombres y de las mujeres viene siendo, tanto por su importancia objetiva como por las dificultades que siempre ha encontrado en su aplicación, acogido y desarrollado por numerosas declaraciones y disposiciones de carácter supranacional’; convirtiéndose la tutela antidiscriminatoria en uno de los elementos caracterizadores del acervo comunitario”.

<sup>173</sup> See re. Li Mingxing, *EU’S Legislation and Practice of Anti-gender Discrimination*, Law Press China, Beijing, 2008, p. 99-108.

regulation, case-law, social policy and a comprehensive three-dimensional institutional system of specialized agency which is in charge of guiding the work of planning, law making, and executing law on anti-gender discrimination.

### 1.1.1 Sources of law of anti-gender discrimination

#### 1. Treaties of European Union:

The most important treaties in the EU are:

A. *Treaty establishing the European Community* is the earliest and the most far-reaching source of law of EU anti-gender discrimination. *Treaty of Rome (1957)* firstly provided the principle of equal pay for men and women<sup>174</sup>.

In 1997, *Treaty of Amsterdam* added art. 13 of *Treaty establishing the European Community*, which provided: “In the premise of not affecting other provisions and within the limits given by European Community, and after the Commission discussed with the European parliament, the council may take appropriate action to oppose discrimination based on gender, race or ethnicity, religion or belief, disability, age, or sexual orientation in common consent”. From this article, we can find the change of word: “prohibit” to “combat”, using the diction that was more uncompromising. This was the change of attitude: passive to active. This word displayed that EU had the determination of anti-discrimination.

Moreover, the *Treaty of Amsterdam* explicitly introduced equality between men and women as one of tasks (art. 2) and activities (art. 3) of the Community. art. 119 (new art. 141) on equal pay was amended significantly. Article 141.1 (ex art. 119.1)

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<sup>174</sup> Art.119 of *Treaty of Rome (1957)*: “Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work...”.



extended the definition of equal pay for equal work with reference to ‘or work of equal value’<sup>175</sup>. The new art. 141.1 (ex art. 119.3) has finally provided an express legal basis for the Council to adopt measures, in accordance with art. 251 (ex art. 189b) co-decision procedure, ‘to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value’<sup>176</sup>. Finally the new art. 141.4 allows Member States to adopt or maintain positive action measures for the under-represented sex in respect of professional careers<sup>177</sup>.

*Treaty of Lisbon* in 2007 on gender discrimination did not change too much. It was art. 141 originally, now become art. 157. *Treaty of Lisbon* as the *Constitution of Europe*, make gender-equality has the constitutional nature.

B. Art. 21 of *Charter of Fundamental Rights of the European Union* provides: “any discrimination based on any ground such as sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.”

## 2. Directives:

Directives are the richest sources of anti-sex discrimination law with the most abundant achievements. Based on art.141 of *Treaty establishing the European*

<sup>175</sup> See the proposals in Dashwood, *Reviewing Maastricht: Issues for the 1996 IGG* (Sweet Maxwell, London, 1996), and esp.297. Art.1 of *Directive 75/117EEC* already makes provision of this and, as the Court pointed out in Case C-96/80 *Jenkins v. Kingsgate*, Art.1 is principally designed to facilitate the practical application of the principle of equal pay outlined in art.119 [new art.141] of the *Treaty* [and] in no way alters the context or scope of that principle as defined in the *Treaty* and Catherine Barnard, *EC Employment Law*, Oxford University Press, 2000, second edition, p. 204.

<sup>176</sup> COM (2000) 334 has been proposed on this basis and Catherine Barnard, *EC Employment Law*, Oxford University Press, 2000, second edition, p. 204.

<sup>177</sup> Catherine Barnard, *EC Employment Law*, Oxford University Press, 2000, second edition, p. 204.

*Community*<sup>178</sup>, EU has formulated more than ten directives directly related to sex discrimination:

A. Like the equal treatment provision in *Treaty establishing the European Community*, *Equal pay for equal work Directive (1957)* is based on the consideration of establishing a unified community market, rather than with the substantive meaning of ensuring gender equality.

B. *Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (1975)* emphasizes member states' responsibilities on ensuring the equality of paying between men and women. It enshrined that the principle of 'equal pay of equal work' laid down in art. 119 [new art. 141], and introduced the concept of 'equal work for work of equal value'. And supplemented by two codes of practice intended to give practical advice on measures to ensure the effective implementation of equal pay<sup>179</sup>.

C. In order to achieve equality of men and women in social actions which include vocational training and promotion, *Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions* was passed in 1976. It proposed comprehensively to protect women's rights and interests in the field of employment, and banned the direct and indirect discrimination in the aspects of civil society status aspect and family environment. It

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<sup>178</sup> Now it becomes art. 157 of *Treaty of European Union*.

<sup>179</sup> COM (94) 6; COM (96) 336 final and Catherine Barnard, *EC Employment Law*, Oxford University Press, 2000, second edition, p. 204.

provided an opportunity for positive measures<sup>180</sup>.

D. In order to implement the principle of equal treatment between men and women gradually in the field of social security, *Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security* was passed in 1978.

E. In order to further implement the principle of equal treatment in the field of social security, *Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes* was passed in 1986. It extended social security programs to industries, professions, companies, self-employed persons and pregnant women.

F. The European Commission adopted new women equality employment opportunity program in 1982, and under this background *Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood* was passed in 1986. It extended the principle of equal treatment between men and women to employers, self-employed women, and the ones work with their spouses full-time.

G. In order to protect employee's safety and healthy and to encourage the employer to improve the working conditions, *Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding* was passed in 1992. Since the *Pregnancy and Maternity Directive* is

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<sup>180</sup> Catherine Barnard, *EC Employment Law*, Oxford University Press, 2000, second edition, p. 201.

concerned with measures favoring pregnant women employees, and therefore directly discriminatory (strictly speaking) against men, it should also be noted here. The measures of positive discrimination, or special protection of women, provided for in the directive, are justifiable direct discrimination in EC law. The different treatment of women from men provided for the *Directive 92/85* is justifiable in term of health and safety, and of the special needs of pregnant women workers and women workers who have recently given birth<sup>181</sup>.

H. *Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC* was passed in 1996 for the sake of UNICE, CEEP, ETUC. This Directive makes equality out of the limitation of status, but starts to pay attention to substantive equality. This is the first Directive adopted under the new procedure provided for by the *Social Policy Agreement*, allowing the Social Partners to negotiate a framework agreement which was then extended to all workers by a *Directive*<sup>182</sup>.

The detailed provision on mother protection and child-care leave, especially, enables females to accomplish the family responsibilities of child care without any troubles back at home. It is an important approach for this directive to protect the equal employment of females.

I. For better protection of the principle of equal pay for equal work the implementation of *Directive 86/378/EEC*, according to a series of case, *Council Directive 96/97/EC of 20 December 1996 amending Directive 86/378/EEC on the*

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<sup>181</sup> Tamara K Hervery, *Justification for Sex Discrimination in Employment*, London, Dublin, Edinburgh, Brussels, Butterworths Press, 1993, p. 54.

<sup>182</sup> See Ch.2. See also the *Directive on Part-Time Work 97/81/EC* [1998] OJ L14/9, as amended by *Directive 97/81/EC* [1998] OJ L131/10, consolidated in [1998] OJ L131/13 and *Fixed-Term Work 99/70/EC* [1999] OJ L175/43 considered in Ch.6 and Catherine Barnard, *EC Employment Law*, Oxford University Press, 2000, second edition, p. 202.

*implementation of the principle of equal treatment for men and women in occupational social security schemes* was passed in 1996.

J. In order to ensure the principle of equal treatment of the decree be more effective, which enables the people who may suffer discrimination to obtain effective judicial relief. So in 1997 *Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex* was passed, which was about burden of proof. Under the terms of this Directive, the *onus* is on defendants accused of discrimination at work to prove that the principle of equal treatment has not been violated<sup>183</sup>.

K. *Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC* is a directive specific to part-time workers. Since most of the part-time workers are women, the decree plays a certain role in protecting the rights of women in work.

L. *Council Directive 99/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP*.

Because women occupy the majority in part-time and temporary jobs, in order to ensure the actual gender equality, the above jobs are put into the system of indirect discrimination to be adjusted. It provides that temporary workers are entitled with the same rights as regular workers.

M. *Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment,*

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<sup>183</sup> Catherine Barnard, *EC Employment Law*, Oxford University Press, 2000, second edition, p. 202.

*vocational training and promotion, and working conditions*. Combines with the social development situation to revise 76/207/EEC to make it better apply to employment, vocational training, promotion and working conditions. It's one of the core anti-gender discrimination legislations in EU.

*Directive 2002/73/EC* greatly make up for the shortage that is not defined “discrimination” in the *Directive 76/207/EEC*. The Directive clearly defines that “discrimination” divides into direct discrimination<sup>184</sup>, indirect discrimination<sup>185</sup>, Harassment and sexual harassment<sup>186</sup>, and instruction to discriminate against persons<sup>187</sup>.

This *Directive* demands the member states to actively take the goal of the realization of equality between men and women while drafting and implementing laws, regulations, administrative rules, policies and activities. It makes the equal treatment of men and women not confined to the protection of legislation only. Rather, it extends to the overall protection covering fields of legislation and law enforcement.

Moreover, this directive protects the rights and interests of women during the pregnancy and maternity leave, preventing them from any relatively adverse treatment during the pregnancy and maternity leave<sup>188</sup>.

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<sup>184</sup> Art 1.1(2) of *Directive 2002/73/EC*, “direct discrimination: where one person is treated less favorably on grounds of sex than another is, has been or would be treated in a comparable situation”.

<sup>185</sup> Art 1.1(2) of *Directive 2002/73/EC*, “indirect discrimination: where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary”.

<sup>186</sup> Art 1.3 of *Directive 2002/73/EC*, “Harassment and sexual harassment within the meaning of this *Directive* shall be deemed to be discrimination on the grounds of sex and therefore prohibited”.

<sup>187</sup> Art 1.4 of *Directive 2002/73/EC*, “An instruction to discriminate against persons on grounds of sex shall be deemed to be discrimination within the meaning of this *Directive*”.

<sup>188</sup> Art 1.7 of *Directive 2002/73/EC*, “A woman on maternity leave shall be entitled, after the end of her period of maternity leave, to return to her job or to an equivalent post on terms and conditions which are no less favorable to her and to benefit from any improvement in working conditions to which she would be entitled during her absence”.

N. *Recommendation of Equality Principle Among Transgender People* was passed according to case law in 2002. It confirmed transgender people as members who enjoy equal treatments officially.

O. *Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services*, which extends the gender equality to the basic social life.

P. In order to further make it clear and better execute the directive relevant to equal treatment before and to establish the principle of equal treatment and implement equal opportunities through a series of cases, *Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)* was passed. This is the latest directive on gender equality of EU. It combines and arranges the original directives of 76/2007/EEC , 86/378/EEC, 75/117/EEC , 97/80/EC, and provides a more complete and comprehensive provision of gender equality in employment.

Equal treatment provided in the *Directive* contains: access to employment, including promotion, and to vocational training; working conditions, including pay; occupational social security schemes<sup>189</sup>. And some discrimination-related conceptions are referred in the art.2, that are direct discrimination, indirect discrimination, harassment, sexual harassment, pay, occupational social security schemes etc.<sup>190</sup>.

Q. *Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME,*

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<sup>189</sup> Art. 1 of *Directive 2006/54/EC*.

<sup>190</sup> Art 2.1 of *Directive 2006/54/EC*.

*CEEP and ETUC and repealing Directive 96/34/EC (Text with EEA relevance).* This Agreement extends the period of parental leave to four months for each parent. In principle, workers should be able to take all of their leave. It applies to all workers and to all types of employment contract. It represents a means of better reconciling workers' professional and parental responsibilities and of promoting equal treatment between men and women<sup>191</sup>.

*R. Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC.*

A report was done on the old Directive 86/613 and the European Commission concluded that its implementation was not entirely satisfactory when measured against the prime objective of the Directive, which was a general improvement in the status of assisting spouses'. 16% of Europe's employment is by self-employed persons and around 11% of self employed workers rely on the help of spouses and partners who work on an informal basis in small family businesses. The dependency on the self employed partner means that these people are at high risk of poverty in the event of divorce, bankruptcy or their partner's death. In December 2007 the Council asked the Commission to revise the old Directive to ensure the rights related to motherhood and fatherhood of the self employed<sup>192</sup>.

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<sup>191</sup> *Parental Leave.*  
[http://europa.eu/legislation\\_summaries/employment\\_and\\_social\\_policy/equality\\_between\\_men\\_and\\_women/em0031\\_en.htm](http://europa.eu/legislation_summaries/employment_and_social_policy/equality_between_men_and_women/em0031_en.htm)

<sup>192</sup> *Self Employed - Equal Treatment.*

<http://www.eubusiness.com/topics/employment/self-employed-equal-treatment/>



“With the entry into force of this new law, Europe takes an important step forward in terms of increasing social protection and providing equal economic and social rights for self-employed men and women, and their partners”, said Viviane Reding, EU Commissioner for Justice, Fundamental Rights and Citizenship and Vice-President of the European Commission<sup>193</sup>.

### 3. European court cases and suggestions

“To include cases into the formal origin of the community law seems to be self-contradictory. According to art. 220 (the original art. 164) of *Community Law*, the role of the court of European Community is only confined to the interpretation and application of law. In other words, the court is ‘the mouth declaring legal words’. This traditional concept of jurisdiction right might be appropriate under other backgrounds. However, in consideration of the reality of the cases of the community, this concept is obviously inappropriate, which could thus ‘neither be seen nor exist’. Actually, it is undeniable that court of European Community has ‘normative values’, and ‘Europe of judges’ actually exists. There is no need for the repeated discussion of ‘judge control’. The fact is that the European Community Court of Luxembourg contributes to the legal integration of community orders in an obvious manner. It awards European community court with the scope of proceeding and consultation function, the peculiar community constitutional system, the energetic community and revolutionary property, as well as the absence of community constitutional convention and legislators. These factors give explanation to the uncommon role that the law and judges play on the laws originating from the treaty<sup>194</sup>.

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<sup>193</sup> *Self-employed workers to gain maternity and pension benefits under new EU law*.  
[http://ec.europa.eu/unitedkingdom/press/press\\_releases/2010/pr1085\\_en.htm](http://ec.europa.eu/unitedkingdom/press/press_releases/2010/pr1085_en.htm)

<sup>194</sup> Denys Simon, *Le Systeme Juridique Communautaire*, translated by Wang Yuwang, Li Bin, Zhao Haiwei, Peking University Press, 2007, p. 327.

The interpretation of relevant concepts and terms, as well as the decisions formed in the treaty and directive of European court constitute the important legal origin of European Union in forbidding gender discrimination in practice. Just as term 4 in art. 438 in Chapter 4 of *EU Constitutional Treaty* says, the interpretations of treaties passed before in the cases of supreme court and the first trial court of Europe, the same as secondary legislation formulated according to these treaties, constitute the origin of relevant terms of EU Law and Constitution<sup>195</sup>.

The suggestions mainly refer to the various kinds of suggestions accepted by EU Commission in promoting women's affirmative action since 1980s. What is different from the directive is that the suggestions bear no compulsory requirements. They are just constructive suggestions of flexibility and selection for the member states to adopt a series of measures and policies in the national framework. It advocates the various member states to eliminate the inequality of females in their career experience through various active actions and policies, and to promote the development of "mixed professions". It includes various policy motions devoted to the elimination of the inequality in the labor market, such as information movement, awareness promotion activity, occupational career guidance, senior women post supplementation, female participation in decision-making, and the equal distribution of paid and unpaid labor between men and women. As the supplementation to the established directives, the specific representation of directive implementation and the basis of new directive motion, suggestions play an important role in the progress forbidding gender discrimination<sup>196</sup>.

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<sup>195</sup> Li Xingming, *EU's Legislation and Practice of Anti-gender Discrimination*, Law Press China, Beijing, 2008, p.103-104.

<sup>196</sup> See re. Xu Jieming, *Analysis of Policy of Equality between Men and Women of Europe*, Sixianzhanxian IV, Yunnan University Press, 2006, p.67-73.

## 1.1.2 Three stages for forbidding gender discrimination in employment

### 1.1.2.1 Equal treatment

The non-discrimination campaign cause after the war of European Union started with the women's requirements of equal treatment, whose basic concept is that anyone should have the equal human rights and opportunities as others.

From the legislation level, this concept could date back to the art. 141 of *EU Treaty*: “Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied”, and art. 142: “Member States shall endeavor to maintain the existing equivalence between paid holiday schemes”. These two articles are considered as the important basic principles for forbidding sex discrimination, the principles for equal treatment for men and women, by EU and European courts. Those are also the origin of EU sex discrimination and the source of the main laws<sup>197</sup>.

With the women's entry of the market and the deepening of the European integration, the attention for the protection of the women's rights is increasing, covering all the considerations of the emergency. In the 60s and 70s, the EU has further made a series of instructions, refined the requirements of equal pay for equal work, and the equal treatment of male and female in the workplaces. The range of its application expands to social security system, agriculture employees and the field of personal initiative. And it requires the member states to make corresponding adjustments in the national law and regulation. Since the pass of *Directive 76/207/EEC* in 1976, this is the first time that the EC surpasses the concept of equal pay for equal work, and defines the

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<sup>197</sup> See re. Tamara K Hervy, *Justification for Sex Discrimination in Employment*, London, Dublin, Edinburgh, Brussels, Butterworths Press, 1993, p. 47-50.

“employment discrimination” as the unequal factors in employment access, profession training, promotion and the conditions of work, etc., completing a great leap in the legislation security system for equalities between the sexes<sup>198</sup>.

### 1.1.2.2 Positive action

The starting point of equal treatment is to ensure the realization of the legal rights of the vulnerable groups. For the moderate points, it only requires a just and open legislation and judicial system, without the need of passing a law and establishing organization for the protection of the discriminated groups. As the women taking more days in the market, the equal treatment could not solve the origin of the problem of sex inequality: “the contract of sex labor division” which is formed unconsciously in a long-term period.

Therefore, since the late 70s, the non-discrimination framework of EC had a new action norm---positive action. It aims to surpass the normal legislation security, and to adopt some specified support and aid measures direct at the female, including the appropriate preference to overcome the problem of “inequality on the starting line”<sup>199</sup> faced by the female in the male-dominated society.

Based on *the Council recommendation of 13 December 1984 on the promotion of positive action for women* passed by *the European Council in 1984*, “Whereas existing legal provisions on equal treatment, which are designed to afford rights to individuals, are inadequate for the elimination of all existing inequalities unless parallel action is taken by governments, both sides of industry and other bodies concerned, to counteract

<sup>198</sup> See re. Tamara K Hervery, *Justification for Sex Discrimination in Employment*, London, Dublin, Edinburgh, Brussels, Butterworths Press, 1993, p. 50-54.

<sup>199</sup> Daniela Caruso, *Limits of the Classic Method: Positive action in the European Union After the New Equality Directives*, Harvard International Law Journal: 44(2), Summer 2003.

the prejudicial effects on women in employment which arise from social attitudes, behaviors and structures...”<sup>200</sup>, and “to adopt a positive action policy designed to eliminate existing inequalities affecting women in working life and to promote a better balance between the sexes in employment, comprising appropriate general and specific measures, within the framework of national policies and practices, while fully respecting the spheres of competence of the two sides of industry”<sup>201</sup>. It provides the legal prove for the positive action of the organizations of EC, European courts and other countries.

In 1988, European Commission has passed “Positive Action-Equal Opportunities for Women in Employment-A Guide”. It proposed that the purpose of positive action is carrying out equal treatment legislation and adopting the measures conducive to eliminate the inequality in reality, allowing the labor department to identify and eliminate the discriminations in employment policy and in practice, and facing the influence made by the past discrimination. It confirmed that the positive action is an effective mean, that is to say, it can make the labor department have a better balance in labor force between sexes, and a better use of the labor capacity value of the labor force. At the same time, it proposed the four steps for the implementation of positive action: promise, analysis, action, guiding and evaluation.

In the third paragraph, art. 6 of *Social Policy Agreement* added in *Amsterdam Treaty* 1993, the equal pay for equal work should “not inhibit the member states to maintain or adopt the special preferential measures, so to facilitate the female to do the occupational activities, and to prevent, compensate the disadvantages in their career”. Issued by European Parliament and European Council in 2002, the *Directive*

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<sup>200</sup> Para. 4 of *Directive 84/635/EEC on the promotion of positive action for women*.

<sup>201</sup> Art.1 of *Directive 84/635/EEC on the promotion of positive action for women*.

2002/73/EC pointed out that the member states could keep or adopt some measures according to the fourth paragraph, art. 141 of *EC Treaty*; its aim is to provide preferential policies for the low-participation sex, helping them get a job easier.

With the push of the Equal Opportunity Division under the EC employment, social affairs and equal opportunity directorate-general, there was a series of sex equality directives in this period, covering the aspects of coordination the social policy of member states, assurance of the safety and health of the pregnant women and the women in lactation period. It contains the discrimination faced by the women who takes maternity leave and part-time workers, helping the women to coordinate the work and family and making the work time more flexible, etc..

### 1.1.2.3 Mainstreaming stage

1. On the fourth World's Conference on Women held in Beijing in 1995, the sex mainstreaming became the theme of this conference. After that, the policies related to sexes of EU were drawing close to the UN's sex mainstreaming. On the same year, Sweden, Austria, and Finland, who had rich experience in sex mainstreaming, joined EU, changing the situation that the EU has moved ahead slowly in the process of sex mainstreaming. Sex mainstreaming became the fourth component for the equal opportunity between sexes, running through the whole acting program<sup>202</sup>.

In 1996, European Parliament officially defined mainstreaming as follows: without the only pursuit, especially outside the overall system framework, to establish the special organizations or launch plans to protect the discriminated groups, but to pursue

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<sup>202</sup> See re. Li Xingming, *EU's Legislation and Practice of Anti-gender Discrimination*, Law Press China, Beijing, 2008, p.116-119.

to involve the gender perspective into all main organizations of governments and the formulation and implement of policies comprehensively and systematically<sup>203</sup>.

2. In 2000, the European Council held a conference in Lisbon, formulating the 10-year plan for the long-term economic development, overall employment, social integration and sustainable development, proposing that it was necessary to increase the employment rate in Europe to 70% before 2010, with female employment reaching 60%. This means that the increased employment opportunities for the employment discriminated group, such as women, disabled people and senior citizens.

3. Entering the 21<sup>st</sup> Century, the effort to establish an EU of social Europe is faced with a daunting challenge in the social issues. First of all, the aging of population causes the decrease in labor force, with heavier burdens for the social security. Secondly, the emergence of globalization, revolution of new science and technology and the flexible job morphing affect and change the whole job market. Lastly, although the EU has devoted to realizing the equal treatment between sexes, the employment rate for women is 57%, the average wage is 15% lower compared to men, and most of the women are working in the low-paid industry and part-time industry. In order to realize the equality between sexes, there is still a long way to go.

In 2005, under the background, EU restated the *EU' roadmap for employment and social actions*, which established in Lisbon strategy. In October, 2006, the European Parliament and European Council have passed *Decision 1672/2006/EC of 24 October 2006 of the European Parliament and of the Council establishing a Community Programmer for Employment and Social Solidarity-PROGRESS (2007-2013)*.

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<sup>203</sup> Mark. A. Pollack and Emilie Hanfner, *Mainstreaming Gender in European Union, from Equal Treatment to Positive Action and Gender Mainstreaming*.  
[http://centers.law.nyu.edu/jeanmonnet/papers/00/00020\\_1-02.html#P54\\_5806](http://centers.law.nyu.edu/jeanmonnet/papers/00/00020_1-02.html#P54_5806).

This plan, which was launched in 2007 and is going to complete in 2013, is a brand new program related to the EU employment and social unity. After launch, the program has taken place of the previous five programs which were completed in 2006. It would take an effective role in combating discrimination, seeking for equality between sexes, employment measures and against social repelling. This program is divided into five domains of policy, so as to support the effective implementation of *The Roadmap for Equality women and men (2006-2010) of EC*<sup>204</sup>.

A. Carry out the sex mainstreaming policy in employment guidance, coordination in social protection and involvement to realize the equality in economic independence between sexes.

B. Increase the harmonizing level between work, individual activity and family through the communication of related experience and analyzed material in the whole Europe.

C. Improve the equality of the discursive power in the decision making process between sexes.

D. Eliminate the impression of sex in the whole world.

E. Improve the executive power of sex discriminated law, strengthen the evaluation work that is affecting the sex, increase the budget for anti-discrimination, establish a thorough anti-sex-discrimination network in the whole Europe. Through these, the ability of promoting sex equality of EU will be improved.

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[http://europa.eu/legislation\\_summaries/employment\\_and\\_social\\_policy/equality\\_between\\_men\\_and\\_women/c\\_10404\\_en.htm](http://europa.eu/legislation_summaries/employment_and_social_policy/equality_between_men_and_women/c_10404_en.htm)



4. Now, the EU sex mainstreaming does not limit in the level of policy, but it is fully integrated and it is fully reflected in the integration of employment, economy and society.

EU framed the new action plan. The content about employment are that as follows:

A. The art. 1 is still that about achieving Economic independence of female. Economic independence is a prerequisite for enabling both women and men to exercise control over their lives and to make genuine choices. Earning one's own living is the main way to achieve this and there has been progress in the participation of women on the labor market during the last decade, with the female employment rate rising to 62.5%<sup>205</sup>. In the EU, women accounted for 9.8 million out of 12.5 million additional employment between 2000 and 2009. This increased participation has contributed to economic growth in the EU<sup>206</sup>.

To reach the Europe 2020 objective of a 75% employment rate for women and men, particular attention needs to be given to the labor market participation of older women, single parents, women with a disability, migrant women and women from ethnic minorities. The employment rates of these groups are still relatively low and remaining gender gaps need to be reduced in both quantitative and qualitative terms<sup>207</sup>.

In order to achieve the object, the Commission will:

a. Support the promotion of gender equality in the implementation of all aspects and flagship initiatives of the Europe 2020 strategy, especially as regards definition and

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<sup>205</sup> From 57.3% to 62.5% between 2000 and 2009 (age group 20-64).

<sup>206</sup> *Strategy for Equality Between Women and Men 2010-2015 European Commission Strategy adopted*, p. 12.

<sup>207</sup> *Strategy for Equality Between Women and Men 2010-2015 European Commission Strategy adopted*, p. 12.

implementation of relevant national measures, through technical support as well as through the Structural Funds and other major funding programmes such as the 7<sup>th</sup> Framework Programme for Research.

b. Promote female entrepreneurship and self-employment.

c. Assess remaining gaps in entitlement to family-related leave, notably paternity leave and carers' leave, and the options for addressing them. Social partners will be consulted on further measures, under Article 154 TFEU.

d. Report on the Member States' performance with regard to childcare facilities.

e. Promote gender equality in all initiatives on immigration and integration of migrants<sup>208</sup>.

B. Equal pay for equal work and work of equal value.

This is the earliest part what was concerned by EU in the field of equality between men and women. But unfortunately, it is not achieved until now. Despite that, the gender pay gap (the average difference between men's and women's hourly gross earnings across the economy as a whole) in the EU remains at 17.8%<sup>209</sup>.

In order to achieve the object, the Commission will:

a. With the European social partners, and respecting the autonomy of the social dialogue, explore possible ways to improve the transparency of pay as well as the impact on equal pay of arrangements such as part-time work and fixed-term contracts.

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<sup>208</sup> *Strategy for Equality Between Women and Men 2010-2015 European Commission Strategy adopted*, p. 14.

<sup>209</sup> *Strategy for Equality Between Women and Men 2010-2015 European Commission Strategy adopted*, p. 16.

b. Support equal pay initiatives at the workplace such as equality labels, ‘charters’, and awards, as well as the development of tools for employers to correct unjustified gender pay gaps.

c. Institute a European Equal Pay Day to be held each year to increase awareness on how much longer women need to work than men to earn the same.

d. Seek to encourage women to enter non-traditional professions, for example in “green” and innovative sectors<sup>210</sup>.

C. Increase the proportion of women decision-making, make more women have the right of decision-making.

In economic decision-making, the proportion of women is lower than that of men at all levels of management and decision-making. Women represent only one in ten board members of the largest publicly listed companies in the EU and 3 % among the presidents of the board<sup>211</sup>.

In order to achieve the object, the Commission will:

- a. Consider targeted initiatives to improve the gender balance in decision making.
- b. Monitor the 25% target for women in top level decision-making positions in research.
- c. Monitor progress towards the aim of 40% of members of one sex in committees and expert groups established by the Commission (20).

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<sup>210</sup> *Strategy for Equality Between Women and Men 2010-2015 European Commission Strategy adopted*, p. 16.

<sup>211</sup> *Strategy for Equality Between Women and Men 2010-2015 European Commission Strategy adopted*, p. 20.

d. Support efforts to promote greater participation by women in European Parliament elections including as candidates<sup>212</sup>.

### **1.1.3 The application of forbidding employment gender-discrimination**

#### **1.1.3.1 The application range for non-gender-discrimination principle**

According to the *Directive 2002/73/EC*, no matter in public sectors or private sectors, including the public organization, it is not allowed to have direct or indirect gender discrimination, especially in the following sectors: employment, self-support, the entry condition of a career, including chosen criteria and recruitment requirement. No matter in any sector or at any level of a business, there should be not gender-discrimination<sup>213</sup>.

This principle is also suitable for the promotion; getting the career guidance, professional training, senior professional training and training qualification in any form and at any level, including the real work experience; employment and working conditions, including dismissal and the payments in *Directive 75/117/EEC*; taking part in some labor organizations or employer organizations, or other organizations for the specific working staff, as well as the treatment provided by these organizations.

The member states should take some measures to ensure the abolishment of any law and regulation inconsistent with the equal treatment. And any labor contract or collective contract, internal regulation of an enterprise or internal rules of the freelancers or workers and the employers' organizations, which are inconsistent with the principles of equal treatment, should be annulled or revised.

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<sup>212</sup> *Strategy for Equality Between Women and Men 2010-2015 European Commission Strategy adopted*, p. 20.

<sup>213</sup> See art. 3.1 of *Directive 2002/73/EC*.

### 1.1.3.2 The equal treatment between women and man in the employment

#### 1. Equal work or work of equal value equal pay

Equal work or work of equal value equal pay is the first domain that got attention for equality between sexes, and they are also the base for equality between sexes. The EU also has the richest law in this domain: up to now, the *EC Treaty* and *Directive 75/117/EEC*, *Directive 79/7/EEC*, *Directive 96/97/EC*, *Directive 97/80/EC*, *Directive 2006/54/EC* and a series of other directives have made some complete provisions in equal work, equal pay<sup>214</sup>.

A. About the definition of pay, art. 157 in *EU Treaty* and art. 2 of *Directive 2006/54/EC* defined: “‘pay’: the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his/her employment from his/her employer...”<sup>215</sup>.

From the related legal precedent, it could be seen that the definition of pay is very extensive, that is directly and indirectly getting the basic pay or minimum pay and the consideration, including paying by the piece<sup>216</sup> or by the time. The pay could be cash or material, and it could be paid at present or in the future, even in the indirect way<sup>217</sup>. Indirect pay could even be travel preference and convenience, without the relation with the substantial pay<sup>218</sup>. The payments given by the employers based on moral or other

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<sup>214</sup> See re. Yolanda Cano Galán, Teresa M.G. Da Cunha Lopes, Risa L.Lieberwitz, Giampaolo Loy, Rolando Murgas Torrazza, Ana I. Pérez Campos, Maria Redinha, Carolina San Martín Mazzucconi, Lucía Villalón Alejo, *Discriminación por Razón de Sexo y Acoso Desde una Perspectiva Laboral Comparada*, Universidad Rey Juan Carlos, Madrid, 2009, p. 75-86.

<sup>215</sup> Art. 2.1 (e) of *Directive 2006/54/EC*.

<sup>216</sup> See re. Case C-400/93 *Specialarbejderforbundet i Danmark v. Dansk Industri*.

<sup>217</sup> See re. Case C-262/88 *Douglas Harvey Barber v. Guardian Royal Exchange Assurance Group*.

<sup>218</sup> See re. Case C-12/81 *Eileen Garland v. British Rail Engineering Limited*.

reasons should be considered as the pay<sup>219</sup>. Therefore, the nursing allowance paid to women based on the law or “women’s special contract” is a kind of pay because “it is related to the work”<sup>220</sup>. Besides, even when the pay does not involve the workers, but is only in a state of future payment, it is also in the range of the pay in the Article 141<sup>221</sup>. In addition, the European courts passes a series of legal precedent to verdict that payment of spending in the event of illness<sup>222</sup>, compensation for unfair dismissal<sup>223</sup>, early payment of a retirement pension for compulsory redundancy<sup>224</sup>, occupational pension<sup>225</sup>, survivor's pension<sup>226</sup>, bridging pension<sup>227</sup>, bridging allowance<sup>228</sup>, additional redundancy payments<sup>229</sup> are all included in the range of pay in the art. 141.

B. Art. 1 of *Directive 75/117/EC* provides: “The principle of equal pay for men and women outlined in art. 119 of the Treaty, hereinafter called ‘principle of equal pay’, means, for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration. In particular, where a job classification system<sup>230</sup> is used for determining pay, it must be based on the same criteria for both men and women and so drawn up as

<sup>219</sup> See re. Case C-360/90 *Arbeiterwohlfahrt der Stadt Berlin e. V. v. Monika Botel*.

<sup>220</sup> See re. Case C-342/93 *Joan Giespie and others v. Northern Health and Social Services Boards*.

<sup>221</sup> See re. Case C-69/80 *Susana Jane Worringham and Margaret Humphreys v. Lloyds Bank Limited*.

<sup>222</sup> See re. Case C-171/88 *Ingrid Rinner-Kuhm v. FWW Spezial-Gebaudereining GmbH & Co. KG*.

<sup>223</sup> See re. Case C-167/97 *Regina v. Secretary of State for Employment*.

<sup>224</sup> See re. Case C-262/88 *Douglas Harvey Barber v. Guardian Royal Exchange Assurance Group*.

<sup>225</sup> See re. Case C-170/84 *Bilka-Karin Weber von Hartz*.

<sup>226</sup> See re. Case C-109/91 *Gerardus Cornelis Ten Oever. Stichting Bedrijfspensionenfonds voor het Glazenwassers en Schoonmaakbedrijf*.

<sup>227</sup> See re. Case C-132/92 *Birds Eye Walls Ltd. V. Friedel M. Roberts*.

<sup>228</sup> See re. Case C-19/02 *Viktor Hlozek v Roche Austria Gesellschaft mbH*.

<sup>229</sup> See re. Case C-173/91 *Commission of the European Communities v. Kingdom of Belgium*.

<sup>230</sup> See re. Case C-427/11 *Margaret Kenny and Others v Minister for Justice, Equality and Law Reform, Minister for Finance and Commissioner of An Garda Síochána*.

to exclude any discrimination on grounds of sex.”

As to equal work, there are two aspects. One is the equal work in the equal pay. The art. 157 in *EU Treaty* confirms the principle of the same pay for the same work. The basic representation is that two or more employees work for the same employer at the same time. To judge whether the work is equal and identical, “in the essence, they are equal in quality. It is related to the quality of the service. As long as it is the same in quality, it is necessary to get the same pay. And this judgment could not be limited in the simultaneity”<sup>231</sup>. The equal pay at the same time is not suitable for the situation that a person has worked in the same business with different occupational aptitudes in a long period<sup>232</sup>.

The other is the work for the same value. The same value work was listed into the first paragraph of art. 141 of *Amsterdam Treaty* (now in the art. 157 of *Lisbon Treaty*) in 1996. It mainly solved the problem that the women work for the same job as the men, but their value is underestimated. The work grade system provides a way to define “same value”. If a work grade system is used to determine the pay, it should be established in a principle that it is suitable for both men and women, and it should be based on the exclusion of any sex<sup>233</sup>. This work grade system should be divided voluntarily based on the employers’ work nature and needs. And it could also be divided abstractly based on the judgment that some works have “same value” made by the courts or member states’ governments. The European court believes that even

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<sup>231</sup> See re.Case C-129/79 *Macarthys Ltd. v. Wendy Smith*.

<sup>232</sup> See re. Case C-309/97 *Angestelltenbets der Wiener Gebietskrankenkasse v. Wiener Gebietskrankenkasse*.

<sup>233</sup> Art. 4 of *Directive 2006/54/EC*: “Where a job classification system is used for determining pay, it shall be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex”.

though the employers are not willing to accept the comparative evaluation, they have to take it.

### C. Day of equal pay for equal work:

Although the field of equal pay for equal work is the earliest one that EU attaches importance to in anti-discrimination, this goal has not been realized until today. The gender pay gap (the average difference between men's and women's hourly gross earnings across the economy as a whole) in the EU remains at 17.5%<sup>234</sup>. Besides the laws and regulations like treaties and directives prescribing equal pay for equal work, EU has adopted a series of social policies and measures to assist this goal, in view of this method of anti-discrimination which is raised earliest. For example, With the European Social partners, they will work on improving the transparency of pay schemes. Raising awareness is also crucial. The European Commission will therefore introduce a European Equal Pay Day as from 2011 so that every year it can "visualise" how much longer women need to work than men to earn the same amount<sup>235</sup>. 5 March 2011 is the first European Equal Pay Day.

But, the root causes of the gender pay gap extend well beyond the question of equal pay for equal work. There is a gap between women's educational attainment and professional development<sup>236</sup>. The causes of the pay gap also derive from segregation in the labor market as women and men still tend to work in different sectors/jobs<sup>237</sup>.

<sup>234</sup> [http://ec.europa.eu/justice/gender-equality/gender-pay-gap/index\\_en.htm](http://ec.europa.eu/justice/gender-equality/gender-pay-gap/index_en.htm)

<sup>235</sup> Foreword of *Strategy for Equality Between Women and Men 2010-2015 European Commission Strategy adopted*.

<sup>236</sup> *Strategy for Equality Between Women and Men 2010-2015 European Commission Strategy adopted*, p. 16.

<sup>237</sup> *EU Justice Commissioner Viviane Reding meets European business leaders to push for more women in boardrooms*.  
<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/242&format=HTML&aged=0&language=EN&guiLanguage=en>



## 2. Equal treatment

For achieve equal employment, just “equal work equal pay” is not enough. Therefore, EU lay down numbers of directives against different kinds of discriminations: *Directive 76/207/EEC* on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions; *Directive 79/7/EEC* on the progressive implementation of the principle of equal treatment for men and women in matters of social security; *Directive 96/97/EC* on the implementation of the principle of equal treatment for men and women in occupational social security schemes; *Directive 2002/73/EC* amending Council *Directive 76/207/EEC* on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions; *Directive 2006/54/EC* on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

Now this *Directive 2006/54/EC* is one of the core laws in the EU anti-sex discrimination laws. Its purpose is to take an important role in securing the substantial and comprehensive equality of men and women.

It contains provisions to implement the principle of equal treatment in relation to: “(a) access to employment, including promotion, and to vocational training; (b) working conditions, including pay; (c) occupational social security schemes. It also contains provisions to ensure that such implementation is made more effective by the establishment of appropriate procedures”<sup>238</sup>.

Furthermore, it gives detailed specifics on the content of equal opportunity and

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<sup>238</sup> Art.1 of *Directive 2006/54/EC*.

equal treatment in art. 14: “(a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion; (b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience; (c) employment and working conditions, including dismissals, as well as pay as provided for in art. 141 of the *Treaty*; (d) membership of, and involvement in, an organization of workers or employers, or any organization whose members carry on a particular profession, including the benefits provided for by such organizations”<sup>239</sup>.

### 3. Equal opportunity

That obtain equal opportunity is the precondition of achieve equal treatment. For instance, without job, equal work or work of equal value equal pay, equal promotion are out of the question. Therefore, equal opportunity is the most important thing in equality. Gratifyingly, EU specifically put forward “equal opportunity” in *Directive 2006/54/EC*. That implementing the first legislation about equality to providing “equal opportunity” go through 50 years.

The heading of the *Directive 2006/54/EC* changed from “equal treatment” to “equal opportunities and equal treatment”. In the first Article of *2006/54/EC*, it points out that the purpose of this *Directive* is to ensure the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. It is to say that this *Directive* changed the limitation of *Directive 76/207/EEC* and *Directive 2002/73/EEC*. *Directive 76/207/EEC* and *Directive 2002/73/EEC* only provide the equal treatment, but in *2006/54/EC*, it stresses the

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<sup>239</sup> Art. 14 of *Directive 2006/54/EC*.

importance of equal opportunities in employment, and it also provides the range of equality<sup>240</sup>.

If legislative approaches to sex equality range from formal equality at one end of the spectrum to a substantive approach to equality at the other end, the EC “equal opportunities model” lies somewhere in between. This is based on the idea that true equality cannot be achieved if individuals begin from different starting points<sup>241</sup>. The aim is therefore to equalize the starting points through a combination of formal and substantive equality measures. While focusing on the importance of the individual, it does recognize that sex-based policies may be used as a transitional remedial measure to address structural discrimination.

### 1.1.3.3 The exceptions to equal treatment

No right is absolute; the equal treatment is no exception. The *Directive* has made three exceptions for the equal treatment: firstly, different treatment based on sex characters<sup>242</sup>; secondly, the protection for the pregnant women and mothers<sup>243</sup>; thirdly, positive action<sup>244</sup>. These exceptions, being derogations from an individual right laid down in the *Directives*, must be interpreted strictly<sup>245</sup> must be regularly reviewed<sup>246</sup>,

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<sup>240</sup> See re. María Amparo Ballester Pastor, Jaime Cabeza Pereiro, Ferrán Camas Roda, Elena García Testal, Mercedes, López Terrada, Enrique Norez Torres, Cayetano Núñez Fernández, *La transposición del principio antidiscriminatorio comunitario al ordenamiento jurídico laboral español*, Tirant lo Blanch, Valencia, 2010, p. 80-92.

<sup>241</sup> Fredman above n. 61.384 and Catherine Barnard, *EC Employment Law*, Oxford University Press, 2000, second edition, p. 239.

<sup>242</sup> Art. 2.6 of *Directive 2002/73/EC*.

<sup>243</sup> Art. 2.7 of *Directive 2002/73/EC*.

<sup>244</sup> Art. 2.8 of *Directive 2002/73/EC*.

<sup>245</sup> See e.g. Case C-450/93 *Kalanke v. Freie und Hansestadt Bremen* (1995) ECR I-3051 and Catherine Barnard, *EC Employment Law*, Oxford University Press, 2000, second edition, p. 239.

<sup>246</sup> See e.g. Case C-222/84 *Johnston v. Chief Constable* and Catherine Barnard, *EC Employment Law*, Oxford University Press, 2000, second edition, p. 239.

and are subject the principle of proportionality<sup>247</sup>. Although the Member States retain a reasonable margin of discretion as the detailed arrangements for the implementation of these exceptions<sup>248</sup>, the list of exceptions is exhaustive, as the Court made clear in Johnston<sup>249</sup>. It said that it was not prepared to subject the principle of equal treatment to, for example, any general reservation as regards measures taken on the grounds of public safety<sup>250</sup>.

### 1. Sex of the Worker Constitutes a Determining Factor

In the art.2 (6) of *Directive 2002/73/EC*: “Member States may provide, as regards access to employment including the training leading thereto, that a difference of treatment which is based on a characteristic related to sex shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate...”.

There is an analysis based on the special circumstances of a case. In the case of *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary*<sup>251</sup>, Mrs. Johnston is a full-time employee for a loyal policeman in Northern Ireland. When the contract was due, the police chief of Northern Ireland loyal police decided not to extend the contracts with Mrs. Johnston and other women, and not allow them to take part in the practice of the light arms. The court accepted this policy, considering that “under the

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<sup>247</sup> Ibid. para. 36. and Catherine Barnard, *EC Employment Law*, Oxford University Press, 2000, second edition, p. 239.

<sup>248</sup> See re. Case C-184/83 Ulrich Hofmann v Barmer Ersatzkasse.

<sup>249</sup> See re. Case C-222/84 and Catherine Barnard, *EC Employment Law*, Oxford University Press, 2000, second edition, p. 239.

<sup>250</sup> Catherine Barnard, *EC Employment Law*, Oxford University Press, 2000, second edition, p. 239.

<sup>251</sup> See re. Case C-222/84 Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary.

circumstance of severe internal disorder, the policewomen who take the light arms could have a risk of being assassinated, so this could be controversial of pursuing social security”. So it affirmed that in some activities of police in Northern Ireland, the sex of the police constructed the definite proposition.

But the rationality of any exception is not permanent. In the case of *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary*<sup>252</sup>, the court insisted the obligation of the member states to evaluate the exception activities regularly, so that it could decide whether to keep the exception or not based on the social development.

In the case of *Angela Maria Sirdar v. the Army Board and Secretary of State for Defense*<sup>253</sup>, the Court concluded that: “The competent authorities were entitled, in the exercise of their discretion as to whether to maintain the exclusion in question in the light of social developments”<sup>254</sup>.

## 2. Protection of pregnancy and maternity

In the art.2 (6) of *Directive 2002/73/EC*: “this *Directive* shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity”<sup>255</sup>. It is one of exception to equal treatment<sup>256</sup>.

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<sup>252</sup> See re. Case C-222/84 *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary*.

<sup>253</sup> See re. Case C-273/97 *Angela Maria Sirdar v. The Army Board and Secretary of State for Defense*.

<sup>254</sup> Catherine Barnard, *EC Employment Law*, Oxford University Press, 2000, second edition, p. 241.

<sup>255</sup> See re. *María Amparo Ballester Pastor*, Jaime Cabeza Pereiro, Ferrán Camas Roda, Elena García Testal, Mercedes, López Terrada, Enrique Nores Torres, Cayetano Núñez Fernández: “3.1.2 *Mantenimiento del marco de garantías establecido para la protección de maternidad*”, *La transposición del principio antidiscriminatorio comunitario al ordenamiento jurídico laboral español*, Tirant lo Blanch, Valencia, 2010, p. 41-46.

<sup>256</sup> Yolanda Cano Galán, Teresa M.G. Da Cunha Lopes, Risa L.Lieberwitz, Giampaolo Loy, Rolando Murgas Torrazza, Ana I. Pérez Campos, Maria Redinha, Carolina San Martín Mazzucconi, Lucia Villalón Alejo, *Discriminación por Razón de Sexo y Acoso Desde una Perspectiva Laboral Comparada*, Universidad Rey Juan Carlos, Madrid, 2009, p. 92: “La protección específica de la maternidad y el embarazo es una de las razones que justifican la introducción de excepciones en el principio de igualdad

In the case of Hofmann v. Barmer Ersatzasse, the father took his non-paid parental leave to take care of his new-born baby, but the mother restarted to work after the initial maternity leave<sup>257</sup>. This man believed that *Basic Law* has some discrimination. The European court believed the seventh paragraph art. 2 allows the member states to launch some rules to protect: “the needed time for the female to recover their physical and emotional state during the maternity and after the birth of the children. A woman on maternity leave shall be entitled, after the end of her period of maternity leave, to return to her job or to an equivalent post on terms and conditions which are no less favorable to her and to benefit from any improvement in working conditions to which she would be entitled during her absence.” As a result of this, the court rejected the requirement of the man.

Further more, for the protection for the mother, it not only means the protection for the women who give birth, but also the ones who adopt the children.

### 3. Positive action

As a result of expounding in Part 1 (3.3Positive action), author does not repeat here.

#### 1.1.3.4 Pregnancy and parental leave

The female mainly take the responsibility of raising the children and taking care of them. In order to realize the equality between men and women, it is necessary to face squarely the responsibility of women and launch other laws to give it the protective measures besides the “non-discrimination principle”. The European Commission also

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de trato entre hombres y mujeres.”

<sup>257</sup> The *Basic Law in Germany* specifies that after the legal 8-week-leave, the women could have optional paid leave until the children are six month old, but the men have no such paid leave.

realized this problem and acknowledged that only by the measure of “reconcile their work responsibilities with family obligations” could really get the equal opportunities between sexes<sup>258</sup>. At present, except *Directive 2002/73/EC*, the EC also has other two directives related to the pregnancy and parental leave: *Directive 92/85/EEC* and *Directive 96/34/EC* (repealed by Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC ). The former one is about the protection for the women in the pregnancy, being in the labor and in nursing. The latter one is about the issue of parental leave because of the birth of the children.

#### 1. *Directive 92/85/EEC*

Article 1 of *Directive 92/85/EEC* provides the purpose of this *Directive*. “This *Directive* may not have the effect of reducing the level of protection afforded to pregnant workers, workers who have recently given birth or who are breastfeeding as compared with the situation which exists in each Member State on the date on which this *Directive* is adopted.” “This *Directive* may not have the effect of reducing the level of protection afforded to pregnant workers, workers who have recently given birth or who are breastfeeding as compared with the situation which exists in each Member State on the date on which this *Directive* is adopted”<sup>259</sup>. That is to say, it sets the minimal protection provided by the *Directive*.

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<sup>258</sup> María Amparo Ballester Pastor, Jaime Cabeza Pereiro, Ferrán Camas Roda, Elena García Testal, Mercedes, López Terrada, Enrique Nores Torres, Cayetno Núñez Fernández, *La transposición del principio antidiscriminatorio comunitario al ordenamiento jurídico laboral español*, Tirant lo Blanch, Valencia, 2010, p. 140: “...se puso de relieve que, puesto que pocos hombres disfrutaban de un permiso parental o de un trabajo a tiempo parcial (un 7.4%, frente a un 32.6% de mujeres) y puesto que las mujeres siguen siendo las principales cuidadoras de niños...”.

<sup>259</sup> Art. 1.3 of *Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding*.

The *Directive*'s contents:

- A. It defines “pregnant workers”, “workers who have recently given birth” and “workers who are breastfeeding” (art. 2)
- B. It provides the evaluative guidelines and purposes for safety and health. (art. 3)
- C. It provides the employer’s evaluative obligation. (art. 4)
- D. It provides the further action after evaluation. (art. 5)
- E. It provides the escape of employee’s night work in the second paragraph. (art. 6)
- F. Member States shall take the necessary measures to ensure that workers. They provide the leave of post in maternity leave and antenatal leave. They provide that the maternity leave should be no less than 14 weeks continuously, and at least 2 weeks’ leave ante partum and post partum. (art. 8 and art. 9)
- G. It provides that Member States shall take the necessary measures to prohibit the dismissal of workers, during the period from the beginning of their pregnancy to the end of the maternity leave<sup>260</sup>.(art. 10)

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<sup>260</sup> In the Case C-63/08, Ms Pontin was recruited by T-Comalux under a full-time contract for an indefinite period starting in November 2005. By registered letter of 18 January 2007, which she received on 22 January 2007, Ms Pontin was informed of her dismissal and given a period of notice beginning 31 January and ending 30 March 2007. The reasons for the dismissal with notice are not apparent from the order of the referring court. Ms Pontin claims before that court that on 19 January 2007 she sent a medical certificate to T-Comalux by ordinary post. The company denies before that court that it received any such certificate. On 24 January 2007, Ms Pontin sent T-Comalux an e-mail informing it that her ‘health [had] hardly improved’, that she would not be able to return to the office the following day and that she would send a medical certificate as soon as possible. By registered letter dated 25 January 2007, T-Comalux informed Ms Pontin that she was dismissed with immediate effect ‘on grounds of serious misconduct’ consisting of ‘unauthorised absence for more than three days’. By registered letter of 26 January 2007, received by T-Comalux on 30 January 2007, Ms Pontin stated that she was pregnant. She claimed that, as a result, the dismissal of which she had been notified by T-Comalux was null and void. As she had not received a reply from T-Comalux to that letter, on 5 February 2007 Ms Pontin brought proceedings before the referring court seeking a declaration that her dismissal was null and void. By judgment of 30 March 2007, that court, in a different composition from that in which it delivered the present order for reference, held that it did not have jurisdiction. Thus, Ms Pontin should have applied to the president of that court for a declaration that her dismissal was null and void. Ms Pontin should have applied to the



H. It provides the employment right, including the right to continue to get the allowance or appropriate allowance<sup>261</sup>. “These conditions may under no circumstances provide for periods of previous employment in excess of 12 months immediately prior to the presumed date of confinement”. (art. 11)

## 2. Directive 96/34/EC

president of that court for a declaration that her dismissal was null and void. Ms Pontin, who does not appear to have been represented at that time by a lawyer, had sent her application. By a second action, brought on 18 April 2007, Ms Pontin claimed that the referring court should order T-Comalux to pay her damages. T-Comalux contends that ordinary Luxembourg law relating to actions for damages does not apply to a pregnant worker. The Court considered that: “...must be interpreted as precluding legislation of a Member State, such as that introduced by Article L. 337-1(1) of the Luxembourg Labour Code, which is specific to the protection provided for in Article 10 of Directive 92/85 in the event of the dismissal of a pregnant worker or of a worker who has recently given birth or is breastfeeding, and which denies a pregnant employee who has been dismissed during her pregnancy the option to bring an action for damages whereas such an action is available to any other employee who has been dismissed, where such a limitation on remedies constitutes less favourable treatment of a woman related to pregnancy. That would be the case in particular if the procedural rules relating to the only action available in the case of dismissal of such workers do not comply with the principle of effective judicial protection of an individual’s rights under Community law, a matter which it is for the referring court to determine”.

<sup>261</sup> In the Case C-471/08, Sanna Maria Parviainen in the main proceedings became pregnant at the beginning of 2007. The date of confinement was 16 October 2007. On account of her pregnancy she was temporarily transferred to ground duties, namely office work, on 30 April 2007. She occupied that position until 15 September 2007, the date on which her maternity leave began. The supplementary allowances represented approximately 40% of the pay of the applicant in the main proceedings before she was temporarily transferred to ground work. Her basic monthly salary is EUR 1,821.76 and her average monthly pay is EUR 3,383.04. After her transfer, the total monthly pay of the applicant in the main proceedings was reduced by EUR 834.56. It is clear from the order for reference that, as a purser, a substantial part of the overall pay of the applicant in the main proceedings is made up of supplementary allowances. The allowances paid to workers may vary considerably depending on whether the person concerned has a supervisory role, such as purser, or whether he or she is an air hostess or steward. Workers may receive various supplementary allowances such as, in particular, allowances for night work, work on Sundays and holidays, an overtime allowance if the working day exceeds eight hours, and allowances for long-haul flights and flights entailing a time difference. In addition, the number of hours worked by persons with the same pay grade may vary considerably, which affects the amount of the supplementary allowances paid. According to the applicant in the main proceedings, Finnair was not entitled to reduce her pay following her temporary transfer, in particular by failing to take into consideration the fact that she was a purser. Such a reduction constitutes discriminatory conduct contrary to Directive 92/85 and Law 609/1986. In her action before the national court, the applicant claimed payment, for the period at issue in the main proceedings, of at least the same pay as that she received as a purser. The Court think It is clear from art. 11(1) of Directive 92/85 that, in the cases referred to in articles 5, 6 and 7 thereof, the rights relating to the employment contract, including the maintenance of a payment to, and/or entitlement to an adequate allowance for, pregnant workers, must be ensured in accordance with national legislation and/or national practice. The pay which must be maintained with respect to a pregnant worker in accordance with art.11(1) of Directive 92/85, following her temporary transfer to a position other than that which she occupied before her pregnancy, cannot, in any event, be less than that paid to workers occupying the job to which she is temporarily assigned.

The main content is in the attachment *Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC*. This *Directive* set two main rights.

Firstly, “this agreement grants, subject to clause 2.2, men and women workers an individual right to parental leave<sup>262</sup> on the grounds of the birth or adoption of a child to enable them to take care of that child, for at least three months, until a given age up to 8 years to be defined by Member States and/or management and labor”<sup>263</sup>. “In order to ensure that workers can exercise their right to parental leave, Member States and/or management and labor shall take the necessary measures to protect workers against dismissal on the grounds of an application for, or the taking of, parental leave in accordance with national law, collective agreements or practices”<sup>264</sup>. “At the end of parental leave, workers shall have the right to return to the same job or, if that is not possible, to an equivalent or similar job consistent with their employment contract or employment relationship”<sup>265</sup>. “Rights acquired or in the process of being acquired by

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<sup>262</sup> If they want to be entitled to take parental leave, father and mother must be employed. In the Case C-5/11, Mr Betriu Montull is an employee covered by the general social security system, which is part of the Spanish State social security system. Ms Macarena Ollé is a Procuradora de los Tribunales (a lawyer). The profession of Procurador de los Tribunales, which is exercised on a self-employed basis, involves the representation of clients in legal proceedings in cases prescribed by law. The Court considered “...which provides that the father of a child, who is an employed person, is entitled, with the consent of the mother, who is also an employed person, to take maternity leave for the period following the compulsory leave of six weeks which the mother must take after childbirth except where her health would be at risk, whereas a father of a child who is an employed person is not entitled to take such leave where the mother of his child is not an employed person and is not covered by a State social security scheme”. In the Case C-104/09, the Court similarly considered: “...which provides that female workers who are mothers and whose status is that of an employed person are entitled, in various ways, to take leave during the first nine months following the child’s birth, whereas male workers who are fathers with that same status are not entitled to the same leave unless the child’s mother is also an employed person.”

<sup>263</sup> Clause 2.1 of *Annex of Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC*.

<sup>264</sup> Clause 2.4 of *Annex of Directive 96/34/EC*.

<sup>265</sup> Clause 2.5 of *Annex of Directive 96/34/EC*. In the Case C-7/12, the officials’ post of Ms Riežniece was abolished due to national economic crisis during her taking parental leave. In the end of her leave, she was transferred to another post which would be abolished soon. Ms Riežniece would be dismissed due to this. The Court considered “a situation where, as part of an assessment of workers in the context of abolishment of officials’ posts due to national economic difficulties, a worker who has taken parental leave is assessed in his or her absence on the basis of assessment principles and criteria which

the worker on the date on which parental leave starts shall be maintained as they stand until the end of parental leave”<sup>266</sup>. “Member States and/or management and labor shall define the status of the employment contract or employment relationship for the period of parental leave”<sup>267</sup>.

Secondly, the agreement provides that: “Member States and/or management and labor shall take the necessary measures to entitle workers to time off from work, in accordance with national legislation, collective agreements and/or practice, on grounds of force majeure for urgent family reasons in cases of sickness or accident making the immediate presence of the worker indispensable”<sup>268</sup>.

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place him or her in a less favourable position as compared to workers who did not take parental leave; in order to ascertain whether or not that is the case, the national court must inter alia ensure that the assessment encompasses all workers liable to be concerned by the abolishment of the post, that it is based on criteria which are absolutely identical to those applying to workers in active service and that the implementation of those criteria does not involve the physical presence of workers on parental leave; and a situation where a female worker who has been transferred to another post at the end of her parental leave following that assessment is dismissed due to the abolishment of that new post, where it was not impossible for the employer to allow her to return to her former post or where the work assigned to her was not equivalent or similar and consistent with her employment contract or employment relationship, inter alia because, at the time of the transfer, the employer was informed that the new post was due to be abolished, which it is for the national court to verify.”

<sup>266</sup> Clause 2.6 of *Annex of Directive 96/34/EC*.

<sup>267</sup> Clause 2.7 of *Annex of Directive 96/34/EC*. In the Case C-116/08, Ms Meerts had been employed on a full-time basis since September 1992 by Proost NV under an employment contract of indefinite duration. From November 1996, she had various forms of career break and, from 18 November 2002, worked half-time as a result of parental leave, which was due to end on 17 May 2003. On 8 May 2003, Ms Meerts was dismissed with immediate effect subject to payment of compensation for dismissal equal to 10 months’ salary, calculated on the basis of the salary she was receiving at the time, which was reduced by half because of the equivalent reduction in her working hours. She challenged the amount of that compensation for dismissal before the arbeidsrechtbank van Turnhout (Labour Court of Turnhout), claiming that Proost NV should be ordered to pay compensation for dismissal calculated on the basis of the full-time salary which she would have been receiving if she had not reduced her working hours in connection with parental leave. Her application was dismissed by judgment of 22 November 2004. On appeal, the Arbeidshof te Antwerpen (Antwerp Higher Labour Court) upheld that judgment. In her further appeal, Ms Meerts submits that both at first instance and on appeal the courts interpreted national law without regard to the provisions of Directive 96/34. The Court supporting Ms Meerts, considered that: Clause 2.6 and 2.7 of the framework agreement on parental leave ... must be interpreted as precluding, where an employer unilaterally terminates a worker’s full-time employment contract of indefinite duration, without urgent cause or without observing the statutory period of notice, whilst the worker is on part-time parental leave, the compensation to be paid to the worker from being determined on the basis of the reduced salary being received when the dismissal takes place.”

<sup>268</sup> Clause 3.1 of *Annex of Directive 96/34/EC*.

### 3. *Directive 2010/18/EU*

Since the formulation of *Directive 96/34/EC*, it has wonderfully balanced the relationship between family and work, which has made great contributions to the equal employment of men and women. But due to the changes of circumstances of 14 years, the minimum requirements on parental leave, which was written in *Directive 96/34/EC*, already was not able to be contented, as an important means of reconciling professional and family responsibilities and promoting equal opportunities and treatment between men and women.

Social partners concluded the *Directive 2010/18/EU* to replaced *Directive 96/34/EC* and required that Member States should bring into force the laws by 8 March 2012 at the latest.

A. In the new directive, the period of parental leave is extended from three months to at least four months. It brings ample time for labors to care for children, which contributes to the stability of family and growth of children<sup>269</sup>.

It also makes flexible adjustment on the principle of non-negotiable leave. It provides that at least one month among the four months is non-negotiable<sup>270</sup>. It not only takes into consideration that females need a certain period of time after the birth for recovery. Moreover, it also balances the father's responsibility in caring for children. It makes it possible for fathers to care for children for three months in parental leave in families that need it. It breaks the principle that the parental leave can only be implemented by mother. It enables different families to make flexible arrangements of

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<sup>269</sup> Annex Clause 2.2 of *Directive 2010/18/EU*, "The leave shall be granted for at least a period of four months and, to promote equal opportunities and equal treatment between men and women, should, in principle, be provided on a non-transferable basis."

<sup>270</sup> Annex Clause 2.2 of *Directive 2010/18/EU*, "To encourage a more equal take-up of leave by both parents, at least one of the four months shall be provided on a non-transferable basis."

the time caring for children according to different situations.

Absolutely, this provision has its certain disadvantages. It is quite possible that the employers demand the female employees to give up the leave of the remaining three month by raising this provision. Therefore, this provision could be transferred only when the mother puts forward it voluntarily.

In addition, this *Directive* does not require that Member State need to take reasonable measures to give parents special care who give birth twins or multiple birth. In the Case C-149/10, a mother required to lengthen her parental leave, then she was refused. The Court considered that “Clause 2.1 of the framework agreement is not to be interpreted as requiring the birth of twins to confer entitlement to a number of periods of parental leave equal to the number of children born. However, read in the light of the principle of equal treatment, this clause obliges the national legislature to establish a parental leave regime which, according to the situation obtaining in the Member State concerned, ensures that the parents of twins receive treatment that takes due account of their particular needs. It is incumbent upon national courts to determine whether the national rules meet that requirement and, if necessary, to interpret those national rules, so far as possible, in conformity with European Union law”<sup>271</sup>.

B. The *Directive* also provides that the way to have the leave could be determined through the negotiation of the employer and employee. It could be taken for once or for stages<sup>272</sup>. Therefore, a flexible arrangement could be made according to one’s own family situation. It avoids the situation in which some families fail to take the parental leave once for some reasons, which brings equality to every family as much as possible.

<sup>271</sup> See re. Case C-149/10 *Zoi Chatzi v Ipourgos Ikonomikon*.

<sup>272</sup> Annex Clause 3.1(a) of *Directive 2010/18/EU*, “decide whether parental leave is granted on a full-time or part-time basis, in a piecemeal way or in the form of a time-credit system, taking into account the needs of both employers and workers”.

If the employer makes provisions that the laborers' period of time working in the company is taken as the standard to judge whether one is qualified to take a leave, this period should not be more than one year.

In this new directive, it also provides that for a laborer with a fixed period of working contract, the period of time provided in the contract should be taken as the standard to judge whether one owns the qualification of taking the leave. In other words, for a laborer with a fixed contract of more than one year, he or she should have the right of taking for child and enjoying the parental leave if he or she works less than a year in the company<sup>273</sup>.

Considering arrangement of the company, workers shall give a notice to employers when they exercise the right to parental leave, and employers the beginning and the end of the period of leave<sup>274</sup>.

*Directive* requires Member States shall take into account of the necessary to take care of children with a disability or a long-term illness, and adjust the parental leave<sup>275</sup>. The provision makes the *Directive* more humane.

C. "Return to work" is the most important part of protect the equal right of workers. Even if parental leave would be perfectly established, parental leave would become

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<sup>273</sup> Annex Clause 3.1(b) of *Directive 2010/18/EU*, "make entitlement to parental leave subject to a period of work qualification and/or a length of service qualification which shall not exceed one year; Member States and/or social partners shall ensure, when making use of this provision, that in case of successive fixed term contracts, as defined in Council Directive 1999/70/EC on fixed-term work, with the same employer the sum of these contracts shall be taken into account for the purpose of calculating the qualifying period."

<sup>274</sup> Annex Clause 3.2 of *Directive 2010/18/EU*, "Member States and/or social partners shall establish notice periods to be given by the worker to the employer when exercising the right to parental leave, specifying the beginning and the end of the period of leave. Member States and/or social partners shall have regard to the interests of workers and of employers in specifying the length of such notice periods."

<sup>275</sup> Annex Clause 3.3 of *Directive 2010/18/EU*, "Member States and/or social partners should assess the need to adjust the conditions for access and modalities of application of parental leave to the needs of parents of children with a disability or a long-term illness."

meaningless due to that workers can not return to work. *Directive* provide: “At the end of parental leave, workers shall have the right to return to the same job or, if that is not possible, to an equivalent or similar job consistent with their employment contract or employment relationship”<sup>276</sup>. This provision not only guarantees that the laborers will not lose the job because of taking the parental leave. It also takes into consideration the possible situations that may occur in the company for the few months during the laborer’s leave. Even if the laborer could not go back to the original work, he or she will be arranged in the similar posts.

In order to take care of their children, workers may need to change the working-time after they return to work. Member States and/or social partners shall help workers to promote better reconciliation<sup>277</sup>.

#### 1.1.3.5 The equal treatment for social security

The laws about the equal treatment of social security are *Directives 2006/54/EC* and *2002/73/EC* and their related contents, as well as *Directive 79/7/EEC*.

In *Directive 79/7/EEC*, the purpose of this *Directive* is the progressive implementation, in the field of social security and other elements of social protection provided for in Article 3, of the principle of equal treatment for men and women in matters of social security, hereinafter referred to as “the principle of equal treatment”<sup>278</sup>. “This *Directive* shall apply to: Statutory schemes which provide protection against the following risks: - sickness, invalidity, old age, accidents at work and occupational

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<sup>276</sup> Annex Clause 5.1 of *Directive 2010/18/EU*.

<sup>277</sup> Annex Clause 6.1 of *Directive 2010/18/EU*, “In order to promote better reconciliation, Member States and/or social partners shall take the necessary measures to ensure that workers, when returning from parental leave, may request changes to their working hours and/or patterns for a set period of time. Employers shall consider and respond to such requests, taking into account both employers’ and workers’ needs.”

<sup>278</sup> Art. 1 of *Council Directive 79/7/EEC*.

diseases, unemployment...”<sup>279</sup>. “This Directive shall apply to the working population - including self-employed persons, workers and self-employed persons whose activity is interrupted by illness, accident or involuntary unemployment and persons seeking employment - and to retired or invalided workers and self-employed persons”<sup>280</sup>.

The defined range of security domain and group by the *Directive* is not very clear, but at least it has some rationality, enabling running through the equal treatment for men and women into the compensating process of the states after employment and inability of the employees for paid labor.

Art. 4 is the core article for the *Directive*. “The principle of equal treatment means that there shall be no discrimination whatsoever on ground of sex either directly, or indirectly by reference in particular to marital or family status, in particular as concerns: - the scope of the schemes and the conditions of access thereto, - the obligation to contribute and the calculation of contributions, - the calculation of benefits including increases due in respect of a spouse and for dependants and the conditions governing the duration and retention of entitlement to benefits. 2. The principle of equal treatment shall be without prejudice to the provisions relating to the protection of women on the grounds of maternity”. The equal treatment of social security provided by the *Directive* has some important realistic practical meaning, especially the emphasis on direct or indirect discrimination in the matrimony relationship and family status.

This was approved in the case of *Jacqueline Drake v. Chief Adjudication Officer*<sup>281</sup>. In this case, the European court believed that the social security law of England in 1975 has violated the provisions in art. 1 and the first paragraph of art. 4, so it has the direct

<sup>279</sup> Art. 3.1 of *Directive 79/7/EEC*.

<sup>280</sup> Art 2 of *Directive 79/7/EEC*.

<sup>281</sup> See re. Case C-150/85 *Jacqueline Drake v. Chief Adjudication Officer*.



discrimination. However, this case does not point out clearly the prerequisite of the application of the equal treatment of social security, which means whether this directive is directly effective in litigious rights of an individual.

In the case of *State of Netherlands v. Federatie Nederlands Vakbeweging*<sup>282</sup>, the European court provided the answer to this question. After the application of *Directive 79/7/EEC (December 12 1984)*, the Holland still had a discriminated (based on matrimony relationship) social security law in practice. This law provides that the married women (except the divorced women) do not have the access to unemployment relief fund unless the woman fitted in the provided law of “head of household”. Fedetatie (the Netherlands Trades Union Federation) litigated to the Netherlands Hague regional court to repeal the law, or at least to limit the application of this law. The Hague regional court consulted the European court: whether art. 4 was directly effective or not. The European court provided the clear answer: the first paragraph of art. 4 was very clear, so it had the direct effect. These two cases approved the equal treatment of social security and the effect of its paragraph. It paved the way for the further queries from member states, normally about the direct or indirect discrimination on matrimony relationship and family status of women.

In addition, equal calculation of benefits between man and women, prohibiting discrimination provided in art. 4 is very important for equal employment. In the Case C-385/11<sup>283</sup> and Case C-577/08<sup>284</sup>, it appeared that EU prohibit unequal calculation of benefits.

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<sup>282</sup> See re. Case C-71/85 *State of Netherlands v. Federatie Nederlands Vakbeweging*.

<sup>283</sup> In the Case C-385/11, On 8 October 2009, aged 66 years, Ms Elbal Moreno applied to the INSS for a retirement pension. Previously, she had worked exclusively as a cleaner for a Residents Association part-time for four hours a week for 18 years. By decision of 13 October 2009, Ms Elbal Moreno's application for a pension was refused on the ground that she had not completed the minimum contribution period of 15 years, required for entitlement to a retirement pension, as provided under art. 161(1)(b) of

The *Directive 79/7/EEC* also provides some special conditions for the application of equal treatment of social security. The second paragraph in art. 3 provides that: “this *Directive* shall not apply to the provisions concerning survivors’ benefits nor to those concerning family benefits, except in the case of family benefits granted by way of increases of benefits due in respect of the risks referred to in para. 1 (a)...”; art. 4 provides that: “the principle of equal treatment shall be without prejudice to the provisions relating to the protection of women on the grounds of maternity”.

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the LGSS. That provision requires a part-time worker to pay contributions for a longer period than a full-time worker, even with the correcting factor represented by the 1.5 multiplier, in order to obtain a pension which is already proportionately lower. Ms Elbal Moreno also submitted that that rule entails indirect discrimination, since it is an indisputable statistical fact that women workers are the principal users of this type of contract (approximately 80% in Spain). The Court also considered that such legislation is contrary to art. 4(1) of *Directive 79/7*, unless it is justified by objective factors unrelated to any discrimination on grounds of sex. That will be the case where the measures chosen reflect a legitimate social-policy objective of the Member State whose legislation is at issue, they are appropriate to achieve that aim and they are necessary in order to do so.

<sup>284</sup> In Case C577/08, Ms Brouwer, a Belgian national residing in Belgium, worked in the Netherlands as a frontier worker from 15 August 1960 to 31 December 1998. From 1 January 1999, she ceased working and received benefits as an early retiree in Belgium. Since she was entitled to a full retirement pension in Belgium until her 65th birthday, and the responsibility for payment fell thereafter to the Kingdom of the Netherlands by reason of insurance periods completed in that state, in 2003, Ms Brouwer brought a claim for a retirement pension before the Rijksdienst. The pension, calculated on the basis of the insurance periods completed pro rata temporis, was fixed at EUR 11 724.61 and was granted to her from 1 May 2004. The amount of the pension was calculated in accordance with the applicable Belgian legislation, in particular art. 5(7) of the *Royal Decree of 23 December 1996, on the basis of notional and/or flat-rate daily wages determined annually* by Royal Decree on the basis of the average pay received by the workers in Belgium during the previous year. On 1 June 2004, Ms Brouwer disputed the amount of the pension granted to her for the period from 1 January 1968 to 31 December 1994, pointing out that the calculation of that amount was based on notional and/or flat-rate wages which, during the period in question, were lower for female workers than for their male colleagues. On 5 July 2004, the Rijksdienst informed Ms Brouwer that it maintained its original decision, arguing that during the period in question the average wage in real terms, on the basis of which the retirement pension was calculated, was not the same for female and male workers, which entailed a difference in the amounts of the pensions. However, from 1995, the daily wage was the same for male and female workers. This development was prompted by the widespread equality in pay and by the fact that women who work increasingly do so for longer periods. Ms Brouwer appealed against the decision of the Rijksdienst to the arbeidsrechtbank te Hasselt (Labour Court, Hasselt). By judgment of 16 June 2006, that court annulled the decision and ruled that the Rijksdienst was to recalculate Ms Brouwer’s retirement pension on the basis of the notional and/or flat-rate wages which were applied to male frontier workers during the period from 1 January 1968 to 31 December 1994. And the Court gave the judgement that: “art. 4(1) of *Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security*, precludes national legislation under which, for the years 1984 to 1994, the calculation of old-age and retirement pensions for female frontier workers, concerning equal work or work of equal value, was based on notional and/or flat-rate daily wages lower than those for male frontier workers”.

In all the exceptions, the most important is the first paragraph in art. 7 ( a ) : “...the determination of personable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits...”. In fact, this paragraph is a result of compromising, for the purpose of respecting the different provisions of retired age in different member states.

#### **1.1.3.6 The provision for the employer’s responsibility**

According to the requirements in *Directive 2002/73/EC*, the employers should take all the responsibilities on the sex discrimination in the workplace<sup>285</sup>. To be specific, the employers should take responsibilities in three aspects:

1. The employers should take some preventive measures to prevent the sex discrimination. This *Directive* requires the member states, according to the law of the state, collective agreement or convention, to encourage the employers and other organizations that are in charge of professional training to take some measures to prevent the sex discrimination, especially harassment or sexual harassment in workplace.

2. The employers should provide some information on equality in sexes to the employees or the representatives of the staff. The information includes the proportion of male and female employees in different level of the units, the adoptive measures with the cooperation of the staff representatives.

3. The employers can not dismiss the employees or the representatives of the employees because they have some complaints on sex discrimination, or take any revenge measures to them, no matter the complaints are proposed internally or to the

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<sup>285</sup> See art. 8b.4 of *Directive 2002/73/EC*.

courts or to other external organizations. But the author thinks this measure has no restrictions on the promotion of the employees, that is to say, it is difficult to tell whether the employers have rejections on the promotion of the employees or not. Furthermore, it is necessary to say that according to the EU law, this *Directive* is mainly used to restrict the member states, and it has no direct effect on the enterprise or individual. As a result of this, on the issue of employers' responsibilities, this *Directive* also asks the member states to take some measures to encourage or ask the employers to take the three responsibilities, but not to give the obligations to the employers directly.

### 1.1.3.7 Sexual harassment

Harassment could be sex discrimination in some conditions. According to the survey of EU, 40%-50% of women believed they had experienced sexual harassment for at least one time in their career, compared to 10% of men<sup>286</sup>.

*Directive 2002/73/EC* is the first time that EU makes the definition for the sex harassment legally<sup>287</sup>, and considers it as a form of sex discrimination. This *Directive* could be divided into two:

One is harassment, or harassment related to the sex of a person. If the unwelcomed action is related to a person's sex, and its purpose or effect will encroach a person's dignity, resulting an insulted, adversary, abased, or humiliated atmosphere, then this forms the harassment.

The other is sexual harassment. Any unwelcomed action related to sex, no matter in the oral form or non-oral form or physical conduct, as long as its purpose or effect will

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<sup>286</sup> Anna Diamantopoulou, *Welcomes Tough New EU Rules Against Sexual Harassment at Work*, Brussels, 18 April 2002.

<sup>287</sup> See art. 2.2 of *Directive 2002/73/EC*.

encroach a person's dignity, resulting a insulted, adversary, abased, or humiliated atmosphere, then it is the sexual harassment. According to this *Directive*, harassment and sexual harassment are both a form of sex discrimination. And they should be banned<sup>288</sup>. The resistance and obedience of a person to these kinds of harassment can not be used to affect the judgment proves.

Sexual harassment happens frequently in the modern workplace, and it is difficult to be proved. In addition, most of the victims are likely to keep silent. So this is a systematic and complex issue. Author will expound sexual harassment in 1.3.

## **1.2 China's anti-gender-discrimination in employment**

### **1.2.1 The source of legislation of anti-gender-discrimination in employment in China**

#### **1. Constitution**

The *Constitute* determines every citizen to have labor equal rights as the fundamental law, which means the country has an obligation to provide for women employment opportunities, safety, training opportunities, and relief for unemployed people<sup>289</sup>. There are specific provisions in the *Constitute* to guarantee women's rights, proclaiming that Chinese women enjoy equal rights with men in all aspects of political, economic, social and family life<sup>290</sup>, which is an embodiment of the principle of sexual equality.

Unfortunately, in the Chinese Constitution, it has not entered the judicial procedure.

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<sup>288</sup> See art. 2.3 of *Directive 2002/73/EC*.

<sup>289</sup> See art. 42.2 of *Constitution*.

<sup>290</sup> See art. 48 of *Constitution*.

The role of the Constitution is only confined to providing some specific departments with legal basis, which does not have applicability. For violations of the Constitution, there could be no constitutional review, or any corresponding remedy mechanism. Although it is very embarrassing, we have to admit that in China, the Constitution exists in name only, which has no substantial effect in dealing with employment discrimination. Although there is provision for the equality between men and women, it acts only as a kind of declarative file. It at most plays a guiding role in the formulation of other relevant department laws. That is to say, if the principle and spirit of equality between men and women in the Constitution have not been converted into the specific law against sex discrimination, these provisions can be said to be meaningless.

In addition, the Constitution only refers to the gender equality, rather than prohibition on gender discrimination. The wording is too weak. Even if the Constitution can enter the judicial process later, it has little influence on the settlement of gender discrimination. From this point, it can be seen that the attitude the nation holds against gender discrimination and employment discrimination is very worrying.

## *2. Law of the People's Republic of China on the Protection of Rights and Interests of Women*

*Law of the People's Republic of China on the Protection of Rights and Interests of Women* has the constitutional character, and it further confirmed the principle of eliminating discrimination on grounds of sex. The *Law* has included a special chapter to secure women's right of work and right of social security<sup>291</sup>. And it provides: "... the state shall guarantee that women enjoy the equal right, with men, to work"<sup>292</sup>. It is to

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<sup>291</sup> See re. art. 22-29 of *Law on the Protection of Rights and Interests of Women*.

<sup>292</sup> Art. 22 of *Law on the Protection of Rights and Interests of Women*

say that guarantee of women's equal work rights is one of the country's obligations and responsibility, which will effectively realize the sexual equality.

A. Art. 2 of the law, as amended in 2005, has reaffirmed women's equal rights with men in all aspects of political, economic, social and family life, and added an article "realization of equality of men and women is a basic policy of the state. The state should introduce necessary measures for rights and interests of women as well as eliminating of all forms of discrimination against women"<sup>293</sup>. The state make sexual equality become one of basic policy, thereby, make sexual equality become the principle of establishing other legislation. It is enough to see that the state attach importance to equality between men and women.

B. As for the selection of officers in the government, it declared that the state shall actively train and select female cadres<sup>294</sup>. The principle of sexual equality must be abided by in training, selection and appointment among state organs, social communities, and enterprises and institutions, and a certain number of women shall work as leading members.

C. Any unit is not allowed to refuse employment of women on sex grounds or raise the employment standards for women, except when the jobs or work post are not suitable for them<sup>295</sup>. According to law, while recruiting female workers, units should sign a labor contract or a service agreement with women. There should be no such content in the labor contracts or service agreements that restrain women's rights to marry or rights of childbearing.

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<sup>293</sup> Art. 2 of *Law on the Protection of Rights and Interests of Women*.

<sup>294</sup> See re. art. 12 of *Law on the Protection of Rights and Interests of Women*.

<sup>295</sup> Art. 23 of *Law on the Protection of Rights and Interests of Women*.

D. Women and men should enjoy equal pay for equal work, equal benefits and interests<sup>296</sup>, and women should not be discriminated in promotion and post assessment of professional skills<sup>297</sup>. Special protections on women's "four periods" were made. It has provided that employers cannot arrange women engage disagree work in "four periods"<sup>298</sup>, and any unit shall not reduce women's wages, fire women, or unilaterally annual their labor (employment) contracts or service agreements on the pretext of marriage, pregnancy, maternity leave or breastfeeding. Exceptions should be made when female workers require terminating labor (employment) contracts or service agreements<sup>299</sup>.

E. The amendments added a new subsection that "while implementing retirement system, any unit shall not discriminate women on grounds of sex"<sup>300</sup>.

F. Moreover it has provided that the state shall develop social insurance, social relief, social welfare, and medical and health services to guarantee women's rights to have social insurance, social relief, and medical and health services<sup>301</sup>.

### 3. *Labor Law of the People's Republic of China*

A. The principle of prohibiting employment discrimination referred in the *Constitution* is translated into specific provisions in the *Labor Law*. It has provided that laborers shall have the right to be employed on an equal basis, choose occupations<sup>302</sup>. Laborers shall not be discriminated against in employment, regardless of their ethnic

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<sup>296</sup> Art. 24 of *Law on the Protection of Rights and Interests of Women*.

<sup>297</sup> See art. 25 of *Law on the Protection of Rights and Interests of Women*.

<sup>298</sup> See art. 26 of *Law on the Protection of Rights and Interests of Women*.

<sup>299</sup> See art. 27 of *Law on the Protection of Rights and Interests of Women*.

<sup>300</sup> Art. 27.2 of *Law on the Protection of Rights and Interests of Women*.

<sup>301</sup> See art. 28 of *Law on the Protection of Rights and Interests of Women*.

<sup>302</sup> See art. 3 of *Labor Law*.



community, race, sex, or religious belief<sup>303</sup>.

B. Aimed at gender, it provides that females shall enjoy equal rights as males in employment. It shall not be allowed, in the recruitment of staff and workers, to use sex as a pretext for excluding females from employment or to raise recruitment standards for the females, except for the types of work or posts that are not suitable for females as stipulated by the State<sup>304</sup>.

C. In Chapter 7 of *Labor Law*, special protection with female workers is regulated:

a. Female workers shall not be arranged to engage in work down the pit of mines, work with Grade IV physical labor intensity as stipulated by the State or other work that they should avoid<sup>305</sup>.

b. Female workers during their menstrual shall be arranged engage in work with high altitude, low temperature and cold water or work with Grade III physical labor intensity as stipulated by the State<sup>306</sup>.

c. Female workers during their pregnancy shall not be arranged to engage in work with Grade III physical labor intensity as stipulated by the State or other work that they should avoid in pregnancy. No female workers pregnant for more than seven months shall be arranged to work overtime or to work in night shifts<sup>307</sup>.

d. After childbirth, female workers shall be entitled to no less than ninety days of

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<sup>303</sup> See art. 12 of *Labor Law*.

<sup>304</sup> See art. 13 of *Labor Law*.

<sup>305</sup> Art. 59 of *Labor Law*.

<sup>306</sup> Art. 60 of *Labor Law*.

<sup>307</sup> Art. 61 of *Labor Law*.

maternity leaves with pay<sup>308</sup>.

e. Female workers during the period of breastfeeding of infants less than one year shall not be arranged to engage in work with Grade III physical labor intensity as stipulated by the State or other work that they should avoid in lactation or work overtime or in night shifts<sup>309</sup>.

All these articles reflect the protection for women, which will favor the sexual equality. Especially, the law protects women in the period of menstrual cycle. They are more specific, detailed and humane, compared to the EU's protection provisions, fully considering women's physical and psychological change in menstrual cycle and fully guaranteeing their rights.

However, both *Labor Law* and *Law on the Protection of Women's Rights* never mention the issue of females returning to work after the leave. This is the biggest failure of China on female reproductive rights and equal employment right protection, not to mention the transference of 90 days of maternity leave to the male.

#### 4. Measures of local government

Government at different levels also adopts all kinds of positive measures to distinguish gender discrimination phenomena in the employment market in the following main forms:

A. Employers should strengthen labor safety security for female workers, prohibit dismissing female workers freely, and guarantee relatively stable work for them. Further more employers are enforced to pay maternity insurance, establish maternity

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<sup>308</sup> Art. 62 of *Labor Law*.

<sup>309</sup> Art. 63 of *Labor Law*.

insurance fund and special protection for female workers. Employers shall not terminate the labor contract during their pregnancy, lactation, and nursing period<sup>310</sup>. When giving birth, female workers have maternity leave according to laws and regulations. During which the maternity allowance are paid from maternity insurance fund, according to the average monthly standard of personnel payment in the enterprise last year<sup>311</sup>.

B. The state support projects for women employment, namely aimed at the specific discrimination object—women, to develop new industrial projects and created new employment opportunity to solve their employment issues. For instance, the Hang Zhou municipal government vigorously encourages non-regular employment organization development to create all kinds of employment opportunity for laid-off and unemployed individuals. Various non-regular employment forms will greatly expand employment scope and alleviate the women employment issue<sup>312</sup>.

C. The preferential policy, namely the state provide special policy support for women employment to help them get employed as soon as possible. For instance, as “*Notice on Further Reemployment Work of Laid-off and Unemployed Women*” points out, encourage women with undertaking desire and capability to initiate small business and provide feasible analysis and guidance for their business. Provide initial capital on micro-credit, simplify the approval procedures, offers certain preferential benefits, and provides agent service of different social insurances and labor security

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<sup>310</sup> Art 29 of *Labor Law*.

<sup>311</sup> Art. 5 of *Trial Procedures for Enterprise Personnel Maternity Insurance of the People's Republic of China*.

<sup>312</sup> See re. Employment Discrimination Regulation Issue Group of Renmin University of China, *Laws and Regulations of China against Employment Discrimination*, Weiwei Li, Lisa Stearns, *Employment discrimination International Standards and National Practice*, Beijing, 2006, Law Press China, p. 219-226.

business<sup>313</sup>.

D. Enhance training for women to improve their educational level. One of the most important reasons of gender-discrimination in the employment market is that women have relatively low-level education and weak competition. Aimed at the phenomenon, the Central Government and local government at different levels actively adopt many methods and forms to enhance occupational training for women to improve their employment competition. For instance, as “*Notice on Further Reemployment Work of Laid-off and Unemployed Women*” points out, train 50 thousand women to undertake business annually and endeavor to complete relatively high training qualification rate and undertaking success rate. The training objects include laid-off and unemployed women, female university and college gradulators, and spare agricultural female laborers, etc.<sup>314</sup>.

## 5. Other rules

The State Council has promulgated Regulations on Labor Protection of Women. Meanwhile, the State has worked out the new national plans for action—Program for the Development of Chinese Women 2000-2010, which has confirmed the objective of female workers’ career development: “to guarantee women’s equal rights of gaining economic resources”, “to eliminate employment discrimination on grounds of sex and realize sexual equality in employment, to guarantee women’s labor rights and to keep the percentage of female workers of the total employed people higher than 40%”, etc..

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<sup>313</sup> See re. Employment Discrimination Regulation Issue Group of Renmin University of China, *Laws and Regulations of China against Employment Discrimination*, Weiwei Li, Lisa Stearns, *Employment discrimination International Standards and National Practice*, Beijing, 2006, Law Press China, p. 228.

<sup>314</sup> See re. Employment Discrimination Regulation Issue Group of Renmin University of China, *Laws and Regulations of China against Employment Discrimination*, Weiwei Li, Lisa Stearns, *Employment discrimination International Standards and National Practice*, Beijing, 2006, Law Press China, p. 288-230.

In addition, China is one of the earliest Contracting States of *Convention on the Elimination of All Forms of Discrimination against Women*. So far, China has submitted periodic reports for 6 times to the UN Committee on the Elimination of Discrimination against Women. China has contracted 24 international conventions of International Labor Organization (ILO), including three core conventions, “*Convention No. 100*”, “*Discrimination ( Employment and Occupation ) Convention*”, and “*International Covenant on Economic, Social and Cultural Rights*”.

Although *Constitution, Labor Law and Law on the Protection of Rights and Interests of Women* has regulations on women’s rights to employment, the State protects women’s equal working rights with men, eliminates sex discriminations, implements equal remuneration, and gives special protection to women during the menstrual period, pregnancy, maternity and breastfeeding or in special workplaces, the present law against the discrimination on employment is, generally speaking, high principled, but deficiently operative. Especially the *Law on the Protection of Rights and Interests of Women* has been always tilted toward the special protection to women but not the protection to women’s equal rights of choosing careers and promotion. It lacks effective and workable safeguard measures.

Combined with what has been mentioned in the chapter above, the employment discrimination is quite serious in China. As the largest constituent in the infringed objects of employment discrimination, the right of equal employment of females is hard to get effective maintenance under the current legal system of China.

## **1.2.2 Current situation and typical cases of employment gender discrimination in China**

### **1.2.2.1 Current situation of employment gender discrimination in China**

Gender discrimination of employment in China finds its outstanding expression in the following respects:

#### **1. Gender discrimination experienced in the process of employment application.**

In February, 2008, the total effective position achieved 94955. However, except those positions asking for male applicants only and those having no restrictions on females (in other words, no clear gender demands are made in the recruitment requirements), there are a mere 6363 positions just for women. Even in big cities like Guangzhou and Shenzhen that have a greater demand for females, positions targeted at female applicants are no more than 10% of the total number of local posts. It is not difficult to see that, among the almost 100000 available positions in China, only 6.7% of the posts are for women specifically<sup>315</sup>.

Report of Gender Discrimination in Employment Situation in China (hereinafter referred to as the report) indicates that 23.6% of the investigated say that they have been refused in the application process as females. Among them, there are 13.2% who have experienced the refusal once again, 6.6% who have experienced the refusal twice again, and 3.8% who have experienced the refusal for three times again. Before that, the research result released by the investigation company of Horizon indicates that 32.9% of women said they had suffered the gender discrimination in employment, while the

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<sup>315</sup> See Li Ying, Zhang Shuai, *A Study of Gender Discrimination in the Workplace in China*, China Social Sciences Press, 2010, Beijing, p. 17.

male was 26.1%<sup>316</sup>.

Actually, these data do not include implicit discrimination. In fact, women suffer more from the implicit discrimination. In some of the recruitments that make no limitations on men and women, in the hiring stage, the employers still tend to make a targeted screening of the candidates. Although the employers have not rejected women's resume, they are often more willing to hire male workers, and in the interview, different thresholds are set for men and women. Finally, the hired men still account for the majority. The survey of National Labor Ministry and Social Security Ministry on 62 designated cities indicates that 67% of the employing units have put forward gender limitation, or have provided that women should not have pregnancy or childbirth during the period of recruitment<sup>317</sup>.

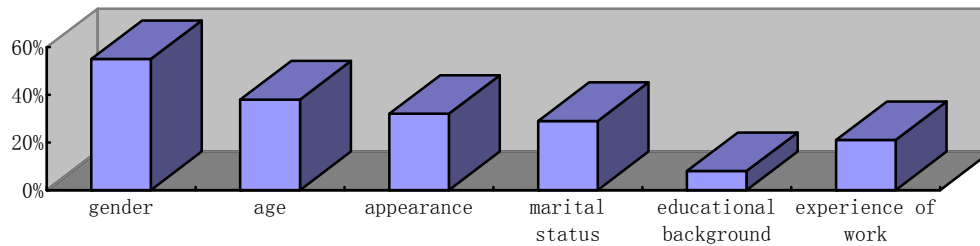
In September, 2010, China hr and Sina Education Channel launched a special survey together named "Have you encountered discrimination in employment?" Over a period of two weeks in the survey period, 4650 people were involved in the investigation. Investigation shows that 75% of the participants have experienced job discrimination. Among those females that have been discriminated, nearly 60% of them are because of gender discrimination (see the chart below). Moreover, combined with the cross discrimination for other reasons, women suffer from serious discrimination in the job application process.

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<sup>316</sup> Zhou Kai, *Research by Lingdian Company*,  
[http://cjb.newssc.org/html/2008-03/08/content\\_67969.htm](http://cjb.newssc.org/html/2008-03/08/content_67969.htm)

<sup>317</sup> Fu Jianfeng, Xiang Ying, *Female Master or Doctor also Suffer Discrimination Like General Women*. <http://women.sohu.com/20060417/n242811340.shtml>

### Reasons of Female Employee Suffering Discrimination



#### 2. Gender discrimination terms in the labor contract or agreement.

While signing a contract with laborers, part of the employing units take advantage of their own dominant position and set various kinds of terms with gender discrimination mandatorily in the labor contract or relevant regulations, including marriage ban, pregnancy ban and child caring ban. After the issuing and implementation of *Employment Discrimination Law* in 2008, the obvious discrimination behaviors of the employing units on females in the labor contract or agreement have been lowered. However, the report shows that there are still 4.1% of female workers who are forced to sign articles of marriage ban, and 3.4% of female workers who are forced to sign articles of pregnancy ban. 21.5% of the respondents indicate that their units are reluctant to hire women at the reproductive age without childbirth yet.

#### 3. The gender segregation in occupation still exists, and status of females is lower than that of males in the overall structure of employment.

The so-called “gender segregation in occupation” refers to the uncoordinated situation between the labor gender constitution and the proportion of labor force population in some industries or occupations. The “gender segregation in occupation” mainly has two aspects. One is the lateral segregation, namely the industry gender



segregation. In the labor market, males tend to concentrate in some industries, while women focus on other industries. In other words, it is “female” occupation and “male” occupation. Another is a vertical segregation, namely the gender segregation in title and post. Whether in the male-dominated industry or female-dominated industry, males tend to have a higher title and post, while women are generally leading a lower position<sup>318</sup>.

The report indicates that 36% of respondents believe that in their units, there is the apparent phenomenon that fewer women are in high-salary positions and management levels. 33.9% of respondents say that in their units, the female workers get less opportunities of promotion than male workers.

The report points out that children and housework are viewed as the major two factors influencing the promotion of women. 33.9% of respondents say that in their units, male workers get more opportunities in promotion than female workers. More than half (52.1%) of respondents believe that “taking care of the children and undertaking housework will influence women’s opportunity of promotion”.

Moreover, there is survey demonstrating that on the company’s manager level, males take up 57.9% and females 42.1%, which is basically equal. However, in the position of general manager, the male ratio jumps to 83.4%, while that of the women is reduced to 16.6%<sup>319</sup>.

4. Unequal treatment during “the three periods” of prenatal, perinatal and lactation periods.

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<sup>318</sup> Xue Ninglan, *Gender Discrimination: Legal Analysis of Gender Discrimination in employment*, in Li Weiwei, Lisa Stearns, *Employment discrimination International Standards and National Practice*, Law Press China, Beijing, 2006, p. 287.

<sup>319</sup> See Li Ying, Zhang Shuai, *A Study of Gender Discrimination in the Workplace in China*, China Social Sciences Press, 2010, Beijing, p. 42.

During these “three periods”, the salary is reduced or the post is changed, which makes it impossible for them to return to the original work or obtain similar work as before. Moreover, their treatment and opportunities have been greatly reduced.

The report points out that 20.9% of respondents say that in their unit, there are females compelled to be changed to other posts or to have salary reduced during the “three periods”. Of those surveyed, 12.1% of women have had their salary reduced during “three periods”. 14.2% of women have been changed to other posts because of the “three periods”. Females that are fired compulsorily during the “three periods” also take up 11.2%.

5. Problem of unequal payment for the same work and treatment differences between men and women.

The problem of unequal payment for the same work between men and women still exists. The report points out that 15.0% of the respondents clearly express that there is the phenomenon of unequal payment for the same work between men and women in their units.

The report points out that 66.2% of female workers believe that in their units, it is harder for female workers than male workers to obtain the purchase qualification of financing housing. Females who have said to be unable to purchase financing housing also account for more than sixty percent (61%).

6. Workplace sexual harassment.

The first time for sexual harassment to appear in Chinese law was in art. 40 and art. 58 of *Law on Protection of Women's Rights and Interests* (revised) passed on August 28, 2005. Although the law has included the ban on sexual harassment on females, it does

give a definition about what sexual harassment is. Moreover, there is no provision about prohibition on sexual harassment on males. China lacks maneuverability in the law against sexual harassment, and it remains a blank in the prevention and treatment of sexual harassment in the workplace.

The report points out that 42.8% of the respondents say that their units do not have provisions prohibiting sexual harassment. Units with relevant provisions only take up 26.9%. 20.2% of the women say that they have experienced the unpopular “ribaldry”; 13.4% of the women have experienced the unpopular “obscene pictures and messages”; 5.7% of the women have experienced the unpopular “body touch”; 4% of the women have experienced “forced sexual behavior”. Among the females suffering from sexual harassment, 17.2% of women suffer from the boss’s harassment, 28.7% suffer from colleagues’ harassment and 54% of women suffer from the harassment from outsiders, such as customers.

#### 7. Discrimination on the issue of retirement.

China implements the public policy of different retirement ages of males and females. According to *Interim Measures about Retirement and Resignation of Workers*, male and female employees and workers have a retirement age difference of 10 years, being 60 and 50 respectively. According to *Provisional Regulations on State Civil Servants*, the civil service retirement age difference of men and women is 5 years, being 60 and 55 respectively.

In addition, the State Council makes provisions on the retirement age of experts with senior titles and intermediate professional and technical personnel in fields of education, health and technology, which “could be appropriately extended”. For the technical personnel of intermediate titles, the extended retirement age of females should

not exceed 60 and that of the males shall not be more than 65. In addition, No.5 document newly released in 1990 by the State Ministry of Personnel provided that the female senior experts could retire voluntarily at the age of 60 so long as their health condition is allowed. Notice on the retirement age of female cadres of county level (department) issued in 1992 by Organization Department of the CPC Central Committee and Department of Personnel provided that any female leaders could extend their retirement age to 60 so long as they can adhere to the normal work voluntarily.

Moreover, China has a special set of retirement policy named as “off-the-job” and “early retirement” besides formal retirement. Both “off-the-job” and “early retirement” are not formal retirement. They indicate the termination of post and treatment in this unit and failure to obtain the endowment insurance and pension, acknowledged by the unit. It significantly reduces the laborers’ treatment. The report also points out that 23.8% of respondents believe that in their units, more female workers have experienced “post-waiting” and “early retirement” than male workers.

According to the report, only 26.4% of the respondents regard retirement age difference is in itself discrimination against women. Among these 26.4% of the respondents, women account for 70.3%. Nearly 60% of the respondents think that “an earlier retirement age of the female employees than male employees” is not discrimination, which has brought blocks to the promotion of the awareness of the same retirement age.

#### **1.2.2.2 Typical cases**

As previously mentioned, the manifestation of employment gender discrimination in China is diverse. However, due to the defects of anti-discrimination law and employment pressure, the victims step back. Few people stand up for their rights

confronted with the discrimination. Even if there is right protection, it becomes quite difficult due to the lack of effective relief approaches. Currently, the domestic employment gender discrimination cases primarily involve the retirement age, pregnancy and childbirth, as well as sexual harassment. A few typical cases in this field will be listed in the following part.

1. A Case on the Compulsory Early Retirement of Female Associate Professors in Famous University in Beijing.

Xu, Yao, and Cheng were all Grade 1 associate professors of a well-known university in Beijing, and the three women were younger than 60 years old. On February 28, 2008, they each received a telephone call from their respective departments, telling them that they had reached the retirement age, that their tenure had been terminated, and that they should complete the retirement procedures at the university's personnel department. Xu and the rest felt that the school's interpretation of retirement age was inconsistent with the law, and its action was tantamount to unilateral termination of engagement<sup>320</sup>.

The three teachers stayed put in their positions after receiving the call and continued to tutor graduate students and undertake important research projects, while their respective department administrative office appraised their performance for tenure 2003-2006. As the university had not entered into any engagement contract with these teachers when they were initially recruited (common practice before the labor contract system was introduced), neither were renewal agreements signed subsequently, the performance appraisal results will determine whether the teacher had met the performance standards, and whether the university should renew their tenure. Each of

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<sup>320</sup> See re. Li Ying, Zhang Shuai, *A Study of Gender Discrimination in the Workplace in China*, China Social Sciences Press, 2010, Beijing, p. 358-365.

teachers received a “Pass” for their appraisals, and indicated under the “recommendation” column was “tenure to be renewed”.

According to the university’s Management Methods on the Creation and Filling of Teaching Positions, a Grade 1 Associate Professor has a four-year tenure; in other words, the three teachers’ tenure should last till June 30, 2010. In addition, the Ministry of Personnel’s Notice on Issues Relevant to the Retirement of Senior Experts [1990] No. 5 provides that “Female senior experts sufficiently fit to perform normal functions and who wish to continue working may retire at 60”. The three teachers, all senior experts and grade 1 associate professors, had certainly not reached the statutory retirement age.

During the many discussions with the university authorities, the teachers had demanded that the university continue its performance of the engagement contracts, but to no avail. In July 2008, they submitted the matter to the Arbitration Committee for Personnel Disputes in Central Government Organizations and Affiliated Public Institutions, demanding that the university perform its contractual obligations.

This case highlights not only workplace gender discrimination within the education sector, but conflicting provisions between the different laws and regulations. The University, which was directly affiliated to the Ministry of Education, had forced female associate professors to retire at 55, knowing very well that the Notice provides quite differently. However, mindful that quite a number of female associate professors in the university meet the “criteria”, the University refused to relent. With such profusion of universities in Beijing, forcing female associate professors to retire at 55 exists to different extents within the many municipal government-funded universities. Considering that these are typical workplace gender discrimination cases occurring in universities, the Centre decided to provide legal aid for the three applicants.

The three arbitrators for the case revealed that for all the personnel disputes they have handled so far, this was the first of its kind, and they had to exercise extreme caution. After nearly three hours of hearing, the arbitration court adjourned the proceeding, and recommended that the parties mediate. The university had also indicated willingness to mediate. After many rounds of negotiation, Yao and Cheng put an end to the deadlock by accepting the university's proposed settlement: each would receive an "allowance" of 3000 yuan. Xu, however, insisted on her original claim, and later took the case to Haidian Court. Before commencement of trial, the court mediated, and the parties reached an agreement. The university would appoint Xu as dean of a Confucius Institute in a foreign country and guarantee her tenured employee treatment. Xu withdrew the case.

The arbitration committee's findings were as follows: The parties had never entered into any engagement contract; hence no unilateral termination of the engagement contract by the respondent was possible. The issue was retirement age. Under art. 2 of the Law on Mediation and Arbitration of Labor Disputes of the People's Republic of China, the Arbitration Committee has no jurisdiction on retirement related matters. The committee mediated the case, where the two claimants, Yao and Cheng, reached a settlement with the university. But Xu, who insisted on her claim, failed to settle with the university. The arbitration committee rendered an award on August 22, 2008: Xu's claims were dismissed under the Law on Mediation and Arbitration of Labor Disputes of the People's Republic of China.

This case involves the issue of retirement of female senior experts. In 1.2.2.1, the provision about retirement of female senior experts has already been mentioned. Moreover, in the first article of No. 141 document of country (1983), it has already been provided that female senior experts refer to professor and associate professor, as well as

researchers and deputy researchers. It is obvious that Professor Xu in the case is a senior expert. So long as they are willing and the health condition is allowed, they could retire at the age of 60. Therefore, it breaks the policy provision for the school to compel the three professors who are not 60 yet under the condition that their health is competent in the current job. We can certainly argue that the aforesaid provisions are explicitly set forth in the documents; however, their implementation has been extremely difficult in recent years. As far as the case is concerned, the university's main "argument" is employment pressure, i.e. if the senior teachers do not retire, the junior teachers cannot be promoted. But the argument cannot stand up to scrutiny. Can we really alleviate employment pressure by ridding of the female senior experts? We learned that many teachers were re-employed after completing retirement procedures; that being the case, they have not made room for their juniors. The other thing is: why should only female associate professors make room for others, whereas their male counterparts, some of whom are less competent in teaching or research abilities, are not required to do the same? The university has left too many questions unanswered.

In this case, although professor Xu finally reaches an agreement with the school and keeps her job and treatment, it is not hard to see that Professor Xu had experienced great hardships to protect her rights. During this period, these two female teachers compromise to the school under such pressure, and receive a compensation of 3000 yuan only. Professor Xu, no longer young, is sent abroad alone, which might be the school revenge.

According to Chinese law, retirement does not belong to the acceptance scope of personnel dispute arbitration cases. This kind of disputes is generally solved through internal communication and internal department bridging. This case obtains the court litigation rights because it involves discrimination in employment according to



*Employment Promotion Law*. In China, there are few persons that could unremittingly safeguard their rights like Professor Xu. Other people are like the two other professors who give up halfway, or make compromise from the beginning. The obstruction of concept and the lack of effective relief approaches make the vast majority of Chinese women faced with the dilemma of early retirement, compulsory off-the-job or informal retirement.

## 2. A Case on Termination of He's ("He" is a Family name.) Employment Contract on Grounds of Pregnancy.

On February 13, 2008, He (a surname pronounced as "her") signed a three-year labor contract with a company in Beijing. According to the contract he was hired as marketing director, with a remuneration of 5000 yuan during the probation period, and 6000 yuan thereafter. He did well during probation, and her salary was increased to 6000 yuan after three months.

On May 16, 2008, He found herself pregnant. She reported her pregnancy, and the boss promised immediately that she would be given due care. But subsequently, she was asked to do frontline sales, whereby she had to pay daily visits to sales points, and she was assigned specific tasks. Her workspace was relocated to a newly refurbished office. At the new office, she was given a chair with one missing roller, without regard to her risk of miscarriage if she fell. Later, she experienced signs of miscarriage, and she asked to take leave to rest at home. The company's regulation provides that leave of absence would not be granted unless the employee applies personally (created only after He had applied for leave); otherwise, the employee would be considered to have been absent without leave. The company developed new rules directed at He's pregnancy, and the rules were brought to He's home for her acknowledgement and signature.

On June 4, 2008, He went to the company to ask for leave absence. She was accompanied by her husband. At the office, she was forced to stay back to discuss her new work arrangement despite having claimed discomfort requested for postponement of the discussion until she returned to work. The company refused. When she insisted on leaving, the human resource manager stopped her. A clash happened between her husband and the human resource manager when her husband pushed him three times. The company called the police immediately. On July 1, 2008, the company issued He a notice of dismissal, giving reason that He had brought an irrelevant person to the office area, during which the person had clashed with an office staff and as a result, injured the company's reputation.

Therewith He took the case to the Labor Disputes Arbitration Committee of Beijing and requested restoration of her employment with the company.

On December 9, 2008, the court of arbitration issued a reconciliation agreement, whereby the company would compensate the claimant 30,000 yuan and issue a normal certificate for discontinuation of service. The compensation was paid immediately in court.

Art. 42 of *Labor Contract Law* and art. 27 of *Law on the Protection of Women's Rights and Interests* have explicitly prohibited the termination of labor contract or reduction of the wage of female workers during "the three periods". Moreover, art. 26 of *Law on Protection of Women* also stipulates that work of females should be arranged according to their characteristics. The company has a duty to protect the safety and health of women at work. During the "four periods", they should also be subject to special protection. The employer in this case clearly violates these provisions. Moreover, it attempts to drive Mrs. He away with the excuse of the change of work. What is most

annoying is that the company makes this pregnant female work in the environment of recent decoration, regardless of influence of the toxic substances in the decoration materials to the fetal health and life. This behavior is an abhorrent crime<sup>321</sup>.

Here, we see two issues that cannot be overlooked. One is gender discrimination in respect of women when enterprises pursue maximum profits; the second is the responsibility of enterprises as socio-economic players to discharge social responsibilities. There is no doubt that enterprises are here to make a profit, and to do so, minimize input and maximize output. However, enterprises are social players and must subordinate themselves to interest of the entire society. Enterprises create material wealth through production or business operations; but the process of wealth creation cannot be complete without the most important social player-people. Women are not only direct producers of material wealth; they also shoulder the important task of labor force creation. The continuity of mankind and balanced social development relies on the unique physiological function of women, for which the law provides for the special protection of women. Discrimination against women starts already at the point of recruitment. To avoid incurring economic losses caused by women's physiological conditions, enterprises subconsciously exclude women during recruitment. Even where women's services are needed, pregnant women are dismissed at any means possible. In final analysis, it boils down to additional costs to be incurred, including direct pregnancy expenses and costs to fill the temporary vacancy. What matters at the end of the day is still self-interest. The modern society has given enterprises an excellent environment for sustenance and development; nonetheless, the call for enterprises to shoulder corporate social responsibility has never been louder. Enterprises have been

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<sup>321</sup> See re. Li Ying Zhang Shuai, *A Study of Gender Discrimination in the Workplace in China*, China Social Sciences Press, 2010, Beijing, p. 387-391.

too indulgent in self-interests and have ignored their social responsibilities<sup>322</sup>.

Therefore, the government should be the beacon. Calling for performance of corporate social responsibility cannot stop at rhetoric; more incentives, guidance and even exhorting are necessary. Expenses and losses incurred due to maternity issues may be addressed in two ways: First, developing and improving maternity insurance; second, supportive government policies. For example, enterprises that undertake greater social responsibility may be given priority in public procurement, and may enjoy tax incentives and fiscal subsidies. Tangible benefits as such will address the root causes of workplace discrimination against women<sup>323</sup>.

### **1.3 Sexual harassment**

#### **1.3.1 A basic introduction to sexual harassment**

The most authoritative definition of “sexual harassment” internationally is the definition made in European Parliament in 1990. It is defined as an unpopular sexual behavior or other behaviors that injured the dignity of men and women at work, including unpopular body contact, language or non-verbal behaviors. that conduct of a sexual nature, or other conduct based on sex affecting the dignity of women and men at work, including conduct of superiors and colleagues, constitutes an intolerable violation of the dignity of workers or trainees and is unacceptable if:

(a) such conduct is unwanted, unreasonable and offensive to the recipient; (b) a person’s rejection of, or submission to, such conduct on the part of employers or workers (including superiors or colleagues) is used explicitly or implicitly as a basis for

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<sup>322</sup> See re. Li Ying, Zhang Shuai, *A Study of Gender Discrimination in the Workplace in China*, China Social Sciences Press, 2010, Beijing, p. 389-390.

<sup>323</sup> See re. Li Ying, Zhang Shuai, *A Study of Gender Discrimination in the Workplace in China*, China Social Sciences Press, 2010, Beijing, p. 390.

a decision which affects that person's access to vocational training, access to employment, continued employment, promotion, salary or any other employment decisions; and/or (c) such conduct creates an intimidating, hostile or humiliating work environment for the recipient”<sup>324</sup>.

According to the survey made by International Labor Organization on sexual harassment regulations of the company, the judging standard of sexual harassment is “whether this behavior is popular”. It takes the bears’ feeling as the standard, rather than the subjective motive of the actors. This standard also differ sexual harassment from the ordinary office flirt. In the determination of sexual harassment, courts of most states take it as a standard<sup>325</sup>.

Currently, there is no unified definition of “sexual harassment” internationally, but a basic consensus has been reached on the behavioral elements of sexual harassment in the workplace, generally including three aspects. First is the behavior must be sexual, for sexual purposes. Secondly, this behavior is unpopular on the side of the bearer, which is detrimental to the personality and dignity. Thirdly, the bearer’s acceptance or not is expressly or implicitly used as a decision-making basis influencing the person’s reception of the occupation training, employment, further employment, promotion, salary, or other employment determinations; or this behavior can lead to a kind of compelling, hostile and humiliating work environment (referred to as hostile work environment by EU) of the bear in the workplace<sup>326</sup>.

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<sup>324</sup> Council Resolution of 29 May 1990 on the protection of the dignity of women and men at work.

<sup>325</sup> [http://vip.chinalawinfo.com/newlaw2002/SLC/SLC\\_SiyItem.asp?Db=SyItem&Gid=838865141](http://vip.chinalawinfo.com/newlaw2002/SLC/SLC_SiyItem.asp?Db=SyItem&Gid=838865141)

<sup>326</sup> [http://vip.chinalawinfo.com/newlaw2002/SLC/SLC\\_SiyItem.asp?Db=SyItem&Gid=838865141](http://vip.chinalawinfo.com/newlaw2002/SLC/SLC_SiyItem.asp?Db=SyItem&Gid=838865141)

### 1.3.2 New thinking on the definition of sexual harassment

Although each country more or less has measures to deal with sexual harassment, sexual harassment phenomenon in the workplace has never stopped. Cases of sexual harassment in workplaces are beyond count. However, over the years, the definition of sexual harassment has not been fundamentally changed. The accurate definition of sexual harassment is related to whether the victim can resort to relevant laws for legal reliefs.

During the beginning of 2011, many media in China have reported an event of “dismissal resulting from the mini-skirt”. On January 2, 2011, a female engineer working in Taiwan Microsoft was noticed to terminate the contract orally. The reason for this is “unprofessional wearing and short skirt, which arouses others’ comments”. This engineer emphasizes that she is unable to accept the firing reason, and hopes to gain justice.

This female engineer explained that after the oral notice on December 28, 2010, she received the contract termination notice from 104 Manpower Bank of Taiwan at five o’clock on the afternoon of that day. Taiwan Microsoft also stopped her email and entry permit the next day. The senior manager of Taiwan Microsoft orally noticed her that the reason for the contract termination was the unprofessional wearing and short skirt, which aroused others’ comments.

Labor Bureau of Taiwan Province has intervened, hoping that Microsoft Taiwan, 104 Manpower Bank and the female engineer could perform a three-party coordination meeting. The female engineer stresses that she could not accept the dismissal reason, because she wears such a garment in the interview, as well as a formal suit in the meeting. She thought that Microsoft was a large company of complete system

and good welfare. She did not believe that she was fired because of this reason and she could not bear it<sup>327</sup>.

Regardless of the result of the event, it could be seen from the event itself that although Microsoft has not give a direct recognition for the reason of the dismissal of Miss Zhao as her dressing, from the manager's attitude, we can still learn that Miss Zhao's dressing is not the main reason for her dismissal. However, it should be considered at least that the dressing style has aroused adverse evaluation of the top level of Microsoft on Miss Zhao to a certain extent. The poor evaluation has also more or less influenced the identification degree of the top level of Microsoft on Miss Zhao's working ability.

On the analysis of this case, most people assume that the reason for Miss Zhao to be fired is based on dressing (the real reason, of course, needs Miss Zhao and her agent to give further evidence to prove), and it is thus easy to position the core of the case on the discrimination towards women or dispatched workers. From the fact of the case itself, however, it is not a typical case of sexual harassment. If there should be sexual harassment, it is the colleagues' comments on the dressing of Miss Zhao, which may bring her hostile working environment. By contrast, the trouble of Miss Zhao's dressing comes from the colleagues or managers. Moreover, according to the survey of International Labor Organization on the sexual harassment regulations and provisions of the company, the standard to judge the sexual harassment is "whether the behavior is popular or not". The bearer's perception is taken as the standard, rather than the subjective motive of the actor. Then, shall we thus identify that the over exposed behavior of Miss Zhao's dressing is sexual harassment on other colleagues?

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<sup>327</sup> A female engineer of Microsoft Taiwan was fired because the skirt is too short, 31/01/2011. <http://tech.xinmin.cn/2011/01/31/9169671.html>

Miss Zhao, who seems to be the victim, turns out to be the offender. In this way, it is natural for Microsoft to fire Miss Zhao, which does not constitute discrimination towards females or dispatched workers.

In this case, there are two behaviors that might be defined as sexual harassment. First is the unfriendly evaluation of colleagues on the dressing of Miss Zhao. Second is the over sexy dressing of Miss Zhao makes other colleagues feel uncomfortable and her dressing behavior is thus unpopular. The first behavior offender has the subjective willingness, but the victim has not found. The second behavior is that the offender has no subjective motive, but makes other feel the unfriendly atmosphere. The first behavior results from the existence of the second behavior. According to the current definition of sexual harassment, it is easy to involve in the paradox.

Therefore, the author believes that the definition of workplace sexual harassment should be extended to the inductive behavior of sexual harassment. In other words, it is any advanced behavior that may lead to sexual harassment, such as over exposed dressing. This preventive definition is favorable to the reduction of sexual harassment, and low cost is needed, which is quite acceptable.

From the perspective of the purpose of law formulation, the purpose is to punish and prevent from illegal crime, as well as safeguard the human rights. The author believes that in order to better protect human rights, more emphasis should be put on the prevention of crimes. In the law, there should be clear texts to put forward crimes of prevention, supplemented by appropriate punishment or penalty, which should be regarded to contribute to the reduction of crimes. Therefore, the definition of workplace sexual harassment is extended to the inductive behavior, which makes it quite possible to reduce sexual harassment crimes to a large extent.



Suppose that inductive behavior belongs to the workplace sexual harassment, and then the problem of how to judge and what behavior belongs to inductive behaviors appears. Although sexual harassment in the workplace belongs to labor law jurisdiction, the author believes that the crime risk assessment theory can be introduced here. In other words, it is the assessment of crime risk recognized to induce others' crime. Of course, this assessment is regional, which is influenced by the local cultural background and legal background. It is impossible to have the same set of assessment in EU and China. Even the different member states in European Union should also be distinguished. Each country could develop a set of appropriate risk assessment method according to its own national condition.

Moreover, the author also believes that the protection of human rights should not sacrifice the individual social responsibility as the cost. For recent years, both China and EU have gained much progress in emphasizing the social responsibility of units and collectives. However, the individual social responsibility is only evaluated by law as the lowest standard, rather than other ways of assessment. However, the scope of ethics, public orders and good morals is much wider than that of law, which makes quite a lot people do a lot of things in violation of ethics and public spirit without touching the bottom line of law. We should not take law as the relief approach to the loss of the public spirit. However, the extension of the scope of sexual harassment to the inductive behavior of sexual harassment is at the cost of giving up fewer individual rights to reduce the happening of sexual harassment. Take the dressing mentioned in the case as an example, the appropriate workplace dressing should be provided according to the local public order and social morals, which could undoubtedly reduce sexual harassment. What is given up might only be the individual preference for dressing. Compared with reducing sexual harassment, there is less cost.

Then, what behaviors constitute the preceding behaviors that may arouse sexual harassment, or may be the inductive factors of sexual harassment? The author believes that the too sexy dressing of Miss Zhao at the workplace is likely to produce a certain psychological hint of the opposite gender, or psychological hint of sex, which may induce others to engage in sexual harassment. An analysis from the perspective of Anthropology and biology tells that too exposed and sexy dressing of adults of the opposite gender may induce people to have more hormones from the adrenal glands. This phenomenon is especially true in males, which is a normal physiological reaction. Although self control behavior is produced early when the human beings have thought to differentiate them from the animals, they have retained the basic properties of biological reproduction, which is beyond question

In this case, it is not to say that Miss Zhao has the subjective desire to make sexual harassment on others. Rather, it is to say that her sexy and exposed dressing may induce others' harassment behaviors. Of course, it is hard to prove through the judicial practice whether Miss Zhao has the purpose or the psychological state of tempting others. It is impossible to judge whether it is "sexual harassment" or "harassment welcome". If there could be evaluation based on risks and assessment of crime prevention as mentioned above to include the exposed dressing and a series of factors as a kind of sexual harassment, it is believed that Miss Zhao will not have exposed dressing in workplace without the purpose of making sexual harassment on others. Moreover, even if the similar inductive behavior is taken as a kind of sexual harassment, Microsoft Company is obliged to remind her of this situation or have clear provisions in the articles of association.

In fact, in many workplaces in China, there are certain rigid rules on the dressing of staffs. Teachers, civil servants, and staffs of most enterprises, for example, are

required to dress properly in workplaces, and formal dresses are best. It is not the manifestation of giving no respect to human right or the backward ideology, but the advancement of human civilization. Although different work or industries have different standards of “being proper”, they are all influenced by the social public evaluation, social order and morals.

Even in Europe and United States where gender ideology is relatively open, few people tend to wear too exposed or sexy clothes in workplaces or on formal commercial occasions, even if there is no clear provision about the dressing requirements in workplaces.

It is believed that the inclusion of exposed dressing that may induce sexual harassment into the category of sexual harassment for regulation in law will gain more identification.

If exposed dressing is not regarded as inductive behavior, we could directly include it in a kind of sexual harassment. In the judicial practice, dirty jokes with sexual indication in workplaces are regarded as sexual harassment on the infringed objects. The exposed dressing then should be regarded the same as dirty jokes, or even more intuitive with sexual indication than the dirty jokes. Even if the exposed people have no desire to sexually harass others, it is still regarded as the behavior of sexual harassment.

Finally, the realization of equal employment of men and women and the fighting against sexual harassment are not confined to the protection of rights and interests of females only. The rights and interests of males should also be protected, as males may also suffer from sexual harassment. To define exposed dressing in workplaces as a kind of sexual harassment is also a kind of protection of the equal employment right of males. Absolutely, the exposed dressing mentioned in this thesis is targeted at females only.

#### 1.4 Gender discrimination and social gender exclusion in the labor market

The gender discrimination in the labor market is a typical phenomenon of social gender exclusion. Serious and long-term gender discrimination result in gender occupation segregation. The amount of economic and social resources determine the excluding side and the excluded side. Human beings have been in a male-dominated society for long, and the female groups have been in a disadvantaged and marginalized status. It leads to the absolute difference of men and women in the occupation of economic and social resources, configuration and even the economic and social status. Women become the excluded side of social gender exclusion<sup>328</sup>.

When one gender takes control of material resources and economic process producing these resources in an imbalanced manner, this gender has the ability to control the relationship between the genders and include the relationship in the gender inequality system, while the weak gender must seek for bargaining strategies to improve their weak position in the economic rights. It is then not difficult to understand why there are few laws that specifically maintain men's rights, whereas males tend to have less infringement than females.

Labor market exchange is not a purely economic process, but full of all kinds of social factors<sup>329</sup>. Although gender discrimination in the labor market is a form of social exclusion, these two still constitute a vicious cycling system of reciprocal causation, mutual influence and mutual intensification. In this system, the traditional culture and customs form the concept and idea of gender. In this market, female workers suffer different or even discriminatory treatment. Income and allocation of resources of female

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<sup>328</sup> See re. Zhang Kangsi, *Gender Exclusion in the Labor Market and Social Gender Exclusion*, Beijing, Science Press, 2010.

<sup>329</sup> *Theory of social exclusion*. <http://baike.baidu.com/view/1162233.htm>

workers are limited. Possession of small amounts of resources determines the ability and the application level, as well as the female workers' social participation degree and position. All of these have a subtle influence on them, which make them excluded by the society. They are thus in the edge of economy and society. Social exclusion in turn makes the social role orientation of gender more consolidate, and it becomes more and more difficult for female workers to enter the market.

Social system exclusion, labor market exclusion, traditional social and cultural concept exclusion and family gender division exclusion are not mutually isolated. They interact with and influence each other, and bring economic discrimination and social exclusion together to female workers.

Through the analysis above, it could be seen that gender discrimination in the labor market is not just a legal issue involving the protection of equal labor rights. It is a complex problem that involves economics, sociology and other multidisciplinary fields. Law can indeed effectively suppress discrimination. However, to better reduce the gender discrimination in employment or even eventually eliminate discrimination, we will have to pay more attention to the economic study of gender discrimination in the labor market and sociological research on social exclusion.

EU and China differ greatly in their stage and level of anti-discrimination. China simply learns or copies the EU law and social policies, which can not solve the problem of discrimination in the labor market. Economics research and social science research on gender discrimination in the labor market can perfectly make up for the limitation of legal researches<sup>330</sup>.

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<sup>330</sup> At present, both EU and China are in the market economic system. The operation principles and rules are the same in the three major markets (capital, goods, labor) of the same economic system, all of which are restrained by the economic law. Gender exclusion is a chronic social problem, in spite of the country. Although EU and China differ in the specific historical background, their social exclusion

## 1. Economics analysis of gender discrimination in the labor market

American economist Gary S. Becker<sup>331</sup> gives an explanation on gender discrimination theory in the labor market from the perspective of economics. Becker believes that in specific work, sexist employers will maximize the utility, rather than to maximize profits. What they focus on is the complete cost of hiring females. It not only includes her salary, but also includes a discrimination coefficient, reflecting the negative utility of money value they have suffered because of her existence. Therefore, only when women's wage is lower than that of men are the employers willing to hire women<sup>332</sup>.

Becker's economics analysis model is based on the assumption and premise that employers, consumers and employees may have a discriminatory preference. Employers with these preferences would employ females only in the following cases. Firstly, wages paid to female workers are low enough to counteract the negative effect to hire them, as a result of the physiological factors which affect the working efficiency. Secondly, wages paid to female workers are low enough to offset the loss of profits resulting from the discriminating consumers who purchase the females' products at a lower price. Thirdly, women are willing to accept lower pay, in order to get the chance to work with men. Its model starts based on the four basic assumptions. The first assumption is that workers of two groups have equal or possibly equal productivity, such as the non-different labor of male and female, which could be completely replaced in the production. The second assumption is that individuals (including employers, formation is essentially the same. Of course, no theory is universal, and to solutions to the specific problems should be treated separately.

<sup>331</sup> American economist Gary S. Becker is the Nobel Prize winner of economics in 1992. He makes an initiative research of the problem of labor market and establishes a rather systematic theory of labor market discrimination.

<sup>332</sup> See re. Zhang Kangsi, *Gender Exclusion in the Labor Market and Social Gender Exclusion*, Beijing, Science Press, 2010, p.87.

employees and customers) have “discrimination preference”, and they are unwilling to have contact with certain groups of members. The third assumption is that the labor market and product market are competitive, and any single company or individual in this market is regarded as recipients of price (i.e. salary). The fourth assumption is that the discrimination of employers, customers and employees does not exist at the same time, and in each market, there is only one discriminative preference. Just as what Becker says, “if a man has a discriminative preference, he is happy to a substitute one group with another group, or feel willing to directly or indirectly (in a manner of income reduction) pay some expenses” (Gary S. Becker, 1955). However, if this preference needs a high cost, it is very likely for them to give up this preference<sup>333</sup>.

To sum up, Becker relies on utility theory and regards the gender discrimination as a “preference”, and to realize it needs the corresponding cost. Becker's analysis is a case exploration of quantitative analysis of non-monetary quantitative change, as well as a methodology exploration. Discrimination coefficient in particular is a unique idea. Becker applies research methods of economics and sociology to make a quantitative analysis of the social problem of discrimination<sup>334</sup>.

Economics analysis regards “discrimination” as an “item”, or commodity with its price. If people have a demand for “discrimination”, they must pay for it. If the price leads to increased cost, it can suppress discrimination to some extent. If it is expensive, and even discriminators can not afford, they will abandon discrimination.

## 2. Sociological analysis of social gender exclusion

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<sup>333</sup> See Zhang Kangsi, *Gender Exclusion in the Labor Market and Social Gender Exclusion*, Beijing, Science Press, 2010, p.87.

<sup>334</sup> See re. Zhang Kangsi, *Gender Exclusion in the Labor Market and Social Gender Exclusion*, Beijing, Science Press, 2010, p. 3-6.

Discrimination behavior in the labor market is due to a strong perception of discrimination. Though the increased cost could suppress discrimination, this economics method, the same as law, is only one of the ways to curb discrimination. In the final analysis, to solve market discrimination, we must solve the problem of social exclusion.

Max Weber believes that behind any social action, there are some hidden things of subjective spirit, and the formation of this subjective spirit has a profound social and cultural foundation. Therefore, to study some kind of economic behavior, we must study the relationship between cultural values and spirit on the one hand and the behavior on the other hand, as well as the relationship between this value, spirit and a broader cultural basis<sup>335</sup>.

The formation of gender exclusion “characterized” by gender difference has both historical reason and social reason.

#### A. Historical reason

After the emergence of human society represented by the private ownership of patrilineal clan, gender prejudice and enlightenment were gradually formed that have lasted for thousands of years.

a. The social division of “men working outside and women looking after the house” makes the women in a subordinate position.

b. Either in east or west, the formulation of the social system and religious doctrine both emphasizes females’ status as a wife or mother, advocating that females should be attached to males. It affirms the stronger position of men than women.

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<sup>335</sup> Max Weber, *Protestant Ethic and Spirit of Capitalism*, Sichuan People’s Publishing House, 1986, p.26.



c. In addition, there are the words of the sage<sup>336</sup>, the extension of education, enforcement of literature and art, women's mental state formed in the long-term edge, etc..

All of them make the absolute advantageous position of males in society and the family accepted and continues naturally. Moreover, a vast majority of women, in the long-term social exclusion, have recognized the evaluation system of "males superior to females". Although the modern women's liberation movement and the feminist movement are developed, it is still undeniable that the females are still disadvantaged in the society. Women are still the excluded side in the social gender exclusion.

#### B. Social reason

Males have comparative advantage in access to many social resources, which is mainly reflected in the diverse social interaction determined by male physiology, psychology and personality characteristics. It also relies on their superiority, the ideal social reputation and other aspects in the market and society. Comparatively speaking, women are much less active in getting social resources than males. In addition to the few and pure ways of the establishment of social relations, their resource endowment is weak. The females usually have social network among females, and males rarely suffer from this limitation as their social network also includes females. It makes females not as good as males in terms of the member constitution of social network or social resources<sup>337</sup>.

In addition, the social policy of gender preference adopts special protective

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<sup>336</sup> Chinese Confucian believes males to be Yang while females to be Yin that "Yang superior and Yin inferior". The western Plato believes that "women, slaves and the inferior should not be imitated by the inferior. The coward or unjust people will become women in the afterlife".

<sup>337</sup> See re. Zhang Kangsi, *Gender Exclusion in the Labor Market and Social Gender Exclusion*, Beijing, Science Press, 2010, p.178-193.

measures on women, which views women as subjects of poor ability and vulnerability and takes various protective restrictions. This policy results in the positioning of females as the weak and the neglect ion of the selective right and ability development. Excessive protection of policy puts females in a more adverse circumstance.

### C. Solution

#### a. Construction of culture

In today's society, expectation and evaluation on the role of women still take the traditional gender division requirement as the standard. In order to eliminate social gender exclusion, it is suggested that the government should gradually lead to the establishment of an advanced gender culture with the goal of a comprehensive and harmonious development of men and women<sup>338</sup>, as well as establish a progressive concept of respect on women in the whole society.

In addition, the females should also set out from themselves to work hard. Female workers should strengthen their own quality and ability, gradually develop strong psychology and strong inhibition, promote the competition and market consciousness, actively seek development opportunities, and change social evaluation by their own hard work and achievements.

#### b. Construction of social relation network

The government should actively organize and build all kinds of women groups,

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<sup>338</sup> Zhou Qunying, *Co-construction of Advanced Gender Culture and Advanced Culture*, Journal of China University of Mining and Technology (Social Science Edition), 2004, p.4, "advanced gender culture takes admitting women's subjective social status and equal personality and dignity of men and women as the basis, the modern orientation, promotion of harmonious gender relationship and recommendation of the common and overall development of men and women as the goal and personalized right, diversified selection and preference to the disadvantaged group as the principle, which is characterized by criticality, leading property, challenge with the tradition, and wide acceptance of the public...".

and encourage the establishment of various NGOs and social cooperation mechanisms concerned about women's rights. Female workers should also spontaneously establish a number of "organizations of mutual help" to unite together and to be brave to cope with the market and the various kinds of social discrimination and unfair treatment. They should endeavor to change their economic status and actively acquire more social resources.

### c. Construction of gender consciousness of public policy

Public policy has a direct or indirect guiding role on the market and the society. Public policy should not only give equal rights to economy and society of both genders, but also give women special security according to the objective physiological properties. The government can incorporate gender equality awareness in the goal of the social security system reform. Through the reform and innovation of employment and social security system, an equal economic, social and legal environment should be fundamentally established.

## 3. Conclusion

From them above, we should adopt legal methods, economic methods and the sociology methods to work together to eliminate gender discrimination in the labor market. At the same time, legal means and economic means should be adopted to work together, in order to suppress the gender discrimination. Gradually, females could enter the mainstream, occupy more resources and have the discourse right, in order to finally change women's exclusion position. Only when the problem of social exclusion is solved can the gender discrimination in labor market completely disappear<sup>339</sup>.

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<sup>339</sup> See re. Zhang Kangsi, *Gender Exclusion in the Labor Market and Social Gender Exclusion*, Science Press, 2010, Beijing, p.241-246.

## **2. Age discrimination**

Just like time, age is a wide gap which nobody can step over. From physical immaturity to aging, our brain power will witness many changes, just like intelligence, knowledge and experience. Accordingly, human beings also witness changes in their fixed positions in the society.

### **2.1 Overview of age discrimination**

#### **2.1.1 Age limit and age discrimination**

It is quite common in various fields of social life to regard age as a kind of limit. In employment field, the whole process, from recruitment, promotion to retirement, is filled with settings of age threshold. People are also accustomed to regarding age as a kind of criteria to judge others. At a young age, people are often considered as inexperienced. At a middle age, people are often regarded as lack of promotion space. At an old age, they will even be deemed to be lack of enough capabilities because of the aging. These judgments based on age are not wholly vicious, many of which are based on the natural law of human beings' growth and aging. Based on these evaluations, there will be various age limits in the job market. Some of these limits are indeed differential treatment according to the actual demands of positions, while some others are just age discrimination.

Age limit is often bonded with age discrimination, and there is a close connection between these two. Age limit, an objectively descriptive term, or a neutral one, refers to a kind of criteria which is based on age. This criteria itself does not contain subjective viciousness. However, age discrimination, a technical term of jurisprudence, refers to a kind of behaviors or attitudes that contain subjective viciousness. Age discrimination

means making depreciating evaluations of human beings' abilities and positions according to age differences, and it is a negative judgment on individuals or certain groups according to age<sup>340</sup>, whose behavior pattern is differential treatment on the basis of age.

Age discrimination is not as obvious as gender or racial discrimination. Taking age as the limit of admittance requires judging whether its reasons are reasonable enough to determine if it makes discrimination<sup>341</sup>. Both age discrimination and age limit have a common characteristic-differential treatment. Many age limitations are reasonable and legal, such as setting the minimum age threshold of employment in order to protect teenagers' rights and interests. There are also some controversial age limits, such as compulsory retirement system (it has already been cancelled in America). As a matter of fact, the scope of age discrimination is obviously narrower than that of age limit. When age limitation is unreasonable or illegal, it becomes age discrimination. Therefore, determining whether age limit is reasonable is of great importance to distinguishing age limit from age discrimination<sup>342</sup>.

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<sup>340</sup> Jiang Xiangqun, *On the Study of Age Discrimination and Seniors Abuse*, People's University Press, 2010, Beijing, p. 1.

<sup>341</sup> See re. Case C-341/08 Domnica Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe.

<sup>342</sup> In the Case C-447/09, it appeared the argument of age limit and age discrimination. Mr Prigge, Mr Fromm and Mr Lambach were employed for many years by Deutsche Lufthansa as pilots then flight captains. Their employment contracts terminated in 2006 and 2007 respectively when they reached 60 years of age, pursuant to art. 19(1) of Collective Agreement No 5a. The applicants to the main proceedings, considering themselves to be the victims of discrimination on grounds of age, contrary to the Directive and the AGG, brought an action before the Arbeitsgericht Frankfurt am Main (Frankfurt am Main Labor Court) for a declaration that their employment relationship with Deutsche Lufthansa had not terminated at the end of the month during which they reached 60 years of age and an order that Deutsche Lufthansa should continue their employment contracts. Deutsche Lufthansa considered that, according to art. 14(1) of the TzBfG, fixing an age limit of 60 was reasonable and the age-limit for pilots guarantees not only the proper performance of the activity but, in addition, protection of the life and health of crew members, passengers and persons in the areas over which aircraft fly. Age is objectively linked to the reduction of physical capabilities. Those pilots considered fixing an age of 60 was age discrimination. The Court supported the applicants, considered that "A measure such as that at issue in the main proceedings, which fixes the age limit from which pilots may no longer carry out their professional activities at 60 whereas national and international legislation fixes that age at 65, is not a measure that is necessary for public security and protection of health, within the meaning of the said art. 2(5). Article 4(1)

### 2.1.2 Age discrimination and ageism

Age discrimination is derived from the discussion of involution and aging, and it is ageism which takes age as the demarcation criteria. In Western society, in their studies on ageism, sociologists paid the earliest attention to the field of employment, namely, being unable to acquire equal employment opportunities because of age.

Young people are deemed to be more adaptive to socialized and industrialized manufacture, while seniors are easier to be eliminated out of the job market. Seniors are categorized into the kind of person who is confused and stubborn in thoughts and ideas, and has obsolete moral ideas. Ageism triggers the young generation to think seniors are different from themselves, and, consequently, they do not treat seniors as normal people<sup>343</sup>. In the society, old age is deemed to be dependent, streaked, impoverished and fragile. Such dividing evidence which is purely based on age is the result of modern social system in which ageism is commonly existed. Ageism leads seniors to be in an inferior position of development opportunities in the society, thus causing seniors to be marginalized and pushed out of the society, deprived of equal social treatment and development opportunities<sup>344</sup>.

#### Several Theories about Ageism:

##### 1. Modernization Theory

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of *Directive 2000/78* must be interpreted as precluding a clause in a collective agreement, such as that at issue in the main proceedings, that fixes at 60 the age limit from which pilots are considered as no longer possessing the physical capabilities to carry out their professional activity while national and international legislation fix that age at 65. The first paragraph of art. 6(1) of *Directive 2000/78* must be interpreted to the effect that air traffic safety does not constitute a legitimate aim within the meaning of that provision”.

<sup>343</sup> See re. Robert N. Butlet, *Dispelling Ageism: The Cross-Cutting Intervention*, *Annals of American Academy of Political and Social*, Vol. 503, *The Quality of Aging: Strategies for Interventions*, Sage Publications, Inc, in association with the American Academy of Political and Social Science, 1989, p. 138-147.

<sup>344</sup> See re. Yi Yong, Feng Shaohang: *Ageism and Seniors' Social Work*, publish in *Chinese Gerontics Magazine*, 2005 (4)

The so-called modernization theory refers to the life style of the whole society from rural life with traditional and narrow values to urban life with diversified angles of view, the former encourages rights, limits technology and has relatively simple system, while the latter does not encourage rights, but intensively differentiates system to satisfy different individual roles, and emphasize on efficiency and progress<sup>345</sup>.

It is believed by modernization theory<sup>346</sup> that seniors' social status is in negative correlation with the level of social industrialization. In pre-industrial age, seniors had been controlling scarce resources and holding traditional knowledge, as a result, they had higher value<sup>347</sup>. However, in modern age, due to such factors as medical treatment technology, economic technology, urbanization and popularized education, seniors have witness decreasing social status<sup>348</sup>.

Age discrimination is an inevitable outcome of seniors' decreasing status. These are all specific reflections of age discrimination, no matter in compulsory retirement policy or various age limitations at work. Modernization theory explains the influence social and economic development and reform have on seniors' status, thus being the reason why human beings can objectively understand various kinds of age discrimination in the society.

However, modernization theory also has its limitation in explaining age discrimination. Modernization theory idealizes the past and ignores the existence of age discrimination in pre-industrial age. At the same time, in different stages of

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<sup>345</sup> See re. Cowgill D., *Aging and Modernization: A Revision of the Theory*, in J. Gubrium (ed.), *Late life: Communities and Environmental Policy*, Springfield, IL: Charles C. Thomas, 1974, p.123-146.

<sup>346</sup> Being put forward by Cowgill in 1974.

<sup>347</sup> See re. John. C. Cavanagh, Susan, Klaus. White Boone, *Gerontics: Multi-disciplinary Angle*, Chinese Population Press, Beijing, 2006, p. 11.

<sup>348</sup> See re. John. C. Cavanagh, Susan, Klaus. White Boone, *Gerontics: Multi-disciplinary Angle*, Chinese Population Press, Beijing, 2006, p. 11 .

modernization course, seniors are influenced in different levels. The development of modernization improves the situation of seniors who have received more education and held higher social status. Seniors hold more political capital and economic resources, which play a role in boosting the formulation of anti-age-discrimination laws and regulations and changing people's inherent ideas toward seniors, which cannot be neglected. In addition, modernization theory also ignores the influence and function different cultures have on people<sup>349</sup>.

## 2. Social Exchange Theory:

It is believed by social exchange theory that people realize resource exchange through social interaction<sup>350</sup>; as interpersonal interaction is regarded as a kind of rational behavior calculating gains and losses, all human behaviors are for the sake of seeking the greatest satisfaction of interest<sup>351</sup>. The amount of resources grasped by seniors that can be exchanged determines their status in the society and family, as well as whether they will receive age discrimination.

When analyzing reasons of age discrimination, social exchange theory divides the society into three kinds of patterns, namely, pre-industrial society, industrial society and post-industrial society. This dissertation will analyze reasons of ageism through the exchangeable resources seniors grasp in these three kinds of social patterns.

In pre-industrial society, seniors were the holders of knowledge and wealth. They grasped a large amount of exchangeable resource, and, consequently, had extremely

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<sup>349</sup> Jiang Xiangqun, *On the Study of Age Discrimination and Seniors Abuse*, People's University Press, 2010, Beijing, p.18

<sup>350</sup> See re. John. C. Cavanagh, Susan, Klaus. White Boone, *Gerontics: Multi-disciplinary Angle*, Chinese Population Press, Beijing, 2006, p. 12.

<sup>351</sup> See re. Jia Chunzeng, *Foreign Social Science History (revised)*, Renmin University of China Press, 2000, Beijing, p. 292.



high social status. Age discrimination was not obvious in this kind of social pattern.

In industrial society, with social development and reform, seniors gradually lost a large amount of exchangeable resources, or the resources they grasped had been dramatically depreciated, which led seniors to be in a vulnerable status in social exchange. In the industrial society which continuously pursued interest, age discrimination was obviously shown, especially in those seniors who didn't hold exchangeable resources and had little value in use.

In past-industrial society, this circumstance witnessed a reverse, as there were more and more seniors who had received favorable education and had more property than other ages did. These seniors formed a new kind of political and economic power in the society, and transformed it into exchangeable capital. Therefore, in past-industrial age, age discrimination was more restrained by laws<sup>352</sup>, which also led people's concepts and would abandon age discrimination in more fields.

At present, China and Europe can act as the representative of industrial society and past-industrial society respectively. Common features of seniors in China are: low education level, less wealth accumulation and be content with things as they are. Therefore, although the number of seniors is large, it cannot form its own power. As a result, Chinese seniors have a commonly low status in politics, economy and society. It is a common phenomenon of ageism in Chinese society, while seniors are not capable enough to change the current situation.

In Europe, most seniors have been well educated, thus making them the group with the most wealth and various social resources when comparing with other ages. There are

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<sup>352</sup> Jiang Xiangqun, *On the Study of Age Discrimination and Seniors Abuse*, People's University Press, 2010, Beijing, p. 19.

also many senior non-governmental institutions, social organizations and cooperators. The senior group has formed a strong power, which is influencing the formulation and modification of relevant policies, laws and regulations, during which, age discrimination, together with gender discrimination and racial discrimination have also become behaviors forbidden by laws. At the same time, the social power formed by seniors is also influencing people's opinions and attitudes toward age.

Social exchange theory makes up a shortcoming of modernization theory-excessively general, which can be persuasive when analyzing age discrimination under different social patterns. At the same time, this theory can be applied in analyzing not only groups, but also individuals, which is more flexible than modernization theory. However, social exchange theory also has its shortcomings. Most of its theoretical evidences come from economics, on the premise of assuming each individual pursues interest. It boils human behaviors down to pursuing maximum interest, and ignores other irrational mental motivations, such as emotions. In the meanwhile, social exchange theory also ignores the influence cultural tradition and values have on evaluating behaviors.

### 3. Disengagement Theory

The two theories mentioned above mainly analyze reasons of ageism from the aspect of society, while disengagement theory<sup>353</sup> supports age limitations from two aspects-society and individual. Seniors not only are passively selected by the society, but also select or fix their own status in the society by taking the initiative to separate from the society.

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<sup>353</sup> Disengagement Theory, the first time of being put forward is in 1961, by Cumming E, and W.E. Henry.

It is believed by disengagement theory<sup>354</sup> that in the process of aging, there will be increasingly less interpersonal communication, whose properties will also change correspondingly, and seniors' negative roles will increase. The process of mutual disengagement between seniors and society is normal and necessary. Such disengagement can guarantee an ideal level of individual satisfaction and continuity of social systems.

The mutual disengagement between seniors and society is representative in most circumstances. The process of disengagement comes from interior reasons in physiology and psychology, and it is unavoidable. This process can not only ensure seniors comfort in their remaining years, but also meet social requirements.

Disengagement can be mainly presented in two aspects: social disengagement and individual disengagement. Social disengagement refers to urging seniors to quit their previous positions to be replaced by adults through certain social retirement system, thus realizing the goal of disengagement. Individual disengagement refers to various social relations formed in adult stage that will be weakened due to disengagement of works in the society after entering senior stage. Such being weakened is more of seniors' own wills. Therefore, it is fair and reasonable for seniors to accept disengagement theory. It can be stated that seniors take the initiative to guide their own behaviors according to disengagement theory. From this aspect, disengagement theory does not think various age limitations or negative opinions toward old age in the society are a reflection of age discrimination. On the contrary, it thinks the existence of such phenomenon is fair, reasonable and necessary, and it is a requirement in maintaining sustainable social development and guaranteeing seniors with comfortable life.

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<sup>354</sup> See re. Cumming E, W.E. Henry, *Growing Old: The Progress of Disengagement*, Basic Books, New York, 1961.

However, this opinion is too negative, which can be reflected in that it takes accepting aging and life finality as a goal of maintaining social stability, encourages seniors to be separated from the society and imposes disengagement values on different individuals under different cultural values, which ignores interpersonal differences in personalities and cultural particularity.

#### 4. Social Role Theory

Social role theory refers to a whole set of standards of rights and obligations, as well as behavior patterns which is in accordance with certain social position and status, it is desired behaviors for persons with specific identities<sup>355</sup>. Role identification proves that actual positions, status, capabilities and other conditions of individuals are in line with and equivalent to the roles they undertake<sup>356</sup>.

After entering senior age, with changes of individual physiology and social environment, seniors are confronted with a series of role transition and loss, among which, the most obvious matter that will lead to role loss is retirement. Retirement refers to seniors losing their roles as workers. With the loss of such roles, seniors will also loss their status, identity and corresponding rights in working stage. Besides, social relations formed in the working stage will also be weakened after seniors are separated from previous working environment, thus causing loss of more social roles. Role loss will not only affect seniors in psychology, economy and life, but also change opinions and attitudes held by other ages toward them in the society, thus leading to the existence of more age discrimination.

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<sup>355</sup> See Zheng Hangsheng, *Introduction to Sociology (3rd edition)*, Renmin University of China Press, 2003, Beijing p. 107.

<sup>356</sup> See Zheng Hangsheng, *Introduction to Sociology (3rd edition)*, Renmin University of China Press, 2003, Beijing p. 113.

## 5. Symbol Interaction Theory

It is believed by symbol interaction theory that society is constructed through a process of continuous negotiation and definition, during which, “the definition of age is put forward and discussed from time to time”<sup>357</sup>. As age participates in daily life and social interaction as a kind of symbol, it becomes a standard of judging capabilities and behaviors. In such circumstance, age discrimination is unavoidable.

## 6. Label Theory

Label theory refers to the kind of theory which probes into social issues from the angle of symbol interaction theory. It believes that the so-called social issues are actually subjective stuff. The reason why certain social phenomenon becomes an issue is that the society labels it to be like this<sup>358</sup>.

Label theory can explain the differences in understanding of age discrimination under different cultural background. European Union prohibits age discrimination by *Directive 2000/78/EC*: “The purpose of this *Directive* is lay down a general framework for combating discrimination on the grounds of ... age...as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment”<sup>359</sup>. However, in China, apart from the *Constitutional Law*, which contains general clauses stating everyone is equal, there are no laws or regulations prohibiting age discrimination. The majority of people, including seniors themselves, do not think various age limitation rules or compulsory policies are age discrimination. In other words, those behaviors that can be labeled as age discrimination will probably not be treated the same in China. Under different social and cultural background, the same

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<sup>357</sup> See re. John. C. Cavanagh, Susan, Klaus. White Boone, *Gerontics: Multi-disciplinary Angle*, Chinese Population Press, Beijing, 2006, p. 14.

<sup>358</sup> See re. Jia Chunzeng, *Foreign Social Science History (revised)*, Renmin University of China Press, 2000, Beijing, p. 339.

<sup>359</sup> Art. 1 of *Directive 2000/78/EC*.

behavior could be legal and illegal.

Since the middle period of the 20<sup>th</sup> Century, aging population has become a common issue facing the whole world, which has comprehensive and profound influence on economic and social development. As the degree of aging deepens, each country is confronted with dual-pressure from boosting economic growth and national welfare. As workable population decreases, each country is undertaking increasing burden in pension system. At present, European Union has entered the degenerating stage, when each country is suffering from heavy burden in offering pension. Elimination ageism can offer employment opportunities for more seniors, thus optimizing employment structure and dramatically relieving burdens the government shall undertake in offering pension<sup>360</sup>.

## **2.2 Age discrimination in employment**

### **2.2.1 The definition of age discrimination in employment and its causes**

Age discrimination involves many aspects in social life, such as social welfare and citizens' political rights, in which age discrimination could be commonly seen. Age discrimination in employment, a constituent part of age discrimination, refers to "employees or promising candidates being treated unfairly or differently in employment because of their ages. Age discrimination will probably occur in recruitment, promotion, job relocation, or training, employment clauses, conditions, arbitrary dismissal, or corporate staff reduction plan, retirement policies<sup>361</sup>, and such aspects in treatment procedures of complaints and appeals. Spontaneously adopted measures in order to increase fair opportunities and assist staffs in different age groups in overcoming

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<sup>360</sup> Ageism, the first time of being put forward is in 1969, by Robert Butlet, an American scholar, it refers to discrimination toward the aged or seniors.

<sup>361</sup> Retirement system here involves the part of age discrimination, and mainly refers to those unreasonable and compulsory retirement systems, which often ignore individual wills.

difficulties do not count as age discrimination”<sup>362</sup>. Age discrimination in employment might occur in any employment stage, including establishing, altering and terminating employment relationship, and it is a kind of infringement behavior which takes age as occupational certification standard.

In reality, the impression of age associated with working capacity is derived from stereotype which is known as “social public mind-set” in psychology. Such “stereotype effect” means when people have certain feelings toward certain group, they will form a psychological preparation state according to their original experience when meeting others, and then expand such stereotype evaluation to others with some similar characteristics<sup>363</sup>.

According to research done by HK Legislative Council, the public do have mind-set on the relations between working performance and age. “The majority of interviewees have inherent opinions, good or bad, toward the working performance of senior and young staff. They think that senior staffs have better performance in job stability and ability to concentrate. However, there are also a large number of interviewees who think senior staffs are more difficult to be trained or re-trained, and have worse performance in adapting to new environment. As to young staffs, the majority of interviewees think they are more capable of learning new skills, but over a half of interviews think they are lack of patience at work”<sup>364</sup>.

Such mind-set of the public is triggered by individual incidents, but has been continuously reinforced and become a strong psychological effect as time goes by. It is

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<sup>362</sup> Art. 1 HK Labor Department, 2006, *Employment Practice Guidance*.

<sup>363</sup> Li Lang, *Public Psychology*, Jilin Literature and History Press, 2006, p. 78.

<sup>364</sup> HK Legislative Council No. CB(2)1577/01-02(04) file: *Committee of Human Resources Affairs of Legislative Council (conference on April 18, 2002)*, about recruitment age.

this kind of psychological effect that leads people to think many age limitations are rational and in line with the reality, and should not belong to age discrimination.

In addition, it is believed by employers that as an index of measuring working performance, age has one advantage-low cost. “Rules are easier to implement than standards, and, consequently, they are cheaper; and cost saved by specific practice of neglecting some of the rules whose goals are damaged might even exceed loss brought by such practice. Incorrect cost of rules is higher but the cost of implementation might be lower; incorrect cost of standards is lower but the cost of execution is higher. The relative scale of these two categories of cost will determine which management approach is the most effective among all the selectable ones under special circumstances. Statistical discrimination is a kind of behavior based on rules, because it is an approach of saving information cost, we will see this approach will be used more in places with high information cost<sup>365</sup>”. “Employers should try to deduce certain employee’s contributions according to his features and performance, and one of the features is age. Age can be seen directly, and performance can’t, that’s why even if the most intelligent employer will take age as a representative of employee’s performance, which is absolutely reasonable<sup>366</sup>”.

### 2.2.2 Features and expression forms of age discrimination

#### 1. Features

A. Age discrimination involves each age group<sup>367</sup>, not only seniors. The core of age

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<sup>365</sup> Posner, *Aging and Aged*, China University of Political Science and Law Press, 2002, p. 278.

<sup>366</sup> Posner, *Aging and Aged*, China University of Political Science and Law Press, 2002, p. 381.

<sup>367</sup> According to W.H.O, youngster is defined as those under 44 year-old, and 45-59 year-old middle-aged. The definition of youngster varies with different countries, regions and social groups. In 1985, the United Nations firstly define 15-24 year-old to be youngsters. Afterwards, in *Tendency of 80s Youngsters* written by the Secretariate of UNESCO, it is pointed out that more and more evidences indicate that defining youngsters to between 15-25 might not be in line with the reality any more. In a



discrimination does not lay in the exact age, but the question whether it is reasonable to regard age as judgment criteria. In other words, age discrimination does not only mean ageism, but also include discrimination toward adolescence and middle-age. In each age level, it is possible for age limitation and discrimination to happen. Age discrimination will not merely influence seniors' life, as a matter of fact; it has been influencing everyone from his birth, just like aging, by restraining his experience, anticipation, relationship and opportunities. Age discrimination is closely related with everyone's life. At present, age discrimination in employment adopts extremely intense incremental grading, which will add age limitation every several ages increased, and it is apparently meaningless to actually distinguishing working capacity.

B. Age discrimination might occur in each link of employment. It exists in not recruitment, but also salary<sup>368</sup>, training, promotion, dismiss and retirement. Decrease in salary, loss of promotion opportunities and job cut, which are caused by age discrimination, will definitely influence workers themselves, as well as the life and economic condition of their family.

C. Age discrimination is closely related with employers' preferences. Age

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local conference on youngster issue held by UNESCO, many attendees and writers of dissertations think that the age of youngsters can extend to 30 or 35 according to different national conditions. Youngster is defined to be 14-34 by UNESCO. After that, W.H.O expanded the scope of youngsters again, to be 14-44 year-old.

<sup>368</sup> In the Case C-297/10, Mr Mai, who was born on 28 December 1967, was employed as a contractual employee of the Land of Berlin from 16 March 1998 to 31 March 2009. He worked as the manager of a care home. He was classified in BAT group Ia and received basic pay in the gross monthly sum of EUR 3 336.09. The gross monthly sum of basic pay for age category 47 in that salary group was EUR 3 787.14. He takes the view that the gradation of basic pay by age categories constitutes discrimination on grounds of age against younger employees. He brought proceedings seeking payment by the Land of Berlin of a salary corresponding to age category 47 in BAT salary group Ia from 1 September 2006 to 31 March 2009. The Court considered that "the principle of non-discrimination on grounds of age proclaimed in art. 21 of the *Charter of Fundamental Rights of the European Union* and given specific expression in *Council Directive 2000/78/EC*, and more particularly art. 2 and 6(1) of that directive, must be interpreted as precluding a measure laid down by a collective agreement such as that at issue in the main proceedings which provides that, within each salary group, the basic pay step of a public sector contractual employee is determined on appointment by reference to the employee's age."

discrimination has intensive artificiality, but has no positive connection with workers' actual working capacity. Employers take age as a label and abuse it in treating workers differently, which makes reflection of employment discrimination together with other factors, such as nation and religion.

D. Different industries hold different discriminations toward age groups. Service industry shows discrimination toward seniors mostly; management positions show discrimination toward young people mostly.

E. Age discrimination exists in different employing units. It is not only market subjects such as enterprises with autonomy in management that have been setting age standards; such official institutions as state organs and public services and facilities have also set various age standards. Age discrimination even exists in the formulation of certain employment policies and relevant laws.

## 2. Expression Forms

### A. Setting Age Limitations Directly

Employers put forward numerous and complicated requirements on age limitations, which basically have several forms as follows:

a. Have upper limit but no lower limit of age. For example, there's a requirement that applicants must be under XX year-old. Such limitations may differ from different positions, and the common standard is that general staff must be under 35 year-old; middle-level managers, such as department managers and directors must be under 45 year-old. This is also the most commonly seen age limitation.

b. Have lower limit but no upper limit of age. For example, there's a requirement

that applicants must be over XX year-old. “There are many age limitations like this, especially in management positions. The main purpose of recruiting units is to leach those inexperienced and immature applicants. As far as those recruiting units can see it, age represents working experience, life experience and occupational quality, ‘higher managers are definitely expected to own certain experience and working background, and those who are too young might lack of the ability to undertake heavy responsibilities.’ one staff from ministry of personnel of a recruiting unit said”<sup>369</sup>.

c. Mark out certain age range. For example, it is required by some positions of the civil service examination that applicants must be between 18 and 35 year-old.

#### B. Setting on the Grounds of Working Experience or Years after Graduation

Setting the requirements of a certain position to be “with X years working experience” or requiring applicants to have X years after graduation in recruitment. As it appears on the surface, requirement of working experience has no direct relation with age discrimination. The age of workers depends on the date of their birth, and working experience depends on the length they stay in one or above positions.

Age is a natural quality of workers, but not a constituent part of their abilities. Working experience is an acquired quality of workers, and a constituent part of their abilities most of the time. Different positions have different requirements toward staff: some of them require staff to be completely qualified for positions, and some others allow staff to have certain time to study. According to different requirements of different positions, it is understandable that employers are choosing different staff.

Employers require working experience related with relevant fields, which is not

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<sup>369</sup> Job hunting website for graduating students: *Techniques of Dealing with Interviews with Age Limitation in Enterprise Recruitment*. <http://www.yjbys.com/Qiuzhizhinan/show-100895.html>

taking age as a limiting condition directly, but distinguishing the matching degree of employees and positions with their proficiency. Therefore, requirement of working experience does not belong to the scope of discrimination. And it is not classified as discrimination no matter in international conventions or legislation in various countries.

However, sometimes requirement of working experience will have certain requirement of age indirectly, some of which can be regarded as indirect age discrimination. For example, “3-5 years of relevant working experience”, those who have over five years of experience also do not fit the recruitment condition, which eliminates senior applicants in essence, thus constituting age discrimination indirectly.

The recruitment condition that applicants must “have less than X year experience”<sup>370</sup> covers a substantial proportion in the job market. Generally speaking, the longer work seniority is, the more working experience there will be, the more matching workers will become with positions, and the bigger production value they can generate. Employees set the upper limit of working experience conflicts with the actual demands of positions themselves. The length of working experience is related with age, and, consequently, such upper limit of working experience can be regarded as an indirect discrimination of senior workers.

Lower limit of working experience, namely, “have more than X year relevant working experience” is also unreasonable. At present, the majority of positions in the job market will have requirement of working experience. As to students who have just graduated, it is almost impossible to have relevant working experience. However, not many positions have compulsory requirement in this field. In order to reduce the cost of

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<sup>370</sup> For example, the recruitment of clerks of Chinese Shantou Departure and Entry Frontier Inspection Master Station requires “less than five-year working experience”, extract from Position Form of Central Authority and its Direct Subordinate Organizations.

training, employers will sometimes abuse the limitation of working experience. Such behavior of abusing the limitation of working experience and taking it as admittance limitation actually causes age discrimination, especially for young people.

### C. Retirement System

Retirement is a separation point of quitting a legal relationship on labor and entering another legal relationship of social pension security. Compulsory retirement age, the only standard of this separation point, seems to be taking age as a standard of determining workers' working ability directly. Whether setting compulsory retirement age constitutes age discrimination has been a topic which attracted many disputes in recent years<sup>371</sup>. In the Report of Active Aging, the majority (53%) do not think there should be a specific age at which people have to stop working; nevertheless, four in ten (41%) agree that there should be a compulsory retirement age. However, there are large differences between different countries. The number of people who agree with compulsory retirement in FYROM reaches 80%; while there are only 15% interviewees in Denmark who say yes to compulsory retirement. According to European Union *Directives*, its member countries are allowed to set compulsory retirement age<sup>372</sup>.

Retirement system is different from termination of employment. Retirement is only a turning point, which will be followed by pension system. Although after the termination of employment, there's also unemployment compensation as a guarantee, its income is confined to the lowest subsistence allowances, which cannot be compared with pension security. Retirement will not necessarily lead to loss of vested interest of workers, and it is just a transition between two beneficial modes.

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<sup>371</sup> Active Aging, Special Eurobarometer, p. 81.

<sup>372</sup> Forward (14) of *Directive 2000/78/EC*: "This *Directive* shall be without prejudice to national provisions laying down retirement ages".

In order to determine whether compulsory retirement age formulated by laws constitutes discrimination, the role retirement age plays in compulsory retirement system needs to be mastered first. For example, with the aggravation of social aging, some countries have already begun to adjust retirement age, with an aim to make up possible labor loss and reduce the burden of pension payment. Under retirement system, setting retirement age is mandatory, and one of the important goals is to regulate and control the level of supply and demand in the labor market, which has extremely strong policy guidance. Regulating compulsory retirement age is conducive to ensuring the balance of supply and demand in the labor market macroscopically, and regulating the proportion of national financial expenditure. Due to individual differences, it is very difficult for laws to formulate a set of standards of retirement. Compulsory retirement age can reduce the cost of judging whether each different worker should retire.

Determine whether compulsory retirement age constitutes discrimination also depends on whether settings of retirement age formulated by laws are reasonable. For example, nowadays, as human life is generally extending and physical fitness is improving, if retirement age is set at 40 year-old, it is apparently unreasonable. Such compulsory retirement age constitutes age discrimination.

Besides, it is very important to determine whether the pension security system linked up with retirement age is reasonable, which is also an important standard of judging whether the setting of retirement age constitutes discrimination<sup>373</sup>. As a matter

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<sup>373</sup> In the Case C-546/11, Mr Toftgaard was the Head of the district administration of Vejle (Denmark) until his dismissal on 8 May 2006, with effect from 31 December 2006, on the ground that his post had ceased to exist. Mr Toftgaard was not entitled to availability pay as he was then 65 years old and therefore entitled, from 31 December 2006, to a civil service pension. There was a compulsory retirement age of 70 for civil servants. Mr Toftgaard informed the Ministry that he wished to be transferred to a different post and that he was willing to take a reduction in salary if necessary. After his dismissal, Mr Toftgaard performed several remunerated duties providing a modest income. Mr Toftgaard regards the refusal to grant him availability pay as discrimination on grounds of age. For that reason, the DJØF, acting on behalf of Mr Toftgaard, brought an action against Mr Toftgaard's employer, namely the Ministry, before Østre Landsret (Eastern Regional Court). As that action was dismissed, the DJØF brought an

of fact, the most basic interest guarantee of workers lay in whether the income gap before and after retirement is acceptable. There are over a half people who are willing to stop working if they can receive pension in European Union<sup>374</sup>. Posner, an American grand justice did an investigation on anti-age-discrimination law prohibited in American employment, in the cases, “there are only 10% plaintiffs (including those plaintiffs who raise an objection to compulsory retirement) who are over 65 year-old; this ratio is lower than that of seniors in the gross population in America”<sup>375</sup>. Posner thinks the main reason is that the majority of those who are over 65 year-old are willing to retire, and will not be protected by anti-age-discrimination law. In other words, when pension system can satisfy retirees’ needs, this retirement system is reasonable, and the admittance mechanism and standard of this system does not constitute discrimination.

The majority of countries take a specific age as the compulsory retirement age, for example, 65 year-old as the retirement age. However, due to individual differences, it is very difficult for laws to evaluate the exact time that is the most suitable for each worker to retire. Employers can judge whether each labor need retirement according to his actual working condition and physical condition. According to the writer’s reflection,

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appeal before Højesteret (the Supreme Court) submitting, inter alia, that para. 32(4)(2) of the Law on Civil Servants is contrary, in particular, to *Directive 2000/78*. The DJØF claimed that availability pay is not an occupational social security scheme within the meaning of para. 6a of the *Anti-Discrimination Law* and art. 6(2) of *Directive 2000/78* and that the age-limit of 65 is not an appropriate and necessary means of achieving a legitimate aim within the meaning of art. 6(1) of that directive. The Ministry contended that para. 32(4)(2) of the *Law on Civil Servants* falls within the scope of the exception provided for in para. 6a of the *Anti-Discrimination Law* and art. 6(2) of *Directive 2000/78*, since availability pay should be regarded as an occupational social security scheme within the meaning of those provisions. In the alternative, the Ministry stated that para. 32(4)(2) meets the requirements laid down in art. 6(1) of *Directive 2000/78*. The Court supported Mr Toftgaard, considering: “art. 6(2) of *Council Directive 2000/78/EC* of 27...must be interpreted as being applicable only to retirement or invalidity benefits under an occupational social security scheme. Articles 2 and 6(1) must be interpreted as precluding a national provision under which a civil servant who has reached the age at which he is able to receive a retirement pension is denied, solely for that reason, entitlement to availability pay intended for civil servants dismissed on grounds of redundancy”.

<sup>374</sup> Active Aging, Special Eurobarometer 378, p. 75: “The majority of citizens (54%) do not want to continue working once they are old enough to get or receive a pension.”

<sup>375</sup> See re. Posner, *Aging and Aged*, China University of Political Science and Law Press, 2002, p. 382.

whether laws can determine an age range for compulsory retirement through national macroscopic arrangement, for example, 60 to 65 year-old. Employees can then determine the exact retirement age of each worker flexibly in this range according to different conditions. Workers can also choose whether to retire within this range.

### 2.2.3 Analysis of anti-age discrimination in employment in European Union

#### 1. The current situation of anti-age discrimination in European Union

According to new research commissioned by Age UK, age is the most widely experienced form of discrimination in Europe<sup>376</sup>. And there has been a strong increase in perceived discrimination based on age. According to the research by Eurobarometer in 2009, 58% of Europeans considered age discrimination to be widespread in their country, compared to 42% in 2008<sup>377</sup>. Equal Opportunities Commissioner Vladimír Špidla said: “One area of concern is the perceived rise in age discrimination as a result of the recession”<sup>378</sup>.

In recent years, economic crisis has been haunted Europe, where the rate of unemployment has been rising. The euro area (EA17) seasonally-adjusted unemployment rate was 10.8% in February 2012. The EU27 unemployment rate was 10.2% in February 2012. Among the Member States, the highest unemployment rates were recorded in Spain (23.6%)<sup>379</sup>. Under the back ground of economic, employment is

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<sup>376</sup> *Age discrimination in Europe*, 01/04/2011, <http://eortrial.co.uk/default.aspx?id=1147290>

<sup>377</sup> *16% of Europeans report experiencing discrimination-new opinion survey*, 09/11/2009. <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1686&format=HTML&aged=0&language=EN&guiLanguage=en>

<sup>378</sup> *16% of Europeans report experiencing discrimination-new opinion survey*, 09/11/2009. <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1686&format=HTML&aged=0&language=EN&guiLanguage=en>

<sup>379</sup> *Harmonised unemployment rate by sex*. <http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&language=en&pcode=teilm020&tableSelection=1&plugin=1>



an area where age discrimination is a huge problem, despite recent legislation tackling the issue<sup>380</sup>.

According to the survey (Active Aging, Special Eurobarometer<sup>378</sup>) requested by the Directorate-General for Employment, Social Affairs and Inclusion and co-ordinated by Directorate-General for Communication, Workplace age discrimination is the most frequently reported form of age discrimination experienced by people. One in five citizens has either witnessed or been the subject of age discrimination in the workplace<sup>381</sup>.


































The worst situation appears in Hungary, where 39% interviewees think they have gone through age discrimination in employment. (See the two tables below) The least cases appear in Ireland, where 14% interviewees think they have experienced the same in employment.

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<sup>380</sup> *Research shows age discrimination is rife in Europe, 03/03/2011.*  
<http://www.cardi.ie/news/researchshowsagediscriminationisrifeineurope>.

<sup>381</sup> Active Aging, Special Eurobarometer 378, p. 32.

% who have either been personally discriminated against on basis of  
age or witnessed such discrimination in last 2 years

		Work	Education/ training	Health care	Financial products/ services	Leisure
	EU27	20%	11%	14%	14%	8%
	BE	18%	7%	11%	14%	7%
	BG	26%	9%	25%	17%	6%
	CZ	36%	12%	19%	18%	8%
	DK	26%	11%	14%	11%	6%
	DE	18%	8%	13%	12%	7%
	EE	24%	6%	12%	11%	5%
	IE	14%	8%	13%	15%	7%
	EL	19%	7%	17%	11%	5%
	ES	20%	10%	8%	15%	5%
	FR	18%	9%	9%	20%	5%
	IT	21%	13%	19%	17%	13%
	CY	23%	9%	16%	10%	9%
	LV	28%	9%	14%	12%	5%
	LT	22%	8%	15%	10%	5%
	LU	15%	6%	9%	11%	5%
	HU	39%	25%	29%	30%	17%
	MT	20%	8%	8%	9%	7%
	NL	28%	6%	11%	15%	8%
	AT	26%	14%	17%	14%	14%
	PL	24%	12%	20%	15%	7%
	PT	14%	6%	12%	10%	5%
	RO	20%	13%	21%	18%	12%
	SI	21%	9%	14%	13%	5%
	SK	33%	15%	28%	19%	6%
	FI	20%	7%	12%	9%	10%
	SE	21%	14%	21%	12%	10%
	UK	17%	10%	12%	9%	7%
	HR	30%	15%	18%	14%	9%
	TR	33%	30%	30%	25%	23%
	MK	27%	18%	24%	15%	9%
	IS	31%	13%	10%	9%	8%
	NO	16%	10%	14%	9%	8%

% who have either been personally discriminated against on basis of age or witnessed such discrimination in last 2 years

	Work	Education	Health care	Financial products/ services	Leisure
EU27	20%	11%	14%	14%	8%
 Sex					
Male	21%	11%	13%	15%	9%
Female	20%	10%	15%	14%	8%
 Age					
15-24	18%	11%	10%	11%	11%
25-39	24%	12%	15%	17%	9%
40-54	26%	12%	17%	16%	8%
55 +	16%	8%	15%	13%	7%

It can thus be seen that age discrimination in employment in European Union is terrible, and as economic crisis deepens continuously, this situation will get even worse. With the aggravation of aging, there will be fewer persons who can be involved in work, and the government will thus suffer from greater burden of pension payment. In the field of employment, ageism separates those seniors who are capable of working from work, and such vicious circle will trigger increasingly unreasonable employment structure and intensify economic recession.

In addition, economic crisis makes the employment issues of young people especially worse. According to EU Employment and Social Situation Quarterly Review-March 2012, the rate of unemployment of youngsters in European Union reaches 22.4% in January 2012, and there are 5.6 million youngsters who cannot find a job<sup>382</sup>. According to the data from German National Bureau of Statistics, the rate of unemployment of youngsters in Spain reaches 45.7%<sup>383</sup>.

The severe employment situation in Europe aggravates discrimination of youngsters in employment. They need time to be proficient in work, which will directly influence the cost-benefit of employment, that's why employers are excessively

<sup>382</sup> EU Employment and Social Situation Quarterly Review-March 2012, 29/03/2012. <http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=1255&furtherNews=yes>

<sup>383</sup> 5,000,000 young people can not find work in EU; in Germany the rate of unemployment of young people is low, 12/08/2011. <http://news.163.com/11/0812/11/7B8JISMQ00014JB5.html>

cautious when choosing young employees, or they will decline youngsters because they have no working experience or haven't receiving any training, thus causing discrimination of youngsters. In addition, there are some stations that professional experience acquired before the age of 18 is not approved by taking calculation of payment<sup>384</sup> and that periods of employment completed by an employee before reaching the age of 25 are not taken into account in calculating the notice period for dismissal<sup>385</sup>.

Moreover, the industrial structure issue of European Union is the main reason

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<sup>384</sup> In the Case C-88/08, Mr Hütter, the claimant in the main proceedings, was born in 1986. Together with a female colleague, he completed a period of apprenticeship, from 3 September 2001 to 2 March 2005, as a laboratory technician with TUG, a public body coming under the Federal Law of 2002 on the organisation of universities and university studies. Mr Hütter and his colleague were then recruited by TUG, from 3 March 2005 to 2 June 2005, that is to say, for three months. As Mr Hütter's colleague was 22 months older than him, she was recruited at a higher incremental step, which translated into a difference in monthly salary of EUR 23.20. That difference stems from the fact that the period of apprenticeship completed by Mr Hütter after attaining his majority was only approximately 6.5 months, as contrasted with 28.5 months in the case of his colleague. Mr Hütter brought an action before the Landesgericht für Zivilrechtssachen Graz (Graz Regional Court for Civil Matters). He sought payment of compensation equivalent to the difference in treatment he received due to his age and which he considers to be unjustified and in breach of both the *B-GIBG* and *Directive 2000/78*. That difference in treatment corresponds to the sum of EUR 69.60. Mr Hütter was successful at first instance and on appeal and so TUG brought an appeal before the court making the present reference. That court wishes to ascertain in particular whether art. 6 of *Directive 2000/78* precludes a national measure that allows employers not to take into account periods of professional experience acquired before attaining majority in order to avoid placing persons who have obtained a secondary education at a disadvantage, to avoid encouraging pupils not to pursue that type of education and, more generally, to avoid making apprenticeship costly for the public sector and to promote the integration of young apprentices into the labour market. The Court held "Articles 1, 2 and 6 of *Directive 2000/78/EC* must be interpreted as precluding national legislation which, in order not to treat general education less favourably than vocational education and to promote the integration of young apprentices into the labour market, excludes periods of employment completed before the age of 18 from being taken into account for the purpose of determining the incremental step at which contractual public servants of a Member State are graded".

<sup>385</sup> In the Case C-555/07, Ms Küçükdeveci was born on 12 February 1978. She was employed from 4 June 1996 by Swedex. Swedex dismissed her by letter of 19 December 2006 with effect, taking account of the statutory notice period, from 31 January 2007. The employer calculated the notice period as if the employee had three years' length of service, although she had been in its employment for 10 years. Ms Küçükdeveci contested her dismissal before the Arbeitsgericht Mönchengladbach (Labour Court, Mönchengladbach). She argued before that court that her period of notice should have been four months from 31 December 2006, that is, to 30 April 2007, pursuant to point 4 of the second sentence of para. 622(2) of the *BGB*. That period corresponded to 10 years' service. According to Ms Küçükdeveci, in so far as it provides that periods of employment completed before the age of 25 are not to be taken into account in calculating the notice period, the second sentence of para. 622(2) of the *BGB* is a measure which discriminates on grounds of age, contrary to European Union law, and must be disapplied. The Court held "European Union law, more particularly the principle of non-discrimination on grounds of age as given expression by *Directive 2000/78/EC* must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides that periods of employment completed by an employee before reaching the age of 25 are not taken into account in calculating the notice period for dismissal."

causing the continuously high rate of unemployment. In European Union, the development of high and new technology industries lag behind that in America and Japan, especially in IT industry, which can create enormous employment opportunities for youngsters, that's why the development in European Union is relatively slowly. Enterprises in traditional high-end manufacture industry, which covers a high proportion of economy, such as German automobile manufacture and Swiss watch manufacture, are not willing to hire inexperienced youngsters because of the high cost of training, or they lay off employees dramatically because of the attack of economic recession. Youngsters are fired due to short working length, lack of working experience and poor stability.

Besides, employers sign short-term contract with youngsters, which can be regarded as discrimination of youngsters to certain extent. In Spain, which has the highest rate of unemployment of youngsters, employment contracts are divided into long-term and temporary contracts. Long-term contracts are poor in flexibility, and it is extremely costly to fire such employees. When comparing with long-term contracts, temporary contracts contain rough clauses. As the contract expires, employers will end the employment relationship. Even if they fire employees within the contract period, the standard of compensation is much lower than long-term contracts. Therefore, employers will be more willing to sign temporary contracts with inexperienced youngsters, who are under the pressure of employment, and are willing to sign temporary contracts. The majority of youngsters in Spain are employed under short-term contracts, and once there's economic recession, employers will cancel their contracts first. This is also one of the reasons of high rate of unemployment of youngsters in Spain under the environment of economic crisis.

In order to deal with age discrimination, European Union has been taking the

initiative to formulate social policies and hold social activities to confront age discrimination. The year 2012 is determined to be the European Year of Active Aging and Solidarity between Generations<sup>386</sup>. Besides, age discrimination is also prohibited in express legal terms of European Union.

## 2. The source of law in prohibiting age discrimination in employment in European Union

Difference in treatment based on age factor is a complicated social issue itself, which is very difficult to be comprehensively prohibited like gender discrimination. Sometimes, even whether some differences in treatment constitute discrimination is also a controversial question. Different countries have different social and cultural backgrounds, and their social security systems also differ, and consequently, the standard of judging age discrimination adopted by each member country of European Union is not completely the same, which makes it difficult to reach a complete consensus on identifying age discrimination. Each member country has been trying to determine the scope, standard and punishment measures of age discrimination according to its national conditions.

Age discrimination has always been regarded as a relatively sensitive concept, which is difficult to distinguish or prohibit with firm standards. In the framework of anti-discrimination in European Union, age discrimination is much later to be paid attention to than gender discrimination. Laws and regulations that prohibit age discrimination are also fewer than those prohibit gender discrimination. Age discrimination does not have many supporting materials, no matter relevant social policies or legal practices.

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<sup>386</sup> <http://europa.eu/ey2012/>

## A. Beginning

Since 1990s, age discrimination has begun to attract active attention in Europe. As Europe entered an aging society, seniors' employment has become increasingly important.

The Community had adopted some soft law measures to address the needs of age ground. In 1991, the Council issued a Decision<sup>387</sup> on Community Action for Elderly which included designating 1993 as the European Year of Elderly and Solidarity between Generations<sup>388</sup>. This year was intended to raise awareness of challenges resulting from an aging population and changes required to help the elderly identify with the process of Community integration. In addition the Council and Representatives of the governments of the Member States adopted a Resolution on the employment of older workers<sup>389</sup> based on the principle the increased efforts are needed to adjust the conditions in which workers in the latter part of their working lives work and are vocationally trained and that older workers must benefit from adequate resources and from measures to prevent their exclusion from the labor market<sup>390</sup>.

## B. Treaties

Since *Treaty of Amsterdam*, age has been officially listed into the scope of anti-discrimination which is protected by laws.

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<sup>387</sup> Council Decision 91/49/EEC[1991] OJ L28. See also Commission Decision 91/554/EEC on the Liaison Group on the Elderly [1991] OJ L296/42, amended most recently by Decision 99/141/EC [1999] OJ L45/54, in Catherine Barnard, *EC Employment Law*, Oxford University Press, second edition, 2000, p. 293.

<sup>388</sup> Council Decision 92/440/EEC[1992] OJ L245. See now COM(99)221 final: "Towards a Europe for all ages—promoting prosperity and intergenerational solidarity", in Catherine Barnard, *EC Employment Law*, Oxford University Press, second edition, 2000, p. 293.

<sup>389</sup> Resolution of the Council and of the Representatives of the Governments of the Member States meeting within the Council on the employment of older workers [1995] OJ C228/1. See also the Resolution of the European Parliament of 24 Feb, 1994 on measures for the elderly in the EC [1994] OJ C77/24, in Catherine Barnard, *EC Employment Law*, Oxford University Press, second edition, 2000, p. 293.

<sup>390</sup> Catherine Barnard, *EC Employment Law*, Oxford University Press, second edition, 2000, p. 293.

Art. 13 of *Treaty on the Functioning of the European Union* provided :

“Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”

From this we can see that Council of the European is entitled to take actions against age discrimination. Although there is no specific expression on which kind of action will be taken, punishment against age discrimination should be regarded as a proper behavior. This article is a kind of promise Community makes to realize equal treatment and no discrimination.

Art. 21 of *Charter of Fundamental Rights of the European Union* provides:

“Any discrimination based on any ground such as sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.”

There is express term in *Charter* that any discrimination based on age is prohibited. Prohibition of age discrimination becomes an important rule of community law.

With the entry into force of the *Lisbon Treaty*, the EU remains committed to combat age discrimination and to promote equality (art. 19, ex-art. 13 TEC).

*C. Directive 2000/78/EC*

Art. 13 of *Amsterdam Treaty* adds several new types of discrimination prohibition,



including age. According to art. 13, European Union is entitled to formulate laws to prohibit any discrimination involved in art. 13. Therefore, on December 2000, European Union formulated a general framework for equal treatment in employment and occupation, namely, Framework Employment Equality Directive-*Directive 2000/78/EC*, which prohibits new types of discrimination, including age. This is also one of the most important laws of European Union in prohibiting age discrimination in employment. It is the result of several negotiations and discussions between European Commission and each member country, which is a reflection that each member country of European Union has reached a consensus in the field of prohibiting age discrimination.

a. Objective:

Art. 1 in this *Directive* explains that the objective of formulating is to go against various kinds of discrimination in employment involved in art. 1 and execute the principle of equal treatment, which includes anti-age-discrimination. Prohibition of age discrimination in European Union is an important constituent part of realizing goals put forward in *Employment Criterion* and encouraging diversified labor force. (See 25 of preamble) The goal of anti-age-discrimination is to obtain high rate of employment and social security, improve living standard and life quality, boost economic development, reinforce social cohesion and unity, and enhance personal freedom of action<sup>391</sup>.

b. Subjects involved in this *Directive*

- Subjects involved in this *Directive* cover a wide range, including all individuals of public and private departments in European Union, including public institutions. (see art. 3) No matter formulation of laws and regulations by states

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<sup>391</sup> See re. Nicky ten Bokum, Tom Flanagan, Roselyn Sands and Robert von Steinau-Steinruch, *Age Discrimination law in Europe*, Wolters Kluwer, 2009.

or staff employment by employers, they are all restricted by this *Directive*, which does not allow behaviors of age discrimination.

- In this *Directive*, the groups that enjoy age protection are not confined to seniors, or certain age groups. It protects not only seniors but also youngsters and middle-aged persons equally. Under the guidance of European Union framework, each member country has not imposed limitations on the age range of staff.
- It is regulated in art. 11 in this *Directive*: “Member States shall introduce into their national legal systems such measures as are necessary to protect employees against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment.” “Employees” here does not only refer to employees themselves who suffer from age discrimination, but also include those who are involved in confronting age discrimination, evaluating behaviors of age discrimination and witnesses.

c. Types of age discrimination: age discrimination in employment can be divided into direct discrimination, indirect discrimination and harassment.

- Direct discrimination shall be taken to occur where one person is treated less favorably than another is, has been or would be treated in a comparable situation, on the age ground. (art. 2.2(a)) In this article, there’s no restriction that the infringed will only be counted as age discrimination because they are infringed due to their own age, thus guaranteeing the just claim of stakeholders of the infringed on age discrimination. For example, in a group, other members

also loss the opportunity to be treated equally because one of them suffers from age discrimination. Apart from the only one being discriminated, others can also claim for infringement damage compensation on age discrimination.

- Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular age at a particular disadvantage compared with other persons, unless: (i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or (ii) as regards persons with a particular disability, the employer or any person or organization to whom this *Directive* applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in art. 5 in order to eliminate disadvantages entailed by such provision, criterion or practice. (art. 2.2(b))
- Harassment shall be deemed to be a form of discrimination, when unwanted conduct related to the age ground takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. (art.2.3) It is also regulated that under such circumstance, the concept of harassment should be defined according to national laws and conventions of member countries.
- Instigating others to discriminate also constitutes age discrimination. For example, HR manager is informed not to hire applicants at certain age group.

d. Stages when age discrimination is possible to happen: the scope of application of this *Directive* includes the whole stages of employment: recruitment, training,

promotion, retirement and dismissal<sup>392</sup>. It is regulated by art. 3 of this *Directive*, including such legal questions involved in public and private employment as employment, occupation, dismissal and payment, occupational training, trade union and employer organization. In community area under administration, this *Directive* should be applicable to those involve:

- Conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion.
- Access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience.
- Employment and working conditions, including dismissals and pay;
- Membership of, and involvement in, an organization of workers or employers, or any organization whose members carry on a particular profession, including

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<sup>392</sup> In the Case C-499/08, Mr Andersen was recruited on 1 January 1979 by the Sønderjyllands Amtsråd (Southern Jutland Regional Council), now the Region Syddanmark (Region of Southern Denmark). On 22 January 2006, the Region Syddanmark notified Mr Andersen of its decision to dismiss him with effect from the end of August of that year. It was determined following arbitration proceedings that he was dismissed unfairly. At the end of his employment relationship with the Region Syddanmark, Mr Andersen, aged 63 at the time, decided not to exercise his right to retirement but to register as a job seeker with the relevant authorities. On 2 October 2006, Mr Andersen brought a claim against his former employer for payment of a severance allowance corresponding to three months' salary, based on the fact that he had completed more than 18 years of service. On 14 October 2006, the Region Syddanmark refused that claim on the basis of para. 2a(3) of the *Law on salaried employees*, on the ground that Mr Andersen was entitled to draw a pension financed by his employer. The Ingeniørforeningen i Danmark, the trade union representing Mr Andersen, then challenged that decision before the Vestre Landsret (Western Regional Court). It is apparent from the decision to refer that the applicant in the main proceedings submits that para. 2a(3) of the *Law on salaried employees* constitutes a measure which discriminates against workers over the age of 60, which is incompatible with articles 2 and 6 of *Directive 2000/78*. The Region Syddanmark disputes this. The Court considered that "articles 2 and 6(1) of *Council Directive 2000/78* must be interpreted as precluding national legislation pursuant to which workers who are eligible for an old-age pension from their employer under a pension scheme which they have joined before attaining the age of 50 years cannot, on that ground alone, claim a severance allowance aimed at assisting workers with more than 12 years of service in the undertaking in finding new employment".

the benefits provided for by such organizations.

e. Justification of differences of treatment on grounds of age :( art. 6)

The legal objectives include legal employment policy, objectives of labor market and occupational training, improve occupational integration, and ensure certain age groups are being protected, as well as social security system.

- Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labor market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary<sup>393</sup>. Such differences of treatment may include, among others :( art. 6.1)

(a) The setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection.

(b) The fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment.

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<sup>393</sup> In the Case C-141/11, the Court considered “The second subparagraph of art. 6(1) of *Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation* must be interpreted as not precluding a national measure, such as that at issue in the main proceedings, which allows an employer to terminate an employee’s employment contract on the sole ground that the employee has reached the age of 67 and which does not take account of the level of the retirement pension which the person concerned will receive, as that measure is objectively and reasonably justified by a legitimate aim relating to employment policy and labor-market policy and constitutes an appropriate and necessary means by which to achieve that aim.”

(c) The fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.

- Member States may provide that the fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including the fixing under those schemes of different ages for employees or groups or categories of employees, and the use, in the context of such schemes, of age criteria in actuarial calculations, does not constitute discrimination on the grounds of age, provided this does not result in discrimination on the grounds of sex.(art. 6.2)

The situation and background of age differ from each country, that's why this *Directive* does not list specific legalized particulars of age discrimination. Therefore, it is of great importance to judge whether the objectives of setting age limitations are appropriate and necessary.

f. Exceptions of differentiated age treatment:

With respect to other discriminations, age discrimination has more exceptional regulations as follows:

- When adopting superficial neutral standard on differentiated treatment, if the regulation, standard or behavior is objectively impartial, and appropriate approaches are adopted to realize legal objectives, it does not constitute age discrimination. (art. 2.2(b))
- The measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the

prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others, do not make discrimination. (art. 2.5)

- This *Directive* does not apply to payments of any kind made by state schemes or similar, including state social security or social protection schemes. (art. 3.3)
- Member States may provide that this *Directive*, in so far as it relates to discrimination on the age ground, shall not apply to the armed forces. (art. 3.4) ((19) of preamble) Due to particularity of armed forces, combined with the demands of national security and battles, there will be high requirements toward physical fitness of entrants. Therefore, it is reasonable to set age limitations in armed forces. Of course, this *Directive* does not forcibly require member country to lay down such formulations; it's just a euphemistic suggestion.
- Member States may provide that a difference of treatment which is based on a characteristic related to any of the age grounds shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate. (art. 4.1) Age itself belongs to a kind of actual occupational requirement to some extent. For example, a kid apparently cannot reach the lowest admission requirement of any career. Age is the reason why this kid cannot be hired. However, in order to prevent "genuine and determining occupational requirement" being abused, European Union has adopted strict restrictions

against it, and required its member countries to report “genuine and determining occupational requirement” by taking age as its condition ((23) of preamble).

- Just like age discrimination, European Union allows its member countries to adopt certain positive actions to reduce infringement of the vulnerable age groups. With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the age ground. (art. 7.1)

It is these exceptions that allows the flexibility in dealing with different conditions of different member countries when applying this *Directive*, and facilitates each member country and organization in reaching a consensus on complicated age issue, thus bringing age discrimination into the scope of employment discrimination that should be prohibited.

g. As to compulsory retirement age:

As a policy with extreme differences, retirement age receives different attitudes and regulations from each country. Accordingly, in this *Directive*, any article about compulsory retirement age is not added to this *Directive*, nor is there any specific article that states whether European Union agrees with compulsory retirement policy. However, through some articles, it can be known indirectly European Union’s attitude toward compulsory retirement age. It is mentioned in art. 6.1 that member countries can formulate reasonable employment policies according to their own conditions. Compulsory retirement policy can be counted as a reasonable employment policy. Furthermore, in (14) of preamble refers: “this *Directive* shall be without prejudice to



national provisions laying down retirement ages”. It shows European Union thinks specific compulsory retirement age can be regulated or not regulated according to conditions of individual country.

h. In the aspect of burden of proof, that of age discrimination is the same as gender discrimination, which adopts regulations that favor the plaintiff. Art. 10.1 provides: “Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment”.

#### D. Case-law

As such, when the *Directive* came into effect in 2003 (or in 2006, for Member States which had taken advantage of the extended transposition period permitted to implement the *Directive*’s provisions on age and disability), it was unclear exactly how the European Court of Justice would strike the balance between these conflicting considerations in applying its age discrimination provisions. This uncertainty was compounded by the absence of substantial national jurisprudence on age discrimination, and the lack of detailed academic commentary on issues of age equality. This context makes the ECJ jurisprudence on age discrimination that has emerged since the seminal *Mangold* decision all the more striking, controversial and significant<sup>394</sup>.

Case *Mangold* as follows:

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<sup>394</sup> See Colm O’Cinneide, *Age Discrimination and the European Court of Justice: EU Equality Law Comes of Age*, *Revue des Affaires Européennes*(2009-10) 2, p. 253-276.

Werner Mangold, a German citizen who is over 56 year-old, is in the employ of a lawyer Rüdiger Helm. Both parties signed a labor contract on June 26, 2003. In art. 5 of this contract, firstly, the employment relations between both parties shall start from July 1, 2003 and end on February 28, 2004; secondly, due to the fact that the employee is over 52 year-old, this contract period accords with the legal rules of “facilitating and making it convenient for senior workers to sign labor contract with fixed term”, and the conditions of signing such contract, moreover, renewable contract is accessible after the contract ends; thirdly, both parties reach a consensus that apart from conditions regulated in the second clause above, the decided contract period cannot be modified. Any reasons restricting contract period in the form of legislation is not applicable to this labor contract.

Mangold, the plaintiff thinks that although contract period restricted in the second clause of art. 5 accords with regulations in para. 14 (3) of *German domestic law-Gesetz über Teilzeitarbeit und befristete Arbeitsverträge*, short for *TzBfG*, it violates relevant clauses in two *Directives* of European Union, namely, *Framework Agreement on fixed-term work, Directive 1999/70/EC* and *Framework for Equal Treatment in Employment and Occupation, Directive 2000/78/EC*, in which age discrimination in employment exists.

Helm, the defendant believes that even if para. 14 (3) of German domestic law- *Gesetz über Teilzeitarbeit und befristete Arbeitsverträge*, short for *TzBfG* does not accord with what is referred in clause 5 of annex-*Agreement on Framework of Labor Contract with Fixed Period*, it is difficult for seniors to get chances of re-employment, which is actually a common and objective phenomenon in German society. Therefore, this should be counted as “objective reason” of art. 5 (1) in annex-“Framework

Agreement”, thus proving his labor contract with fixed period signed with Mangold, the plaintiff does not violate German domestic law or rules established by *Directives* of European Union.

After accepting and hearing this case, Munich local labor court couldn't judge the litigation claimed by Mangold, the plaintiff, and allegation of Helm, the defendant. Therefore, it consulted European Court of Justice (ECJ) and requested European Court to make relatively specific explanation of corresponding articles in these two *Directives*.

European Court of Justice made a verdict of this case on November 22, 2005, which emphasized on explaining and answering controversial questions.

a. As to para. 14 (3) of *TzBfG* and Article 5 of annex of *Directive 1999/70/EC*. Its focus lays on whether senior employees can be counted as “reasonable and objective reasons” of the labor contract with fixed period signed between employee and employer. European Court of Justice actually avoided this question in the verdict, which pointed out that it is shown by art. 5 of annex of *Directive 1999/70/EC* that this is an article about “renewal” of labor contract with fixed period. However, in this case, Mangold, the plaintiff and Helm, the defendant signed a labor contract with fixed period for the first time. Therefore, European Court of Justice declined to explain art. 5 of annex of “Framework Agreement”

b. As to whether age threshold regulated in the first sentence of para. 14 (3) of *TzBfG* that was lowered in New Year's Day of 2003 in Germany violates the prohibition of regression(reduction of protection) in art. 8 (3) of annex of framework treatment of labor contract with fixed period-guiding directive in European Union. European Court of Justice made a positive answer to this by deciding art. 8 (3) of annex of “framework treatment” makes expanded explanation of “the realization of treatment”,

thinking that the target of “realization” is not only “framework treatment” and its annex, but also domestic laws and each member country, which means after adopting this explanation, member countries should add or modify domestic laws that are already valid, with an aim to satisfy “prohibition of regression”. In other words, “framework treatment” is capable of guiding legislation activities inside Germany.

However, in view of that European Court of Justice is not expected to make mighty verdict. European Court of Justice declined to explain “prohibition of regression” as a static legal provision that strictly prohibits domestic laws of member countries to lower the level of any protection measures, but suggested to make transparent laws and regulations, which means prohibiting member countries to abuse this article on the one hand, and avoiding ignorance of this article from any member countries on the other hand.

c. As to whether provisions about age limitation in para. 14 (3) of *TzBFG* violates art. 2 of *Framework for Equal Treatment in Employment and Occupation, Directive 2000/78/EC* on prohibiting “direct discrimination” or “indirect discrimination”, or such age limitation could be supported by art. 6 of *Directive*, and that is the core question of this case.

The target of key investigation of European Court lays in whether provisions on age limitation in para.14(3) of *TzBFG* possesses “objective and reasonable” legislation objectives and “appropriate and necessary” means required in art. 6 of *Directive 2000/78/EC*. The final judgment believes: in Germany, senior unemployment workers confront great difficulties in re-employment, the legislation objective of German *TzBFG* is to win them more employment opportunities. Therefore, although differential treatment is adopted by the legislation according to different ages, the legislation

objective is “objective and reasonable”. However, at the same time when pursuing “objective and reasonable” legislation objective, para.14 (3) has already surpassed “appropriate and necessary” limit, namely,

The application of this *Directive* will lead to the phenomenon that all senior workers over 52 year-old will confront termination of their original labor contract, without any exception. Instead, employers will sign labor contract with fixed period, which doesn’t have any guarantee. As to workers, they ages become the only decisive factor. Therefore, they will probably lose the interest of stable employment in their career life. Therefore, although German *TzBfG* possesses “objective and reasonable” legislation objective, it fails to state clearly that whether adopting the mode of fixed age threshold under the premise of losing workers’ personal interest is an irreplaceable channel of promoting the objective of employment.

In summary, para.14 (3) of *TzBfG* does not accord with “appropriate and necessary” means of art. 6 of *Directive 2000/78/EC*, and should constitute age discrimination in art. 2 of *Directive 2000/78/EC* correspondingly.

d. As to whether *Directive 2000/78/EC* is valid in Germany before December 2, 2006. According to European Court of Justice, it is a tough question. Because according to the second paragraph of art. 6 of *Directive 2000/78/EC*, Germany is entitled to postpone the effective date of *Directive* to three years after December 2, 2003. Accordingly, European Court of Justice made a quite shocking explanation, namely:

“Equal treatment principle” in employment and occupation is not initiated by *Directive 2000/78/EC*. In reality, as a legal principle, “prohibiting various forms of discrimination” has been approved by constitutional conventions of various international organizations and member countries long time ago. Therefore, “prohibiting

various forms of discrimination” should be regarded as the basic principle of European Union laws. Accordingly, no matter specific clauses of *Directive 2000/78/EC* has become valid in member countries, once domestic laws of any member countries violate the principle of “prohibiting various forms of discrimination”, they should be discarded.

There are two questions that we should pay attention to:

a. In this case, in order to avoid the objective fact that *Directive 2000/78/EC* hasn't take effect in German, thus reaching the goal of defending European Union laws. European Court of Justice found an approach, namely: creating “prohibiting various forms of discrimination” into a principle of European Union laws with wide applicability in the form of legal precedent, thus leaping over obstacles of domestic German laws and be applicable to German citizens directly.

In fact, it is not the first time European Court of Justice summarized generalized principle from European Union *Directive*. As far back as the end of 1970s, European Court of Justice has passed and gave judgment that anti-age-discrimination regulations in employment and occupation in European Community *Directive 76/207/EEC* should be abstracted and created into the basic principle “prohibiting various forms of discrimination” in European Union laws. Even so, the practice of abstracting the principle “prohibiting various forms of discrimination” from *Directive 2000/78/EC* still shocked the European public, because when the principle “prohibiting various forms of discrimination” was abstracted from *Directive 76/207/EEC* by European Court of Justice, both European Community laws and domestic laws of member countries expressed their acknowledge of this principle in the form of legislation. However, European Court of Justice put forward the principle “prohibiting various forms of discrimination” this time, which is completely established on the basis of “his own

wishful thinking”, and completely ignores the fact that Germany has never adopted *Directive 2000/78/EC* in the form of legislation. This verdict made by European Court of Justice seemed not to be clear and coherent logically, because it abstracts a generalized principle from laws and regulations that its member countries have never acknowledged, and requests its member countries to accept this principle.

b. Generally speaking, European Union Directive puts forward its requirements toward legislative assembly bodies of member countries, which cannot have direct legal validity on natural or juridical persons inside each member country. Only after the content of *Directive* is transited into domestic laws by member countries through legislation or its modification, natural or juridical persons inside each member country can be restricted indirectly. However, this verdict formed a new understanding of the efficacy of *Directive*, which means *Directives* can not only be applicable to legislation of each member country, but also be applied to citizens directly through legal precedent of European Court of Justice. Such attribute can be known as “parallel direct efficacy”.

#### **2.2.4 Analysis of anti-age discrimination in employment in China**

In China, there’s no law or regulation prohibiting age discrimination. As stated above, China started very late in the aspect of employment discrimination. Up till 2008, *Employment Promotion Act* was executed, which filled up the gap China has in laws regarding anti-employment-discrimination. art. 5 (2) of *Employment Promotion Act* (draft), which was published in 2007, listed age discrimination into the scope prohibited by laws, according to which: “workers’ employment shall not be discriminated because of such factors as nation, race, gender, religious belief, age and physical disability.” However, in *Employment Promotion Act* that was finally executed, age discrimination was deleted from the categories of anti-discrimination.

Indifferent attitude the government adopts against age discrimination; inactive attitude private academic organizations adopt toward the investigation and study of age discrimination; looseness the massive workers adopt toward age discrimination makes it a kind of social morality and habit. At present, the majority of age limitations in the field of employment have the property of age discrimination. No matter in quantity, or tendency, age discrimination has become the most serious employment discrimination.

Employers don't need to use "real occupational qualification" to disguise age discrimination at all, because without legislative protection, employers can discriminate any age group they want. Such arbitrary discrimination has been continuously duplicated and extended, which has dramatically influenced Chinese employment structure.

Seven years ago, some scholars did an *Empirical Study on Age Discrimination in Employment in China* in local labor markets. Based on data statistics of recruitment conditions, this investigation gathered data in eleven years, from 1995 to 2005. In over 300,000 recruitment ads, recruitment conditions have been classified in every five years as an age group, each one of them have different recruitment conditions according to age. In any type of positions, no matter service, management or technology, workers over 40 year-old have generally received differential rejections<sup>395</sup> by employing units.

In an investigation report two years ago, age threshold has already turned into 35 year-old. Among the recruitment requirements that have specific age limitations, over three fourth positions require applicants to be less than 35 year-old, there are even 40.25% employing units lay down age limitation of less than 30 year-old, from which

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<sup>395</sup> Zhouwei, *On the Empirical Study of Age Discrimination in Employment in China-take 300,000 recruitment ads in Shanghai and Chengdu from 1995 to 2005 as an example*, published in *Politics and Law Treatise*, Phase 3, 2007.



we can see that age limitation has developed toward a much younger tendency<sup>396</sup>. 35 year-old should be the most energetic and creative age in life. However, in reality, it stands in the way of a large number of applicants like a ruthless ridge.

The increasing young tendency of age discrimination has caused dramatic waste of human resources. Such age threshold that is becoming lower and lower is the result of failure in containing age discrimination and its continuous spreading.

In addition, the government has set a bad example in the aspect of age discrimination, which can be reflected in that it hasn't formulated laws or regulations against age discrimination, but taking the lead in age discrimination. Age discrimination has become institutionalized and its infringement has become systematized.

Age limitation in civil servants' employment shows obvious standardized tendency. *The Temporary Provisions of National Public Servant Employment* published by the Ministry of Personnel in June 1994 became the initiator of the provision that "applicants registered for civil servant examination must be under 35 year-old". On November 6, 2007, the Ministry of Personnel published *The Provisions of Public Servant Employment (trial)*, which continued the action of *The Temporary Provisions of National Public Servant Employment*, and laid down a limitation that civil servant must be "under 35 year-old". It is found out in *Investigation on Age Discrimination Situation in National Civil Servants' Recruitment* in 2010 that in the six items of employment discrimination being investigated, age discrimination is the most serious one, which covers 100% of national civil servants' recruitment conditions.

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<sup>396</sup> *Shenzhen Employment Discrimination Investigation Report*, published by Shenzhen Hengping Organization-non-governmental commonweal organization. This report investigates recruitment information of 1560 employing units in 103 industries in Shenzhen through network and telephone interviews, it is also the first investigation of age discrimination in Shenzhen. <http://gd.news.sina.com.cn/news/2010/05/18/901659.html>

Not merely in civil servants' recruitment, in other links of employment, age threshold also exists in a wide range. Age threshold in promotion and system of resigning from a leading post are the specific forms of age discrimination. Resigning from a leading post is a kind of pre-retirement system which is unique in China. It refers to a political summary of removing leading positions ahead of time when officials or leading cadres of enterprises are coming near to the retirement age, and undertaking the positions of consultant or investigator in corresponding levels, but can still enjoy political and economic treatment of their original positions. Generally speaking, resigning from a leading post means instead of managing or confronting directly, it offers service to or supervises the leading post. The system of resigning from a leading post is actually replacing seniors with youngsters. It takes age as the only evaluation standard of position transformation, which is age discrimination in essence.

Cadres' promotion has strict requirements in age. Those who are over 40 year-old cannot be promoted as middle-level cadres; those who are over 50 year-old cannot be promoted as divisional cadres; those who are over 55 year-old cannot be promoted as cadres of departmental directorship; and those middle-level and divisional cadres who are over 50 year-old must resign from a leading post. According to laws, civil servants must retire at 60 year-old, but those who are in higher level of leadership can work till 65 or even 70 year-old. The promotion and resign of each level of leaders and cadres are graded according to age. The lower the position is, the lower age threshold of employment will be, and the higher the position is, the higher age threshold of employment will be<sup>397</sup>. It can thus be seen that the current promotion system of civil servant in China has obvious age discrimination.

Age discrimination of employment system of civil servants reflects governmental attitude toward age discrimination. The attitude public departments hold plays a leading

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<sup>397</sup> Cai Dingjian, *Cadres' "Young Tendency" is Suspected of Age Discrimination*, published in Southern Weekly, March 6, 2008.

role in private departments. As a result, age discrimination has been widespread and uncurbed in the whole employment field. Not only does age discrimination become severe in China, but also fails to find any relieving channels. So far, several cases on age discrimination have ended up with plaintiffs' lose. In order to solve these questions, legislation against age discrimination must be conducted firstly, thus spreading national prohibition of age discrimination and winning just claim for those people infringed by age discrimination through legislation.

### **2.2.5 Reference from legislation of EU in forbidding age discrimination**

In consideration of the complexity of age issue and current legislation situation in China, our legislation against age discrimination can use reference from *European Union Treaty* and *Directive of Equal Employment Framework*.

#### **1. Establish Principles of Prohibiting Age Discrimination**

Several European Union Treaties that have constitutional properties have established that the prohibition of age discrimination is one of the general principles of European Union legislation. Provisions of prohibiting age discrimination can be added to Chinese constitution and labor laws. Regard the prohibition of age discrimination as a general principle of Chinese legislation and an indispensable condition of realizing equal employment right, with an aim to lead the formulation and perfection of legislation, including laws, administrative laws and regulations, regulatory documents, local regulations and rules, as well as separate regulations.

#### **2. Criterion and Exceptions of Age Discrimination**

The criterion of judging a behavior mostly derives from its definition and classification. There is no direct definition on age discrimination in

*Directive2000/78/EC*, instead, concepts of several categories of age discrimination are listed out, namely, direct discrimination, indirect discrimination and harassment. It is mainly because the Directive comes down to various categories of prohibitive discrimination; and the definition and criterion of age discrimination can be concluded from the concepts of direct discrimination, indirect discrimination and harassment. It is more of Chinese legal convention to express the definition of certain behavior directly and specifically in laws. Therefore, the definition of age discrimination in employment should also be added to provisions of prohibiting age discrimination. It will be more specific to divide the categories of discrimination on the basis of the definition of age discrimination.

Discrimination caused by age will generally lead to some controversies, and adding limitations to age threshold should take interest appeals of various parties into consideration. In *Directive2000/78/EC*, age discrimination is not absolutely prohibited, but dealt with flexibly. This *Directive* lists out a series of exceptional provisions. For example, real and necessary occupational requirement, reasonable and necessary employment policies, objectives of labor market and occupational training, employment conditions for specific groups, lowest conditions based on occupational requirements, highest age setting based on training requirements and reasonable employment period before retirement, lowest working age, social security plan of retirement and positive actions. China can use these exceptions for reference in listing out exceptions that are in line with our national conditions.

Each member country of European Union is required to transform *Directive2000/78/EC* into domestic laws according to its national conditions. *Directive* merely regulates a lowest standard. Due to the great differences in geographic locations, cultural backgrounds, and economic development in various places of China, the

cognition and standard of age discrimination are not completely the same. Therefore, Chinese national laws can confirm a rule and lowest standard just like European *Directive* does. The specific regulations and measures can be refined through publishing local laws and regulations by local governments on this basis. Besides, because of the differences in employment structure of different industries, industrial laws and regulations can also be formulated to refine.

### 3. Burden of Proof

When there are laws prohibiting age discrimination, there will be less brazen discrimination. A large number of discriminations will show up in the form of indirect discrimination, which makes it of great importance to judge whether it constitutes age discrimination. Besides, it is always difficult to put to the proof of indirect discrimination. Based on the consideration of protecting workers, burden of proof on appeals of age discrimination should belong to the defendant by taking *Directive 2000/78/EC* for reference in China.

#### **2.2.6 Channels of solving age discrimination**

1. Legislative protection is the most primary and basic means of solving age discrimination. Only when age discrimination is prohibited by laws can infringement acts find relieving channels. Moreover, rights and interests confirmed by laws will have deterrent force. Liability for tort regulated by laws can dramatically increase the cost of age discrimination. As a result, employers have no way but consider restraining legal factors before having any discrimination behavior. Besides, as the guidance of people's behaviors in a nation and region, laws play a strong guiding role. As age discrimination is prohibited by laws, people will not make negative evaluation of certain age groups arbitrarily, thus reducing emotional factors of age discrimination. Of course, legislation

of prohibiting age discrimination should be continuously improved and refined.

2. On the basis of legislation, our nation should also establish relevant authorities to be responsible for dealing with age discrimination in employment. Besides, corresponding supervising system should also be established in the country.

3. The government should also formulate social policies which will guide and publicize in the right direction. Such guidance and publication should mould positive images of each age group, for example, youngsters' vitality, middle-aged persons' decision-making skills and seniors' working experience and stability, especially seniors, who are easier to be discriminated. At present, the degree of aging in each country has been continuously deepened, and ageism will stand in the way of active aging. The government should take steps to increase seniors' employment opportunities and reinforce relation between generations.

4. Social action and reform is also an effective channel in boycotting age discrimination. Private organizations also play an important role in eliminating age discrimination. Cooperation among lawyers' organizations, various age organizations and non-governmental organizations should be reinforced, the appeal of anti-age-discrimination in employment should be boosted from individual level to group level, thus promoting the question of age equality into a human rights campaign.

5. Change the thinking mode of measuring working capability by age, and seek for reasonable evaluation modes. The development of human resources discipline can already provide effective evaluation for working capability in various aspects, without drawing support from vague means, such as age. For example, modernized quantitative evaluation mechanism, which takes performance as its core can better "realize objective

and impartial evaluation of staff”<sup>398</sup>.

6. Emphasize on the evaluation of economic loss caused by age discrimination, for example, the cost of studying age discrimination, and quantization of the dramatic burden age discrimination has caused to the society. For a long time, it has been difficult to quantize age discrimination, which caused failure in really cognizing the social and economic consequences, and consequently, launching the evaluation of economic loss caused by age discrimination can effectively improve people’s cognition of the negative benefit caused by age discrimination, thus eliminating age discrimination consciously.

7. Stress the important role seniors play in eliminating age discrimination. It is pointed out by relevant studies that seniors are the most primary victims of age prejudice or discrimination. According to empirical study, seniors have extremely low cognition toward age discrimination, which means seniors cannot play the role of negative “victims” in age discrimination; instead, they should become positive participants<sup>399</sup>.

In conclusion, solving age discrimination is a systematic social project, which cannot be accomplished in a short period of time. Of course, it cannot be solved in the legal layer, it requires consideration from many aspects, such as laws, social policies, economy and culture, and together with mutual efforts from the government, social groups and each individual can this issue be solved.

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<sup>398</sup> Zhang Zhirong, *On the Construction of Dynamic Management System of Human Resources Based on Performance Management*, published in Academic Journal of Gansu Economic Management Cadre College, Phase 4, 2008.

<sup>399</sup> Sujata Ray, Ellen Sharp and Dominic Abrams, *Ageism: A benchmark of public attitudes in Britain*, published by Age Concern Reports, 2006.

### **3. Discrimination on disability**

#### **3.1 Overview of value of disability and definition of disability**

##### **3.1.1 Overview of value of disability**

Obviously, it is hard for disabled persons to participate in social life completely like normal people because of their own physical or mental defects. This exclusion of social participation, apart from the fact that disabled persons have their defects, also results from some problems existing in the system of social structure, which hinder participation of disabled persons in social life. Both individual and social reasons make it impossible for the disabled persons to stand at the same starting line with normal persons in the social competition. Disabled persons become the vulnerable group in the vulnerable community. Social attitude towards disabled persons determines the value orientation of policy and law related to disabled persons, as well as the positioning of disabled persons in the society. Social attitude towards disabled persons has gone through several stages.

##### **1. Medical Model**

Social attitude towards disabled persons has changed from indifference to concern. Earlier discussion about disability starts from the perspective of health and the improvement of medical condition of disabled persons. During this period, Biomedical Model of disability is established. According to this model, disability refers to the process in which individual is influenced by disease. The phenomenon of disability is positioned as a physical system to produce lesions with the specific diagnosis of symptoms in this model, and the disabled persons receive various kinds of treatment



and rehabilitation as patients<sup>400</sup>. What is mainly responsible for disabled persons is the medical structure. Its specialists need to help disabled persons to treat and adjust body and enable the disabled persons to recover as much as possible. Moreover, professional medical personnel should help disabled persons to adjust their psychological status and enable them to adapt to the disabled life. The core of the policy of disabled persons in this model of concept is to reduce the negative impact of the consequences of disease on the lives of disabled persons. Medical model puts emphasis on the reduction of life resistance of disabled persons through medical means, rather than taking into account the influence of social system, institution, structure and other factors on the life of disabled persons.

In “medical model”, disabled persons passively receive treatment and protection, as well as sympathy. Disability is regarded as a kind of tragic burden, and disabled persons are perhaps viewed as a burden to society. The internal needs and right demands of disabled persons are ignored, as well as the equal human rights and dignity of disabled persons.

Medical model derives charity model or compensation model. As the name suggests, the state makes all kinds of compensation to disabled persons through social security and other high-welfare measures and enables the disabled persons to survive without the need of market economic activities. First of all, it should be affirmed that this model originates from goodwill of the state to protect vulnerable group and improve the survival condition of disabled persons through welfare system. However, the charity model puts too much emphasis on compensation on disabled persons and regards disabled persons as objects of charity, in spite of willingness of disabled persons to participate in the

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<sup>400</sup> See re. P. Minaire, *Disease, Illness and Health: Theoretical Models of the Disablement Process*, Bulletin of the World Health Organization, 1992, volume 70. (3), p. 373-379.

mainstream social life. Medical model and charity model both intend to help disabled persons, but disabled persons could only passively receive this kind of help.

## 2. Social Model

In fact, it is far from enough by giving disabled persons material help through medical means to cure disability and welfare means only, so as to meet the need of disabled persons in the market life. The concept of disability undergoes the transformation from medical model to Social Model. The key of the process of individual disability does not lie in the individual functional limitations resulting from injury, but the social exclusion resulting from the social structural barriers in the environment.

The earliest one to explain the phenomenon of disability from the level of society is S. Z. Nagi, who believes disability to result from the failure of disabled persons themselves to completely comply with or satisfy the expectation of the society on role of individuals. The gap between the ability of disabled persons themselves and social role expectation reflects standard value and projection of local society on the so-called normal people apart from physiological and psychological functional barrier of disabled persons themselves. Disability refers to the barrier of physical and psychological injury on individual action and ability of playing the social role. It is just this expectation of ability of role and the failure of the full play of role function that lead to individual barrier<sup>401</sup>.

M. Oliver deepens the viewpoint of S. Z. Nagi and proposes Social Model of disability. According to this model, objective fact of disability is that the physical and

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<sup>401</sup> See re., Nagi, S.Z. *Some Conceptual Issues in Disability and Rehabilitation*, in Sussman M.B. (ed.), *Sociology and Re-Habilitation*, American Sociological Association, Washington D.C., 1965, p. 100-113.

psychological system of the disabled persons has suffered from injury; but the disability process on disabled persons is imposed by social structure. Therefore, the so-called disability is about the issue of external environment and social system, rather than handicapped ones themselves. Barrier of the external social environment is the source of disability experience of disabled persons, and the improvement of social environment, system, social value, public policy, bias and discrimination on disabled persons are the key of policy of disabled persons<sup>402</sup>.

It could thus be seen that Social Model of disability reverses the viewpoint that defines disability as biochemical model of individual medical issue, believing that disability is not individual shortcoming, but constructed by the society. Social environment barrier makes it impossible for individual with bodily injury to enjoy equal civil rights. Moreover, Social Model of disability points out that due to the existence of oppression and exclusion of social and cultural factors on disabled persons, disabled persons should have special rights in order to enjoy rights enjoyed by citizens in general<sup>403</sup>.

Social Model regards disabled persons as the main body of rights and discusses the problem of disability from social structure, instead of being confined to individuals. It views disability experience as the result of social discrimination and bias. The elimination of disability experience of disabled persons does not require disabled persons to adapt to and comply with the standard of “normal person” in the mainstream society by changing themselves. Instead, it aims to eliminate the barrier of the external environment and system. Disability is a kind of social phenomenon, resulting from history, culture, politics, economy and other factors. Therefore, disability policy should

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<sup>402</sup> See re., M. Oliver, *Understanding Disability: From Theory to Practice*, Macmillan, London, 1996.

<sup>403</sup> See re., Colin Barnes, Geof Mercer, *Disability*, Polity Press, Cambridge, 2003.

put emphasis on the change of social structure; the elimination of different rights and status of different social groups in the society; the elimination of suppression and discrimination on attitude and measure of disabled persons; the promotion of social participation and social integration of disabled persons.

The submitting of Social Model has a far-reaching influence on the solution of disabled persons. new classification system of disabled persons (International Classification of Functioning, Disability and Health, ICD-ICF Model) issued by World Health Organization in 2001 adopts the classification standard of Social Model of disability, which discards classification system of disabled persons (International Classification of Impairment, Disability and Handicap, ICIDH Model) formulated in 1980 based on Biomedical Model. ICD-ICF Model includes the influence of individual condition and environment factors and stresses the activity and participation scope of disabled persons. Obviously, the new classification system not only reflects that injury of disease on individual psychological and physical systems will be better controlled along with the progress of medical technique. It also emphasizes that the opportunity and approach for disabled persons to participate in the society will also be influenced by the improvement of external social environment and their own ability of activity<sup>404</sup>.

### 3.1.2 Definition of disability

#### 1. Definition of Disability

Along with people's attitude about disability from indifference to concern, value of disability also changes from Medical Model to Social Model. The concept and definition of disability also change correspondingly. Art. 5 in Preface to *Convention on the Rights of Disabled Persons* also points out that disability is a concept in evolution.

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<sup>404</sup> Wei Zhaiwen, *Disability, Social Exclusion and Intervention of Social Security Policy*, Journal of Renmin University 2008 I, Renmin University Press, Beijing, 2008, p. 17.

According to *Declaration on the Rights of Disabled Persons* in conference of the United Nations in 1975, disabled persons refer to the part of people who could not guarantee that they could gain all or part of necessities in normal individual life and social life by themselves due to congenital or non-congenital physical and mental defects<sup>405</sup>. The definition is not comprehensive enough in defining the scope of disabled persons. Although physical and mental defects have been mentioned, the specific defect it refers to has not been illustrated. If it is only confined to physical and mental defect literally, the defect in spirit and intelligence is ignored.

The United Nations issued *World Action Program about Disabled Persons* in 1982, of which Article 6 stipulates “disability refers to the lack of ability to engage in certain normal activities as normal people in a normal manner due to defect.” Art. 8 stipulates that “disabled persons are not a group of a single character, which includes people with mental illness, mentally retarded people, visual, auditory and speech-impaired people, action ability restricted people, and medically disabled people, etc.”. The definition of disabled persons through enumeration shows progress compared with *Declaration on the Rights of Disabled Persons*, in which the definition is more explicit and expands the definition scope of disabled persons.

International Labor Organization of disabled persons passed *Vocational Rehabilitation and Employment Convention of Disabled Persons* on June 20, 1983, in which No.159 Resolution defined “disabled persons” as individuals who are greatly affected in acquisition, maintenance and promotion prospect in an appropriate career due to formally acknowledged physical or mental injury<sup>406</sup>.

In 2006, the 61<sup>st</sup> Conference of the United Nations passed *Convention on the*

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<sup>405</sup> Art.1 of *Declaration on the Rights of Disabled Persons*.

<sup>406</sup> Art. 1.1 of *Vocational Rehabilitation and Employment Convention of Disabled Persons*.

*Rights of Disabled Persons*, bringing more social significance to the definition of disabled persons. It gives the concept of disability the dual property of medicine and sociology. Convention stipulates that “disability is the result of the interaction of full and real participation of various kinds of social attitudes and environment barriers<sup>407</sup> by disabled ones on the basis of impeding their equality with others”. This definition not only emphasizes disability itself, but also stresses social attitude and environment barrier. Moreover, it looks at disability from a social perspective.

## 2. Measuring of Disability

The measuring standard of disabled persons could be viewed both subjectively and objectively. On one hand, it is the self-assessment of the existence of social life participatory barrier; on the other hand, it complies with the official disability standard<sup>408</sup>. Although the treatment of the issue of disabled persons mainly relies on the official standard, the combination of both aspects is more conducive to disability.

*Convention on the Rights of Disabled Persons* acknowledges the diversity of disability. Article 1 in Convention stipulates “disabled persons includes people with long-term injury in body, spirit, intelligence or sense and the interaction of all these injuries and various barriers may prevent disabled persons from the full and real participation in the society on an equal basis to others. ”

World Health Organization (WHO) divides disabled persons into three types according to different kinds of influence of different disabilities on physiological function and social function influence of people:

First is impairment: also called “structural and functional impairment”. It

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<sup>407</sup> Art.1 of *Convention on the Rights of Disabled Persons*.

<sup>408</sup> Haveman and Wolfe (1990) generally measure disabled persons from two aspects.

specifically refers to a certain degree of impairment in the body structure and function (physical, psychological) due to all kinds of reasons. Health, spirit and intellectual activities are constrained to different extents, affecting independent living, working and learning to a certain extent in spite of the fact that they could still take care of themselves. It mainly includes intelligence impairment, psychology impairment, language impairment, hearing impairment, visual impairment, internal organ impairment, and deformity, etc. This is the first step during the occurrence and development of disability. It could further develop into disability or directly result in handicap. It could be both eternal and temporary.

Second is disability: also called “individual ability barrier”. It mainly means that as a result of impairment or certain diseases, body organizational structure and functional impairment are rather serious and physical, mental and intellectual activity have obvious barrier, making it impossible for patients to have daily living activities in a normal manner within a normal scope (such as dressing, washing, action, personal hygiene and verbal communication). It results in individual activity ability barrier, including behavioral disability, language disability, sports disability and various kinds of activity disability. This is the second step of disability occurrence and development, which could further develop into handicap. Similarly, if positive treatment and recovery could be gained, the disability during this stage is bi-directional, which could both further develop or recover.

Third is handicap: also called “social ability barrier”. It is the impairment or disability that brings barriers to the normal participation in social life activity of individuals, which may even influence the normal play of social function. In other words, they could not play their due role according to their gender, age, cultural background and social background. while enjoying social rights and fulfilling social

obligations, patients are in a disadvantageous position due to their ability barrier, including identification handicap (unable to identify people, place and time), physical handicap (unable to act and take care of themselves), sports handicap, career handicap, social interaction activity handicap, economic self-sufficiency handicap, etc.. It is the adverse outcome of the development of disability. Then, society, family and environment have great influence on handicap, and good social environment and social system, family support, and systematic and reasonable rehabilitation treatment will reduce handicap. Body shape and functional defects or abnormality affect disabled persons in participating normal social activities<sup>409</sup>.

The existence and degree of barrier are decided by the relationship between the disabled persons and their living environment. When disabled persons suffer from cultural, material and social hindrance and could not utilize various kinds of social systems accessible to others, barrier comes into being. Therefore, barrier is the loss or restriction of opportunity to participate in social life equally as sound people.

Combined with the official standard of disability, classification method of disability could be mainly divided into four types:

First is the classification according to nature, degree and influence of disability, such as impairment, disability and handicap.

Second is the classification according to organ system, such as sensory disability, neurological disability, musculoskeletal disability and cardiopulmonary.

Third is the classification according to cause of disability, such as disability, illness and developmental disability.

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<sup>409</sup> See re. *International Classification of Impairment, Disability and Handicap*, abbreviated as ICIDH.



Fourth is the classification according to physical, intellectual and mental status, such as physical disability, intellectual disability and mental disability.

An overview of the world and internal legal documents shows that it is hard for us to find a completely unified and determined definition. The definition and measuring of disability are affected by political, economic and cultural factors, which thus demonstrate a complicated and diversified phenomenon.

In fact, disability is a concept of which its literal meaning is easy to grasp. We could always determine its general connotation from the description from any perspective, both medicine and sociology, and abstract and concrete descriptive measuring and defining manner. However, the basic requirement is to grasp the general characteristics and intrinsic connotation of this group. In other words, the type of person who is physically, intellectually or mentally deviated from the normal condition that leads to their reduction or loss of participation ability in social activity, he could be classified in the scope of disability<sup>410</sup>.

The way for people to judge disabled persons is to grasp the essence of disabled persons. It is unified with the spiritual connotation of the definition of disabled persons on the basis of medical cognition, and puts more emphasis of the social attribute of disabled persons. We should have a thorough experience of the evolution of the concept of disability in Convention of rights of disabled persons, master the time of the concept of disability, and seek the way to solve the problem of disabled persons through the concept of disability.

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<sup>410</sup> Qi Yanping, *Rights Protection of Social Vulnerable Group*, Shandong People's Publishing House, 2006, p. 360.

### 3.2 Discrimination on disability in employment

#### 3.2.1 Overview

As different countries differ in their definition of disabled people, the data targeted at disabled persons in the investigation are also different. From an overall perspective, however, disabled persons could not get equal opportunities compared with the ordinary ones. The living condition of disabled persons still lags far behind ordinary people even with national preference and compensation policy, as well as legal assistance. Data from the United Nations indicate that almost one out of ten all over the world is disabled. Recent research indicates that the proportion of disabled persons among poor population in developing countries is as high as 20%<sup>411</sup>. Many disabled persons continue to face barrier in their participation in community activity and they tend to live in the social edge.

Reason for this result mainly comes from the discrimination on disabled persons in various fields apart from the condition confinement of disabled persons themselves. *Convention on the Rights of Disabled Persons* defines “discrimination based on disability”, referring to any difference, exclusion or restriction based on disability. Its purpose or effect is to recognize, enjoy or exercise all human rights and basic freedom on the basis of harm or cancellation of equality to others in politics, economy, society, culture, citizen and all other fields. Discrimination based on disability includes all forms of discrimination, including refusal of providing reasonable convenience; “reasonable convenience” refers to necessary and appropriate modification and adjustment according to specific demands without causing excessive or inappropriate burden, in order to guarantee that disabled persons could enjoy or exercise all human rights and

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<sup>411</sup> *Factsheet on Persons with Disabilities*. <http://www.un.org/disabilities/default.asp?id=18>

basic freedom on the basis of equality to others<sup>412</sup>.

Among them, discrimination in the field of employment is an important reason leading to the worse living condition of disabled persons. Disability discrimination directly makes unemployment rate and level of poverty of disabled persons much higher than the ordinary people. Employment is the basis for disabled persons to have a comprehensive participation in social life and the important approach for them to share the economic and social development achievements. Labor employment of disabled persons has always been a difficult problem. Although people attach increasingly greater importance to it, most countries in the world have the policy measures to encourage the employment of disabled persons. In today's increasingly fierce global competition and deregulation of labor market, many employers tend to not to hire disabled persons.

Failure to gain equal employment opportunities makes disabled persons unable to gain a good job, or even unable to get a job at all. The unemployment or the low income work makes disabled persons originally required to pay the medication fee even poorer. Data from all aspects indicate that there are a great many poor people among the disabled persons. World Bank estimates that 20% of the poorest people in the world are disabled<sup>413</sup>, and they are the vulnerable group in their respective community. An estimated 386 million of the world's working-age people have some kind of disability, says the International Labor Organization. Unemployment among the persons with disabilities is as high as 80 per cent in some countries. Often employers

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<sup>412</sup> Art. 2 of *Convention on the Rights of Disabled Persons*.

<sup>413</sup> See re. Connie Laurin-Bowie, *The Status Report on Poverty and Disability in the Americas*, Published by Inclusion International, London, 2004, p. 5 "the World Bank estimates that people with disabilities account for as many as one in five of the world's poorest people, suggesting that 260 million (43%) of the estimated 1.3 billion people world wide living on less than \$1 per day have a disability".

assume that persons with disabilities are unable to work<sup>414</sup>.

Generally, employers believe disabled persons to have no working ability. However, most disabled persons have labor ability. Once there is the appropriate evaluation, training, placement, and support, they could engage in the work<sup>415</sup>. *Vocational Rehabilitation and Employment Convention of Disabled Persons* of International Labor Conference demands member states to pass the law and adopt necessary steps to enable the disabled persons to gain and maintain appropriate career and gain promotion.

To enable the disabled persons to gain equal treatment in employment and eliminate employment discrimination, art. 27 of *Convention on the Rights of Disabled Persons* gives a detailed listing of legislative protection and other measures that all states parties should adopt, and the brief analysis is as follows:

1. States parties guarantee that disabled persons enjoy work right on the basis of equality with others, including the opportunity to make a living and freely select or accept work in the open and inclusive labor market and working environment which do not constitute barriers to disabled persons. In order to guarantee and promote the realization of work right, including the realization of work right of disabled persons during the period of employment, states parties should adopt appropriate steps, including passing the legislation and other approaches:

- A. Continue employment, career promotion and safety and health working condition and forbid disability discrimination of any form of employment, including

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<sup>414</sup> *Factsheet on Persons with Disabilities Factsheet on Persons with Disabilities*.  
<http://www.un.org/disabilities/default.asp?id=18>

<sup>415</sup> Zhang Jianwei, Hu Jun, *Employment Achievement, Problem and Promotion Measures of Disabled Persons in China*, in *Journal of Population Studies* 2008II, p. 49.

recruitment, employment and condition. This provision establishes the discrimination on disabled persons in employment field in an overall manner.

B. Protect disabled persons to enjoy equal and good working conditions with others on the basis of equality, including equal opportunities and right of equal pay for work of equal value, as well as the enjoyment of safe and healthy working environment, including the right of not being harassed and the enjoyment of complainant.

These two items not only negate the legality with disability as work access, but also do not allow disability as the measuring standard to bring disabled persons unequal treatment. It complies with the principle of equal opportunity and treatment in equal employment.

C. Ensure that the disabled persons could exercise Trade Union right on the basis of equality with others, so as to guarantee that disabled persons could be protected by the Trade Union and express their willingness equally through Trade Union, as well as enjoy various kinds of resources provided by Trade Union.

D. Enable disabled persons to really participate in general technical and vocational guidance programs, gain job placement services, vocational training and refresher training. Social evaluation on vulnerable disabled persons makes disabled persons have fewer opportunities in further education. In order to enable the disabled persons to participate in these services, it is necessary for government of all states parties to adopt some encouraging measures and policies, as well as the help of all social groups.

E. Promote employment opportunity and career promotion opportunity of disabled persons in the labor market, and help disabled persons to seek, gain, maintain and recover work. Due to the disabled persons' own defects, for example, they may have a

narrower channel to gain work information. The government of all states parties should actively help disabled persons to understand employment information and help them to gain the appropriate work.

F. Promote self-managed employment, embark management, and create cooperative and individual entrepreneurial opportunity. The government of all states parties should support disabled persons who seek career by themselves in policy as much as possible, such as reducing industrial and commercial registration process and taxation, etc..

G. Employ disabled persons in the public department. Due to different disability degrees of disabled persons, a majority of disabled persons could be completely competent in ordinary work after training, and much work in the public department could be completed by disabled persons. On one hand, work in the public department is relatively stable. On the other hand, work treatment in the public department is relatively higher than the private department, which could not only guarantee the stable source of income of disabled persons, but also render reference to private departments.

H. Adopt appropriate policies and measures to promote private departments to employ disabled persons, including equal right action program, reward and other measures. Most countries in the world have more or less policies of reward to encourage private departments to employ disabled persons, such as the reduction of taxation.

I. Ensure to provide reasonable convenience to disabled persons in work place. This is of vital importance to the equal employment of disabled persons, as well as the key for disabled persons to really have equal employment. Currently, EU, China and many countries and regions in the world are exercising “barrier-free environment” for disabled persons, such as barrier-free architecture and barrier-free public facility,

including barrier-free passage (road), barrier-free lift (elevator), barrier-free platform, barrier-free room, barrier-free washroom (toilet), barrier-free seat, Braille marking, acoustic prompt and communication, information exchange, and all relevant living facilities. These barrier-free measures provide reasonable convenience to disability.

J. Promote disabled persons to gain work experience in the open labor market. work experience could enable the disabled persons to get to know what kind of work they are competent in, have relevant training in work they could adapt to and increase confidence of disabled persons; they could also provide reference to employers in hiring disabled persons, improve the competitiveness of disabled persons and allow disabled persons to better integrate in the society.

K. Promote the vocational and professional rehabilitation service of disabled persons, reserve work and recover work program.

2. States parties should guarantee that the disabled persons are not slaved or expelled. Moreover, they should be protected on the basis of equality with others, without being forced or compelled to work. This demand not only requires the forbidding in Labor Law, but also could add criminal law to strengthen the punishment intensity of labor behaviors of disabled persons. It is because that forcing disabled persons to work is generally accompanied by harm or injury to disabled persons. By strengthening punishment intensity of this behavior, states parties could better protect the personal safety and labor safety of disabled persons.

As the most important treaty to realize equal treatment of disabled persons and guarantee rights and benefits of disabled persons, *Convention on the Rights of Disabled Persons* has already had 149 countries of signature, including all countries of EU and China. This article gives a detailed summary of measures that all states

parties should adopt, which is strong in operation. While opposing to employment discrimination on disabled persons, it plays an important role in guaranteeing the equal labor of disabled persons.

### **3.2.2 Disability discrimination in EU employment**

#### **3.2.2.1 Evolution of strategies of EU towards employment of disabled persons**

According to different targets of policy, the employment policy development of EU/European Community on disabled persons could be divided into the following five stages:

1. Vocational rehabilitation period from 1974 to 1980. During the early period of the establishment of European Community in 1957, its work focused on the integration in economy and politics, rather than the maintenance of social integration and human rights. It is almost 20 years after the establishment of EU in 1974 guided by the idea of “full employment and better employment” that EU Committee put forward a project about vocational integration and social integration of disabled persons. It puts forward the necessity of vocational rehabilitation and suggests the use of social fund to support projects related to the action of disability work.

2. Stagnation period from 1981 to 1985. At that time, strict free economic policy is abided by worldwide and almost all social policy intentions raised by EU Committee are opposed to by member state Britain. Therefore, the whole social policy of EU is stagnant, and the policy of disabled persons shows no development during this period.

3. Labor market integration period from 1986 to 1995. In 1986, *European Community Suggestions to Employment of Disabled Persons* was issued, demanding to guarantee the equal opportunities of disabled persons in EU labor market through national anti-discrimination policy and positive action. At that time, it means that a



series of targeted measures including employment creation, employment protection, employment training guidance, compensatory social security arrangement, barrier-free work place, housing, transportation, and information must be put into practice. Meanwhile, social policies in many other fields start to demand the increase of employment rate of disabled persons. The 1991-1993 and 1993 -1996 community action program for disabled persons focuses on vocational training and rehabilitation project.

4. The transition period to equal rights from 1996 to 2000. Actually, in 1987, *The Single European Treaty* started to explicitly introduce civil rights; *Treaty of Maastricht* in 1991 started to emphasize human rights and freedom. *Treaty of Amsterdam* was passed to point out a new direction for the policy formulation of disabled persons for EU. Disability becomes topic of civil rights, while anti-discrimination right is regarded as a constituent of social rights. Equal opportunity and treatment, equality in the labor market in particular, become the guideline of policy formulation.

5. Anti-discrimination and equal right period after 2000. In 2000, the introduction of career and employment anti-discrimination framework in *Charter of Fundamental Rights* is the first legislation intervention with member states in terms of right of disabled persons. After that, *Directive 2000/78/EC* was formulated and clearly pointed out the opposing to disability discrimination in the field of employment and the guarantee of employment of disabled persons.

From 2004, non-discrimination peace becomes the focus of world attention, and to safeguard human right also becomes the policy formulation idea policy of the society. The current *Action Plan 2006–2015* pays special attention to the overall program design and is devoted to the establishment of a flexible, suitable and comprehensive framework that could meet the demands of specific situations of different countries. It also establishes 15 main action fields including human rights, non-discrimination, equal

opportunity, civil rights and full participation, etc..

After the formulation of *Convention on Rights of Disabled Persons* by UN, the field of EU policy of disabled persons is affected. In 2009, *Directive 2010/48/EC* was formulated. Up until now, all state members have signed this Convention.

### 3.2.2.2 Current situation of employment of EU disabled persons

According to European Disability Strategy 2010-2020 data, until the year of 2010, EU disabled population has reached 80 million, more than 1/6 of the European population. As a result of environment or attitude barriers, they fail to fully participate in economic and social life. Poor population among disabled persons reaches and exceeds 20%. Among them, risk of poverty of male disabled persons is 21.6%; risk of poverty of female disabled persons is 20.6%; and that of non-disabled persons is 13.5% and 14.7%<sup>416</sup>. The poverty rate of disabled persons is almost 70% higher than that of the normal people, much higher than the poor population proportion among normal people.

Quality jobs ensure economic independence, foster personal achievement, and offer the best protection against poverty<sup>417</sup>. However, the average employment rate of European disabled persons is below 50%. In other words, more than half of disabled persons have no work, no life guarantee or ability to stand against poverty. Among these disabled persons, female disabled persons and old disabled persons see a more serious employment situation. The employment rate of female disabled persons is only 41%, lower than that of male disabled persons of 48%. In countries like Czech Republic, Greece, Hungary, Ireland, Malta, Poland and Romania, the employment rate of female disabled persons is only 1/3 of that. Moreover, the employment rate of old disabled

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<sup>416</sup> Research Note 5 /2011, *The situation of working-age people with disabilities across the EU*, p. 15.

<sup>417</sup> European Disability Strategy 2010-2020, p. 8.

persons aged 55-64 is only half of the employment rate of non-disabled persons of the same age. In Hungary, Malta and Romania, the employment rate of the old people in this range of age is only 15%<sup>418</sup>. Such a low employment rate is the origin for the poverty of disabled persons.

Such a low employment rate of disabled persons, apart from their own ability loss, greatly results from discrimination on disabled persons in employment. Data of Special Eurobarometer 317 indicates that 53% of Europeans believe there to be discrimination on disabled persons in their countries. Although it does not explicitly list discrimination proportion of disabled persons in the field of employment, it could be believed that disabled persons suffer from serious discrimination in employment, combined with low employment rate of disabled persons. Therefore, they are unable to get equal work, not to mention high-quality work. A large number of disabled persons have to spend their whole life in the dual blow of poverty and disability. Moreover, the unemployment rate of disabled persons shows continuous increase with the declining economy.

### **3.2.2.3 Source of law of EU anti-discrimination on employment of disabled persons**

#### **1. Treaty**

The same as opposing to age discrimination, *Treaty of Amsterdam* forbids the disability discrimination in all fields in art. 13 for the first time:

“Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on ...disability ...”.

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<sup>418</sup> Research Note 5 /2011, *The situation of working-age people with disabilities across the EU*, p. 10.

It could thus be seen that the same as measures to fight against age discrimination, Council of the European has the right to take actions in view of disability discrimination. Although it does not explicitly state what kind of action is taken, disability discrimination punishment or the formulation of preference policies targeted at disabled persons are regarded as appropriate behaviors. This article is also a kind of promise of Community to realize equal treatment and non-discrimination of disabled persons. It is also the basis for EU to formulate anti-disability discrimination laws, regulations and other policies.

Art. 21 of *Charter of Fundamental Rights of the European Union* also stipulates forbidding any disability discrimination based on disability. forbidding disability discrimination becomes an important principle in community law.

With the entry into force of the *Lisbon Treaty*, the EU remains committed to combat age discrimination and to promote equality (Art. 19, ex-art. 13 TEC).

## 2. Directive 2000/78/EC

A. Forbid any kind of disability discrimination in the field of employment, including direct and indirect harassment<sup>419</sup>;

This *Directive* does not make a clear provision about the definition of disability or clearly points out what groups belong to the protection category of forbidding disability discrimination. The judgment in European Court, however, makes a definition of it. In 2006 in Chacon Navas the Court defined disability: “a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life<sup>420</sup>”. The definition of disability

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<sup>419</sup> See re. art. 1 and 2 of *Directive 2000/78/EC*.

<sup>420</sup> See re. Case C-13/05 Sonia Chacón Navas v Eurest Colectividades SA.

made by EU has the following points asking for attention:

a. Disease is not disability. Although European Court has a wider definition of disability, disease is not a kind of disability, which does not belong to the protection category of this Directive. In Case C-13/05, the Court clarifies the way to distinguish disease and disability, or “the impairment must be permanent or have lasted, or be likely to last, for a significant period of time”<sup>421</sup>. This definition clarifies that barrier of overall participation in employment life brought by impairment to disabled persons must be or should be judged continuous within a rather long period of time. One breaks his leg in a car accident, for example, could completely recover after a certain period of treatment, which does not affect one’s life of career. Although there has been leg injury that affects his normal life, it is not continuous within a rather long period of time. Therefore, during the leg injury period, he is not a disabled person, and could not adopt provisions that forbid disability discrimination or reasonable convenience provided to disabled persons as relief approach.

b. Disability not only includes physically visible impairment, but also includes intellectual and mental impairment. Mental or psychological impairment is not visible as physical and intellectual impairment.

c. The objects protected in Directive in forbidding disability discrimination are not confined to disabled persons only. They also include a part of people related to disabled persons. Judgment from the ECJ signifies that the carers of persons with disabilities can be treated as disabled for the purpose of protection against discrimination and

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<sup>421</sup> See re. para. 45 of Judgment of Case C-13/05, “In order for the limitation to fall within the concept of ‘disability’, it must therefore be probable that it will last for a long time”, and Lisa Waddington and Anna Lawson, *Disability and non-discrimination law in the European Union, An analysis of disability discrimination law within and beyond the employment field*, European Network of Legal Experts in the non-discrimination field, 2009, p. 5.

harassment<sup>422</sup>. In case of *Coleman v. Attridge Law and Steve Law*<sup>423</sup>, a mother received unfavorable treatment compared to parents of normal children, because of looking after her disabled son. Court judgment of similar cases should be protected by *Directive*. This is the expansion of the definition of disability, exerting great significance to the protection of rights and interests of disabled persons.

Furthermore, this broad interpretation of discrimination, which includes 'discrimination by association', offers wide protection under the *Employment Equality Directive*, as it also covers, in some circumstances, victims of discrimination who do not themselves have a disability<sup>424</sup>.

B. This *Directive* covers all public sectors and private sectors in the community, including public institutions<sup>425</sup>.

C. Various periods of forbidding employment and field of career: including access condition of employment, entrepreneurship and career, promotion after employment and career training; work condition; salary and dismissal; social security scheme<sup>426</sup>; the

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<sup>422</sup> FRA, *The legal protection of persons with mental health problems under non-discrimination law, Understanding disability as defined by law and the duty to provide reasonable accommodation in European Union Member States*, Belgium, 2011, p. 17.

<sup>423</sup> See re. Case C-303/06, *Coleman v. Attridge Law and Steve Law*.

<sup>424</sup> ECtHR-FRA (2010), p. 27, in FRA, *The legal protection of persons with mental health problems under non-discrimination law, Understanding disability as defined by law and the duty to provide reasonable accommodation in European Union Member States*, Belgium, 2011, p. 17.

<sup>425</sup> See re. art. 3(1) of *Directive 2000/78/EC*, "Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies..."

<sup>426</sup> In the Case C-312/11, the Court considered that "Articles 2(2) and 6(1) of *Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation* must be interpreted as not precluding rules of an occupational social security scheme under which, in the case of workers older than 54 years of age who are made redundant on operational grounds, a calculation is to be made of the compensation on the basis of the earliest possible date on which their pension will begin – unlike the standard method of calculation, which takes account in particular of the length of service – with the result that the compensation paid to those workers is lower than the compensation resulting from the application of that standard method, though still at least one half of the standard amount. Art. 2(2) of *Directive 2000/78* must be interpreted as precluding rules of an occupational social security scheme under which, in the case of workers older than 54 years of age who are made redundant on operational grounds, the compensation to which they are entitled is calculated on

qualification to become member of a certain team, etc<sup>427</sup>. The same as the equal employment of normal persons, disabled persons' employment protection includes all employment periods and links.

D. Equal employment of disabled persons protected by this *Directive* shall not apply to the armed forces<sup>428</sup>. This provision is out of the peculiarity of armed forces and to guarantee the demands of battle efficiency of the armed forces. That is the reason why disabled persons are excluded in the protection scope in this *Directive*. This provision does not forbid armed forces of member states to employ disabled persons, and member states could determine whether to have disabled persons by themselves according to their practice.

E. Provide disabled persons with reasonable convenience. Reasonable Convenience Theory was put forward during the end of 1970s, and it is in this *Directive* that Europe starts its legal responsibility for employment for the first time. Reasonable convenience provisions in this *Directive* are the most effective and practical protection to disabled persons, as well as the key to realize equal employment of disabled persons. Without reasonable convenience measure, it is impossible even if employers want to employ disabled persons. Without appropriate and convenient place, equipment, and

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the basis of the earliest possible date on which their pension will begin – unlike the standard formula, under which account is taken inter alia of the length of service – with the result that the compensation paid is lower than the standard formula compensation, although still at least one half thereof, and that alternative calculation method takes account of the possibility of receiving an early retirement pension on the ground of disability.”

<sup>427</sup> See re. art. 3(1) of *Directive 2000/78/EC*, “...(a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;(b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;(c) employment and working conditions, including dismissals and pay;(d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations”.

<sup>428</sup> See re. art. 3(4) of *Directive 2000/78/EC*, “member States may provide that this *Directive*, in so far as it relates to discrimination on the grounds of disability and age, shall not apply to the armed forces”.

work time, it is impossible for disabled persons to participate in work, not to mention promotion.

Art. 5 establish the obligation for employers to make a reasonable accommodation for disabled people. It provides:

“In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to provide training for such a person, unless such measures would impose a disproportionate burden on the employer. When this burden is, to a sufficient extent, remedied by existing measures as an element of disability policy in the Member State, it should not be considered disproportionate.”

Art. 20 in Preface expands the so-called appropriate measures, including premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources<sup>429</sup>. Although the discussion in Preface has no restrictive power on member states, it could still play a role of reference.

Moreover, art. 21 in Preface gives a detailed explanation about how to judge whether the burden that employer undertakes is within a reasonable scope. This kind of detailed explanation could prevent employer from taking disproportionate burden as the excuse to escape from providing reasonable convenience<sup>430</sup> as much as possible.

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<sup>429</sup> Recital 20 of Preamble of *Directive 2000/78/EC*, “Appropriate measures should be provided, i.e. effective and practical measures to adapt the workplace to the disability, for example adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources.”

<sup>430</sup> Recital 21 of Preamble of *Directive 2000/78/EC*, “To determine whether the measures in question give rise to a disproportionate burden, account should be taken in particular of the financial and other costs entailed, the scale and financial resources of the organization or undertaking and the



3. *Convention on the Rights of Disabled Persons* of the United Nations. EU has already signed this Convention, and formulated the concrete explanation of application of this Convention in EU in *Council Decision* 2010/48/EC. Moreover, this Convention enjoys legal power in EU and constitutes one of the sources of law forbidding employment discrimination on disabled persons.

### 3.2.3 Disability employment discrimination in China

#### 3.2.3.1 Overview of current situation of employment of disabled persons in China

1. The second sampling investigation data of national disabled persons developed in 2006 indicate that:

A. China now has 82.96 million of disabled persons, taking up 6.34% of the total population.

B. Township disabled persons total 20.71 million, taking up 24.96%; rural disabled persons total 62.25 million, taking up 75.04%.

C. Disabled persons of employment age total 34.93 million, taking up 42.10% of the disabled persons. Moreover, according to *Employment of Township Disabled Persons and Rural Disabled Persons of All Areas in 2006*, the actual national township disability employment population is 4.35 million. The actual rural employment population is 16.72 million (including population engaged in agriculture). In other words, the employment rate of disabled persons in China is 60.3%<sup>431</sup>. This figure seems to be higher than that of Europe. However, combined with the low social security and industrial structure in China, the proportion of poor disabled population in China is inevitably higher than EU.

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possibility of obtaining public funding or any other assistance.”

<sup>431</sup> *Employment of Disabled Persons in Urban and Rural Areas (2006)*.  
[http://cn.chinagate.cn/reports/2008-01/15/content\\_9535284.htm](http://cn.chinagate.cn/reports/2008-01/15/content_9535284.htm)

D. Among the township disabled persons, about 2.75 million persons enjoy minimum living security for local residents, taking up 13.28% of the total township disabled population. 9.75% of township disabled persons have received regular or irregular relief. Among rural disabled population, about 3.19 million persons enjoy minimum living security for local residents, taking up 5.12% of the total rural disabled population. 11.68% of rural disabled persons have received regular or irregular relief<sup>432</sup>.

## 2. Employment of disabled persons from 2007 to 2011:

A. In 2007, township disabled persons employment sees an increase of 392,000. The employed rural disabled persons reach 16.965 million<sup>433</sup>.

B. In 2008, township disabled persons employment sees an increase of 368,000. The number of rural disabled persons that participate in production labor reaches 17.171 million<sup>434</sup>.

C. In 2009, township disabled persons employment sees an increase of 350,000. About 17,570,000 rural disabled persons stably realize employment. People who are engaged in agricultural production labor<sup>435</sup> total 13.555 million<sup>436</sup>.

D. In 2010, township disabled persons employment sees an increase of 324,000.

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<sup>432</sup> *Bulletin of the main data of the second sampling investigation of national disabled persons in 2006.* [http://www.gov.cn/fwxx/cjr/content\\_1311943.htm](http://www.gov.cn/fwxx/cjr/content_1311943.htm)

<sup>433</sup> *Statistical bulletin of career development of disabled persons in 2007 in China.* [http://www.cdpc.org.cn/2008old/sytj/content/2008-05/12/content\\_25056403\\_2.htm](http://www.cdpc.org.cn/2008old/sytj/content/2008-05/12/content_25056403_2.htm)

<sup>434</sup> *Statistical bulletin of career development of disabled persons in 2008 in China.* [http://www.cdpc.org.cn/2008old/sytj/content/2009-04/23/content\\_30243206\\_3.htm](http://www.cdpc.org.cn/2008old/sytj/content/2009-04/23/content_30243206_3.htm)

<sup>435</sup> Rural population employment in China. The Chinese registration system divides Chinese citizens into township population and rural population. According to the 6<sup>th</sup> census report, rural population exceeds more than 50% of the total population in China. The employment approaches of rural population generally include: engagement in agriculture, rural enterprise employment, township employment and entrepreneurship. The property of land in China belongs to rural collective, which exercises individual land contract system. In China, more than half of rural population engages in agriculture, while most township-working population is floating population.

<sup>436</sup> *Statistical bulletin of career development of disabled persons in 2009 in China.* [http://www.cdpc.org.cn/2008old/sytj/content/2010-04/01/content\\_30272746.htm](http://www.cdpc.org.cn/2008old/sytj/content/2010-04/01/content_30272746.htm)

The actual national township employment population is 4.412 million; 17.497 million rural disabled persons stably realize employment. People who are engaged in agricultural production labor total 13.473 million<sup>437</sup>.

E. In 2011, township newly arranges employment of 318000 disabled persons. The actual national township employment population is 4.405 million; 17.488 million rural disabled persons stably realize employment. People who are engaged in agricultural production labor total 13.677 million<sup>438</sup>.

As the third sampling investigation of national disabled persons has not been published, we are unable to arrive at the concrete employment rate of disabled persons currently. According to the data in the above-mentioned *Annual Career Development Statistical Bulletin of Disabled Persons in China*, employment of disabled population has been increasing year by year. However, from the growth trend<sup>439</sup> of disabled population in the recent five years, we should not be too optimistic about the disabled persons' employment rate. Moreover, to the huge rural disability labor population, 78.2% of them realize employment through agricultural labor. Seen from the industrial structure and the current benefits of agricultural production in China, it is hard to change the current poverty through agricultural labor only. Therefore, employment of disabled persons in China is not promising.

### 3. Disability discrimination in employment

The major approach of the employment of disabled persons in China is the employment through government arrangement and market access on one's own. Most

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<sup>437</sup> *Statistical bulletin of career development of disabled persons in 2010 in China.*  
[http://www.cdpf.org.cn/2008old/sytj/content/2011-03/24/content\\_30312814.htm](http://www.cdpf.org.cn/2008old/sytj/content/2011-03/24/content_30312814.htm)

<sup>438</sup> *Statistical bulletin of career development of disabled persons in 2011 in China.*  
[http://www.gov.cn/fwxx/cjr/content\\_2104842.htm](http://www.gov.cn/fwxx/cjr/content_2104842.htm)

<sup>439</sup> *The second national sample survey report of persons with disabilities.*  
[http://bm.aybm.cn/xbm/71/fanye\\_nr.asp?id=7530&title=&lb=0&lbl=218](http://bm.aybm.cn/xbm/71/fanye_nr.asp?id=7530&title=&lb=0&lbl=218)

employment work arranged by the government is work low in technical content and salary, while disabled persons that enter the market feel even harder to find work. In order to survive, most disabled persons tend to accept the low-salary work posts provided by the government, even if they are more competent in better work. Moreover, although *Regulations about Employment of Disabled Persons* stipulates that the proportion of disabled persons in administrative units and enterprises should not be lower than 1.5%, and that of the administrative institutions in China lags far behind the statutory ratio. Wuhan has the highest proportion of 0.39%, while Kunming has the lowest proportion of 0.2%<sup>440</sup> only.

This leading discrimination behavior of the government also influences a majority of private owners. Employers necessarily have discrimination on disabled persons, believing them unable to be competent in high-quality work. Although the government gives enterprises that have the arrangement of disabled persons some taxation policy preferences, the majority of employers are unwilling to hire disabled persons. Most disabled persons feel it hard to enter the market. According to the an investigation made by Employment Promotion Website of disabled persons in 2009, 55.57% of disabled persons feel it “very hard” to seek a job and 34.73% of them feel it “hard”. In other words, more than 90% of disabled persons strongly feel the hardship and torture in seeking a job in the market. Moreover, the investigation report also mentions that among all the external factors affecting the employment of disabled persons, discrimination ranks first. About 51.23% of disabled persons have selected it<sup>441</sup>. Meanwhile, the above-mentioned *Questionnaire Report of Current Employment Discrimination in China* in 2005 indicates that among the interviewees, the proportion

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<sup>440</sup> Investigation report of recruitment of disabled persons in administrative institutions (2012). <http://yirenping.org/article.asp?id=513>

<sup>441</sup> Employment of disabled persons. <http://cjrjob.cn/html/93/n-5293.html>

of being refused out of disability is highest among all discriminations.

#### 4. Poverty of disabled persons

The serious employment further strengthens the poverty of disabled persons. On August 24, 2011, *Research Report of Proportional Arrangement of Employment of Disabled Persons in China* was issued, claiming that disabled persons at a disability employment age total 32 million, and 70% of them have labor ability. However, their employment rate and average salary are only half of the healthy people; among the poor population whose food and housing problems have not been settled, about 42% of them are disabled persons<sup>442</sup>.

#### 3.2.3.2 Source of law

All through the 20 years from 1990 until now, China has gradually formed a legal system that guarantees the disabled persons. *Law on the Protection of Disabled Persons*, *Regulation on Employment of Disabled Persons*, *Regulation on Employment of Disabled Persons*, *Taxation Reduction Policy of Disabled Persons* and a series of particular policies and regulations have made provisions of rehabilitation, education, employment, cultural life, social environment, labor protection, auxiliary career of disabled persons. All provincial administrative areas have issued regional implementation law of *Law on the Protection of Disabled Persons*, and have established regional CDPF organization and government coordination, implementation and supervision.

1. *Law on the Protection of Disabled Persons*(1991) promotes the protection of disabled persons to the category of law for the first time. As the fundamental law in

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<sup>442</sup> *Employment discrimination of disabled persons.*  
[http://epaper.oeeee.com/A/html/2011-10/10/content\\_1478049.htm](http://epaper.oeeee.com/A/html/2011-10/10/content_1478049.htm)

China about the security of disabled persons, it makes a clear stipulation of the fundamental labor rights of disabled persons. concentrated employment is applied to township disabled persons, which is further divided into three basic forms of proportional, scattered and individual employment; it encourages rural disabled persons to engage in planting, aquaculture, handicrafts and other forms of production labor; it also has relevant illustration of welfare corporate taxation, production and management, recruitment, and training of disabled persons.

2. In 2007, *Law on the Protection of Disabled Persons* is revised, and passed on April 24, 2008.

#### A. Definition of disability

*Law on the Protection of Disabled Persons* makes a clear definition of disabled persons, “disabled persons are people who have mental, physiological or physical loss or abnormality in a certain structure and function, or even totally or partly lost the ability to be engaged in a certain activity in a normal manner. Disabled persons include people who have Visual disability, hearing disability, speech disability, physical disability, intellectual disability, mental disability, multiple disability and other disabilities”<sup>443</sup>. This is mainly a description based on medical model of disability. It is much more backward compared with the assessment model of EU that takes social model as the basis.

#### B. Employment manner of disabled persons

Labor employment of disabled persons exercises a combined guideline of concentration and scattering. It adopts preference policy and support protection measure to make labor employment of disabled persons become gradually popular,

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<sup>443</sup> Art. 2 of *Security Law of Disabled Persons*.

stable and reasonable through multiple channels, levels and forms (art.31).

### C. Forbid disability discrimination

The state exercises proportional employment arrangement system of disabled persons (art. 33).

Both the public sector and private sector should arrange employment of disabled persons according to a certain proportion. (art. 33) Here, the specific proportion is not clearly clarified, but the following *Regulation on Employment of Disabled Persons* gives a clear reply. Moreover, this article requires public sector and private sector to comply with this proportion, making it significantly different from *Labor Law* and *Labor Contract Law* set for the private sector<sup>444</sup>, which directly have constraints on the recruitment of public sector personnel.

There should be no discrimination on disabled persons (art. 38) in staff recruitment, regularization, promotion, job classification, payment for labor, welfare, rest and vacation, and social security. This is supplementary to *Labor Law* which fails to forbid disability discrimination, and plays an important role in forbidding employment disability discrimination in China. However, compared with provisions of EU, it still has a few shortcomings. This provision fails to set forbidding disability discrimination in all links of employment and to include career training and career guidance in the category of forbidding disability discrimination. This is quite simple without stipulating type of disability discrimination, such as direct discrimination, indirect discrimination and harassment; it also fails to present stipulations of responsibility and punishment measures. This article is just barely

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<sup>444</sup> Provisions of Labor Law and Labor Contract Law in China shall apply to enterprise and other private organizations in China, while the administrative institutions could deal with relevant items based on these two laws. Both of them only have certain jurisdiction over informal personnel that have signed labor contract with public sector, rather than the formal personnel. Refer to *China Labor Law* art. 2 and *Labor Contract Law* art. 2.

added by National People's Congress under the pressure from human rights and law scholars, having no effects in the practical operation.

Units of disabled employees should provide the appropriate labor condition and labor protection according to the characteristics of disability staffs and renovate their labor place, equipment and living facilities according to the practical demands. (art. 38) This Article is similar as "reasonable convenience" in EU Directive. However, EU reasonable convenience is more reasonable than the provision of "providing appropriate labor condition and labor protection and change hardware based on practical demands". Moreover, reasonable convenience stipulated by EU involves career access, and participation in employment and training, as well as other aspects; in addition, they should offer appropriate measures which refer to effective operable measures for disabled persons to adapt to work place, such as adjustment of room and equipment, work time model, labor division or offer training or integrate resources. Similar "reasonable convenience" in China only involves employment participation. Lastly, EU "reasonable convenience" also takes into account the compensation that employer undertakes, which makes it easier to mobilize employers' enthusiasm to offer reasonable convenience.

Units of disabled employees should make post technical training of disabled employees and improve their labor skills and technical level. (Art. 39) This article is similar as positive action in EU directive, giving disabled persons more help.

Besides, *Law on the Protection of Disabled Persons* does not mention special provisions of battle departments on disabled persons like armed forces and police. There is no way to distinguish discrimination when armed forces refuse to recruit disabled persons, especially when law demands the proportion of disabled persons on public sectors about whether armed forces and police should be excluded from



the sector in need of a certain proportion of arrangement of disabled persons.

In order to guarantee the effective implementation of *Law on the Protection of Disabled Persons*, all provincial areas have formulated *Implementation of Law on the Protection of Disabled Persons* respectively based on their practice.

3. After that, targeted at the articles of labor employment in *Law on the Protection of Disabled Persons*, the state has issued *Regulation on Employment of Disabled Persons*, which further makes a detailed regulation of the proportion of concentrated employment and scattered employment, as well as security payment and management practice of the disabled persons. It plays an important and positive role in opposing to employment discrimination of disabled persons and safeguarding labor rights of disabled persons.

#### A. Forbid disability discrimination

The state encourages social organizations and individuals to help and support disabled persons' employment through various channels and forms. It is forbidden to have discrimination on disabled persons in employment. (art. 4)

Units of disabled employees should provide disabled staffs with labor condition and labor protection that are appropriate for their own physical condition. They should not have discrimination on disabled staffs in terms of promotion, title assessment, remuneration, social insurance and living welfare, etc. (art. 13 the same as *Law on the Protection of Disabled Persons* art. 38)

#### B. Proportional arrangement of employment

Units of disabled employees should arrange employment of disabled persons according to a certain proportion and provide them with the appropriate kind of work and post. The proportion for employment units to arrange the employment of

disabled persons should not be lower than 1.5% of the total staffs in this unit. The specific proportion is decided by the province, autonomous region and municipality people's government according to the practical situation of that region. For those employment units of which the arrangement of employment of disabled persons fails to achieve the prescribed proportion of the province, the autonomous region, the municipality people's government, they should pay safeguard money for the employment of disabled persons. (art. 8)

However, besides fixed proportion and inflexibility, it has another problem that the personnel of public sector could be both formal and employed temporarily. In other words, if public sector employs all disabled persons according to a certain proportion as temporary personnel, the work and life of disabled persons could still never be well guaranteed. Therefore, it should be noted in this article the proportion of formal personnel and temporary personnel.

### C. Positive action

The people's governments above the county level shall take measures, broaden the employment channel of the disabled persons, develop public welfare posts appropriate for disabled persons, and guarantee the employment of disabled persons. The people's governments above the county level shall develop community service career and give preference to the employment of disabled persons. (art. 15)

The country shall legally give preference to employment units that have a concentrated use of disabled persons, and support them in production, management, technology, capital, material, and place. (art. 17)

The people's governments above the county level and relevant departments shall clarify the product and project appropriate for the production and management of

disabled persons, give preference to the arrangement of concentrated production and management of employment units with disabled persons, and determine the exclusive production of certain products of employment units with disabled persons. Government purchase, in similar conditions, should give preference to the purchase and concentrated use of product or service of employment units with disabled persons. (art.18)

The state encourages and supports disabled persons to choose their own jobs and start their own businesses. Disabled persons engaged in individual business shall be given tax incentives. The departments concerned should give care in operating site, and charge no management, registration, license and other administrative fees in accordance with the provisions. The state gives micro-credit and other support to disabled persons who choose their own jobs and start their own businesses within a certain period. (art.19)

Local people's governments at all levels shall raise funds from various aspects, and organize and support rural disabled persons to engage in farming, aquaculture, handicrafts and other forms of productive labor. The department concerned shall give help to rural disabled persons engaged in agricultural production activity in the production services, technical guidance, agricultural material supply, agricultural acquisition, and credit. (art. 20)

People's governments at all levels and departments concerned shall provide disabled persons of hard employment with targeted employment assistance service, encourage and support vocational training institutions to provide vocational training to disabled persons, and organize disabled persons to regularly develop vocational skill competition. (art. 21)

China Disabled Persons' Federation and its local organizations of employment of disabled persons' service agencies shall provide the following services to disabled persons' employment for free: issue disabled persons' employment information; organize the development of disabled persons' vocational training; provide disabled persons with vocational counseling, occupational adaptation assessment, vocational rehabilitation training, job directional guidance, and employment agencies and other services; offer necessary help to disabled persons in selecting their own career; provide necessary support for employment units to arrange the employment of disabled persons. The state encourages other employment service institutions to provide free service to the employment of disabled persons. (art. 22)

Preference measures and assistance measures of disabled persons could be regarded as the positive actions taken to realize equal employment of disabled persons. Only in this way can the long-term disadvantageous position of disabled persons resulting from physical and psychological injury be improved. Moreover, positive action targeted at disability discrimination should not be the same as positive action of discrimination, which will gradually be canceled with the mainstream progress. It is because that the unfavorable conditions brought by disability almost do not disappear with the development of social economy.

#### D. Punishment measure

Targeted at relevant administrative departments and work personnel who have abuse of power, dereliction of duty and constitution of crime, they shall have criminal responsibility; for those who do not constitute a crime, they will be punished by law. (art. 25)

For employment units that fail to pay security fund for the employment of disabled

persons as required, financial sector will warn them and order them to pay before the deadline; for those who still fail to pay overdue, they shall be subject to a daily 5% of delayed payment since the date of default of payment apart from unpaid amount. (art. 27)

Both the punishment on administrative departments and employment units is relatively light. Moreover, there is no detailed illustration about the judgment of its illegal behaviors. In addition, employment security fund is a kind of guarantee over proportional arrangement of the employment of disabled persons. However, the amount of employment security fund is only the average salary of the employees of that place during that year. It is a drop in the bucket to employment units and could not play an effective restrictive role.

#### *4. Law on Promotion of Employment*

##### *A. Forbid disability discrimination*

The state protects labor rights of disabled persons. (art. 29) People's governments at all levels shall make a unified planning of the employment of disabled persons and create employment conditions for them. While recruiting personnel, employment units shall not have discrimination on disabled persons. (art. 29) Discrimination on disabled persons is forbidden here, but the discrimination type in Article 3 of the law has not taken disability discrimination as the forbidden type. Such a provision is incredible.

##### *B. Positive action*

The State encourages enterprises to increase employment positions to support the unemployed and disabled persons' employment and the following business shall be given tax incentives: enterprises with an arrangement of disabled persons reaching

the provided proportion or a concentrated use of disabled persons; disabled persons engaged in individual business; (art. 17)

Departments concerned shall give care to disabled persons engaged in individual business in management place and free them from administrative charges. (art. 18)

Difficult employment personnel refer to those who are hard to realize employment due to physical condition, skill level, family factor, loss of land, and other reasons and those who have consecutive unemployment for a certain period of time without realizing employment. The specific scope of employment difficult employment personnel is provided by provinces, autonomous regions, and municipality people's government according to the practical situation of that administrative region. (art. 52)

5. The United Nations *Convention on the Rights of Disabled Persons* was passed on June 30, 2006 and implemented on May 3, 2008, marking a milestone in the movement of rights of the world's disabled persons. The Chinese government representatives signed it on July 30, 2007, and passed this *Convention* to be implemented by the highest legislative body of the country on June 26, 2008. It brings the policy of disabled persons in China the transition opportunity and prompts the career of Chinese disabled persons to make a big step forward. The Chinese government approves *Convention on the Rights of Disabled Persons*, and starts its international-standard rights-based defense of the disabled persons' rights campaign in literature. At present, barrier-free regulations and rehabilitation regulations of disabled persons have already been put on the legislative agenda of the State Council.

### 3.2.3.3 Reference of China on the realization of equal employment of disabled persons by EU

Guarantee policy measures of the employment of disabled persons in China have made some achievements. However, years of formation of socio-cultural norms of discrimination on disabled persons impede disabled persons to participate fully in employment. Disabled persons are often kept out from the mainstream society. Discrimination caused by disability in education, employment and other fields is serious particularly, which finally weakens the recognition, enjoyment and implementation of equal rights of disabled persons. It has not been long for China to have a comprehensive legal system construction, and the public has a long-term dependence on administrative approaches rather than legal approaches to solve disputes. They have a strong inertia in dealing with the public crisis, and the implementation effectiveness of many laws and regulations is greatly reduced even after they are issued. After the enactment of the legal provisions, even if they are out of touch with social reality, they will not soon be modified as a result of struggle of related interest groups. This is the most significant difference from EU in disability policy measures.

#### 1. Principle of forbidding disability discrimination with a positive attitude.

In mandatory law, prohibiting disability discrimination is set forth. EU explicitly forbids disability discrimination in any field in important laws of *Charter of Fundamental Rights of the European Union* and *Directive 2000/78/EC*, including the field of employment. art.12 of Chinese *Labor Law* and art.3 of *Employment Promotion Law* only stipulate “labor employment shall not see discrimination in different ethnics, races, genders and religious beliefs.” The situation without discrimination obviously does not include disability. This omission in legal provisions undoubtedly brings

convenience to employment discrimination of disabled persons. Meanwhile, as the fundamental law to protect rights and interests of labors, Labor Law should have provided relief approaches to disabled persons who suffer from employment discrimination, but it fails to make the corresponding provisions in “employment opportunity discrimination” and “Unequal pay for equal labor”. Concretely, *Labor Law* confines its protection scope to labors who have already established labor relationship with employment units, and excludes labors who have not established labor relationship with employment units. Meanwhile, for labors who have already been employed, their labor dispute acceptance scope does not include disputes in equal treatment.

## 2. Change appraisal model of disabled persons

The current policy of disabled persons in China is primarily social assistance that guarantees basic living, complemented by a mixture of part of employment assistance and social services, as well as social welfare, which is the same as legal policy model of disabled persons before 2000 by EU. Appraisal model of disabled persons still remains on the compensatory model and never achieves the social model. As mentioned above, forbidding disability discrimination is rather weak. Both *Labor Law* and *Employment Promotion Law* fail to include disability discrimination as a kind of discrimination. Conservative policy model makes legal policy of disabled persons based on equal human rights is in the distant future.

## 3. Explicitly point out the types of disability discrimination

The type and definition of disability discrimination shall be explicitly expressed in law. As China does not have special law about anti-employment discrimination, there is no such kind of description. The classification of disability discrimination could draw reference from classification of discrimination in *Directive 2000/78/EC*: direct



discrimination, indirect discrimination and harassment. In view of the current legal situation in China, apart from listing of these discriminations, there shall be a detailed illustration of the specific discriminations.

#### 4. Strengthen punishment intensity of disability discrimination.

The existing laws and regulations in China have a far insufficient punishment intensity of employment discrimination. *Labor Law* only stipulates that labor administrative department shall warn and order to correct and undertake certain compensation responsibility in view of employment units that have brought injury to laborers. According to *Employment Regulations of Disabled Persons*, for employment units that have an arrangement of employment of disabled persons that fail to achieve the legal proportion, they shall pay employment security fund for disabled persons, and the amount is the average salary of the employees of that region last year. It should be pointed out from both the perspectives of administrative responsibility or economic responsibility, the intensity of this kind of punishment is light. Warning is just until that point, and compensation fund and employment security fund is a drop in the bucket, playing no restriction to employment units. Moreover, the government itself has not paid enough attention during the current stage. As mentioned above, the proportion for the government sectors to employ disabled persons fails to achieve the legal proportion. The payment intensity of employment security fund is insufficient, and there are a great many phenomena of the failure of payment and refusal of payment in employment units, and the employment security fund is confronted with great loss.

#### 5. Change the function of Remnant Association to equal opportunity model.

Remnant Association is only a business group without any restriction on employment units, but supervision only. The above-mentioned employment security

fund is paid by illegal employment units to Remnant Association. As Remnant Association has no law enforcement means and law enforcement network, some enterprises could not be timely and powerfully governed even if they owe or refuse to pay it. Moreover, *Employment Regulation of Disabled Persons* stipulate that disabled persons' employment is implemented by two individuals of people's government at all levels and Remnant Association. It differs from that of EU which relies on professional "Equal Employment Opportunity Committee", the vast social interlocutors, non-governmental organizations, and other models. The local government undertakes multiple functions of economic development, infrastructure construction and labor protection, which tends to be unable to attend to everything at once; Remnant Association system lacks administrative authority, and has the phenomenon of right loss, mutual excuse during the process of implementation, making it impossible for many legal claims to be well solved. Long-term accumulation of a series of doubts and difficulties are ignored, affecting the impartiality and seriousness of laws and regulations. Therefore, we shall draw reference from EU "Equal Employment Opportunity Committee" model, and professionally accept and deal with various kinds of anti-discrimination labor disputes to achieve a better effect.

6. Break fixed proportional employment of disability and apply different proportions to different industries and departments of different properties.

The proportional employment makes its first appearance in British *Employment Act of Disabled Persons* (1944), and is later accepted by most countries. Germany, Italy, France, Austria, Spain, the Netherlands, Belgium, and other dozens of countries and regions have provided the proportional arrangement of employment of disabled persons through legislation. However, most provisions of proportion of the employment of disabled persons are rather flexible. German employment units (including private and

public) over 20 persons, for example, must arrange employment of 5% of disabled persons<sup>445</sup>; the Netherlands makes an arrangement of disabled persons according to different industry regulations, ranging from 3% to 7%<sup>446</sup>, etc.. Moreover, although the Spanish government has a fixed proportion of the employment arrangement of disabled persons, or the proportion of disabled persons of all public sectors and private sectors more than 50 persons should be 2%, it needs to adopt employment adjustment measures (provide capital to improve equipment of work place of disabled persons, protect safety of disabled persons, and increase opportunity for disabled persons to enter the public field to work)<sup>447</sup> of there is no exercise of proportional employment.

However, China has a fixed standard of 1.5% in spite of the nature of employment units and the scale of employment units. However, it may bring burden to developing small-scale enterprises and have no effect at all to large and medium-sized enterprises with a strong anti-risk ability which even enjoy industry protection. Objectively, this kind of action eliminates the weak and supports the strong, but it results in the contradiction among a part of social members.

7. Clarify the principle of reasonable convenience and adopt a barrier-free employment objective. EU has excellent barrier-free experience.

8. Strengthen cooperation among the government, Remnant Association and non-governmental organization

The Chinese government is the subject of formulating policies and laws of disabled

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<sup>445</sup> *Statutory targets on employment of people with disabilities in the public sector.*  
[http://www.nda.ie/cntmgmtnew.nsf/0/84AA79B029E870AE8025729D0046CAED/\\$File/people\\_with\\_disabilities\\_in\\_public\\_sector\\_04.htm](http://www.nda.ie/cntmgmtnew.nsf/0/84AA79B029E870AE8025729D0046CAED/$File/people_with_disabilities_in_public_sector_04.htm)

<sup>446</sup> Wim van Oorschot, *FROM CHOICE TO INCENTIVES Disability and Vocational Rehabilitation Policies in The Netherlands*, Tilburg Institute for Social Security Research, 1998, p. 11.

<sup>447</sup> *Statutory targets on employment of people with disabilities in the public sector.*  
[http://www.nda.ie/cntmgmtnew.nsf/0/84AA79B029E870AE8025729D0046CAED/\\$File/people\\_with\\_disabilities\\_in\\_public\\_sector\\_04.htm](http://www.nda.ie/cntmgmtnew.nsf/0/84AA79B029E870AE8025729D0046CAED/$File/people_with_disabilities_in_public_sector_04.htm)

persons. Guided by it, Remnant Association makes the specific implementation. Remnant Association at all levels plays a major role in promoting the policy development of Chinese disabled persons and maintaining the rights and interests of disabled persons. However, Association of Disabled Persons lacks independence, making it restricted by the maintenance of rights and interests of disabled persons. Meanwhile, due to the lack of powerful support of laws and regulations, the civil society organization of disabled persons is weak in power and slow in development. The formulation of policies and laws of disabled persons lack the participation of disabled persons and civil society organization of disabled persons. We shall draw experience from the development of policies and laws of disabled persons in EU countries promoted by civil disability organization and movements of disabled persons, so as to formulate policy and law that could safeguard the rights and interests of disabled persons in the real sense.

9. Absorb the experience of insufficient “hard policy” of EU and promote the legal effect of policy of disabled persons.

As it has already been mentioned above, due to the diversity of member states, it is hard to unify policy of disabled persons with compulsory “hard policy”. However, China is different. Although different places have imbalanced development and regional difference, the formulation and enforcement of legal policy are not as hard as those of EU. Moreover, in the vast China, only deterrent and coercive “hard policy” could guarantee the rights and interests of special groups, disabled persons in particular.

10. Play the role of community

In the implementation of policy of disabled persons of EU, the society and community have played quite important roles. various kinds of care institutions and

service centers of disabled persons, barrier-free public facilities everywhere and assistance obligations prescribed in law explicitly enable disabled persons to almost live independently according to their own willingness. If disabled persons need a temporary or long-term independent life at home, family members could reserve door service through service phone. If disabled persons go out, all drivers and service personnel on bus, subway and railway are obliged to help disabled persons. Passengers on the special seats are obliged to offer seats, and most buses have the special space for wheelchairs to rest. In current China, barrier-free facilities have just started, and are far from sufficient in meeting the demand; on the other hand, based on the cultural tradition formed through history, family needs to play a role in caring the disabled persons. Different from the traditional role before, this role should be explicitly provided by law with clear reward and punishment.

11. Vigorously develop civil organizations of disabled persons and cultivate powerful organizations of disabled persons

In the current China, civil organizations and other non-governmental organizations are rather weak, making it impossible for them to play a significant role in the development of policy and law of disabled persons like European organizations of disabled persons within a short or long term. Strengthening the organization of disabled persons and enabling them to make sound that best represents voice of the disabled persons could effectively maintain the equal employment right of disabled persons.

Moreover, public opinion expression agencies have a slow development, making it hard to meet the demands of the public to express their willingness. There are few public opinion expression agencies, and they play a limited responsibility and role. Non-governmental social and public opinion poll organizations have an imbalanced distribution, mainly concentrating in Beijing, Shanghai, Guangzhou and few

metropolitans. However, in the majority of central and western regions in greater need of expression of public opinions, poor and backward regions in particular, there is almost no official social and public opinion poll organization, hindering the expression of the public opinions.

## CONCLUSIONS

**FIRST.-** During the global post financial crisis era, there is sharply increasing pressure of inflation, more and more serious employment situation, lasting high unemployment rate, technological change, aging societies, climate change, and bankruptcy in part of the countries. Under the background, discrimination of employment is very serious all over the world, including Europe and China.

The achievement of EU in anti-discrimination is the accumulation of experience for more than 60 years after World War II. It is one of the most developed regions studying employment discrimination in the world, while the anti-discrimination in China does not have a slow start until the recent two years. *Expert Opinion Draft on Anti-employment Discrimination Law* drawn up in 2008 by Constitutional Research Institute of China University of Political Science. Constitutional Research Institute put forward related legislative proposals and bills to two Conferences during the period of National People's Congress in 2009 and 2010. This *Expert Opinion Draft* takes laws and regulations of EU in anti-employment discrimination as one of the major reference foundations. Rich experience of EU about anti discrimination in employment is worth China earnestly to study and explore.

**SECOND.-** In the complex international and domestic political and economic environment, the legislators, law-executors, Civil society organizations, scholars, and ordinary citizens in EU have made unremitting efforts in terms of anti-discrimination, in order to make EU become the most developed area in the beyond the field of employment anti-discrimination in the world. The principle of anti-discrimination becomes the fundamental right of European Union. The evolution of anti-discrimination of EU is divided into four phases in the whole.

**The first phase, from post World War II to the beginning of 1970s.** Early at the beginning of the establishment of European Economic Community, the establishment treaty had included contents like forbidding national discrimination and protecting people's free flow. However, the postwar reconstruction task is imminent, and the political game among powers is perplexing. Therefore, for 20 years before and after the war, the process of European integration has concentrated on the cooperation in the economic field. To guarantee the equality of human rights has not immediately become the primary task of European Economic Community. During this phase, the primary goal of anti-discrimination policy action is to prevent the market competition from distortion, fully realize the free development and flow of labor, improve economic efficiency, and construct a unified market.

**The second phase, from 1970s to 1990s.** During this period of time, the progress of European integration was winding and complicated with few programmatic documents and declarations. However, it was an important period during which the concept and practice of anti-discrimination were gradually disseminated to the society of various countries. Therefore, it excited an extensive civil discussion and constantly enriched specific social policies, which found its expression in the following aspects:

1. A deeper understanding of different types of discrimination. Attention of the academic circle, decision makers and the civil society expanded from gender equality to racial discrimination, discrimination against the disabled and age discrimination.

2. Policy perspective expanding. For example, against gender discrimination especially, EU passed a series of directives relevant to equal treatment of men and women. It expanded the equal treatment of men and women to fields of social insurance, agriculture and individual business, etc.



3. Action principle changed pursuing of equal rights in legal definition into establishing support policy and aid agency especially targeted at discriminated groups and the perspective of safeguarding the rights of those who were discriminated.

**The third phase, from 2000 to 2009.** EU passed two important anti-discrimination directives: *Directive 2000/43/EC* and *Directive 2000/78/EC* in 2000. These two directives formulated a minimum requirements for anti-discrimination legal protection enjoyed by citizens of EU. It also clearly required the state members to set up specialized agencies against discrimination.

In 2004, EU issued *Green Paper on Social Policy* and *Green Paper Equality and Non-Discrimination* in an Enlarged Union.

In June 2005, European Commission submitted *Non-discrimination and equal opportunities for all - A framework strategy* to the Council of Ministers, the European Parliament and the European Economic and Social Committee. The *Strategy* pointed that 7 emphasis in the field of European anti-discrimination in the future.

In 2006, European Parliament and the Council of Europe adopted *Decision 1672/2006/EC of 24 October 2006 of the European Parliament and of the Council establishing a Community Programme for Employment and Social—PROGRESS(2007-2013)*. Further more, EU passed *Directive 2006/54/EC* in 2006.

In 2007 besides relevant measures of the year of equal opportunities, what was worth mentioning was that *Employment in Europe 2007* put emphasis on the employment problem of youths.

The global economic shock in 2008 exerted great influence on European Union.

Employment discrimination was one of the greatest resistances of the growth of employment. EU restarted *Lisbon Strategy* towards new challenges of employment.

In 2009 EU established short-term monitoring tool. The new short-term monitoring tool didn't aim at employment discrimination directly, yet had much effect on grasping and controlling the situation of employment discrimination promptly.

**The Forth phase: Beginning of the new period.** In 2010, European Union regained the enthusiasm in the employment discrimination. In 3rd March 2010 in Brussels, the European Commission launched the Europe 2020 Strategy to go out of the crisis and prepare EU economy for the next decade. The first sentence of the preface of 2020 Strategy is: 2011 must mark a beginning.

Then March 8, the European Council established *Directive2010/18/EU*. The *Directive* is one of the important directives about gender-equality. In March 19, ESF put out the news to take actions to fighting discrimination and support to non-discrimination in recruitment and employment.

**THIRD.-** Each member state has taken agreement with the regulations of EU in terms of anti-discrimination on employment, training, and work treatment. Different from other international anti-discrimination law system, not only the governments of EU member states must enact and adjust the domestic legislation according to the requirements of EU laws, and obey in indirect effect of EU; moreover, directives of EU can be applied to national court proceedings, and have direct force and effect. It could be said that anti-discrimination mechanism of EU establishes an overall framework for the anti-employment discrimination in all the member states. Moreover, it also plays an enlightening role in the legislation and judicial practice in other countries and regions.

In *Directive 2000/43/EC* and *Directive 2006/54/EC*, there are provisions about forbidding discriminations on the grounds of gender, religion or belief, disability, age or sexual orientation.

According to *Directive 2000/43/EC* and *Directive 2006/54/EC*, there are classifications of discrimination: direct discrimination, indirect discrimination, harassment and instruction to discriminate against persons, as followed:

1. **Direct discrimination**, also called as differentiated treatment, direct discrimination shall be taken to occur where one person is treated less favorably than another is, has been or would be treated in a comparable situation, on any of the grounds gender, religion or belief, disability, age or sexual orientation.

2. **Indirect discrimination** shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular gender, a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless: that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

3. **Harassment** shall be deemed to be a form of discrimination, when unwanted conduct related to any of the grounds gender, religion or belief, disability, age or sexual orientation, takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In EU's anti-discrimination policies, the treatment of harassment is identical with direct discrimination, such as sexual harassment.

4. **Instruction to discriminate against persons** on the grounds of gender,

religion or belief, disability, age or sexual orientation, shall be deemed to be discrimination.

**FORTH.- Positive action:** Positive action refers to that in order to rectify the different competitive ability caused by former discrimination, some groups of people can get special look after, which is often called as affirmative action or reverse discrimination. In *Directive 2000/78/EC*, there is provision that with a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds of religion or belief, disability, age or sexual orientation. In *Directive 2006/54/EC*, there is a similar provision about positive action for gender.

Certainly positive action is a rather disputed issue since the benefit for minority groups obviously means the impairment on the interests of other races under the finite social resources. If the affirmative action is to prevent other people to enjoy the legitimate rights of equality, then the law should not be legalized; but if it's dedicated to design and specifically for disadvantaged groups, then the law should regard it as an important tool of combating discrimination. As a result, we need to be cautious for dealing with this problem and clear about its distinction with discrimination. We need to make continuous progress along with the time, make amendments for perfection or even elimination in the end, so as to realize the balance among all groups.

**FIFTH.- Burden of proof:** In reality, it has many considerable difficulties in burden of proof in employment discrimination, especially burden of proof of indirect discrimination. In the international community, the amount of penalties for employer discrimination is very large, frequently to hundreds of thousands or even hundreds of

million, therefore employers should be extremely cautious to set job requirements and treat recruitment conditions and recruitment process. Therefore, rational allocation of the burden of proof becomes particularly important, which will largely determine the outcome of the lawsuits. The misallocation of the burden of proof will cause victims to lose a reliable means of relief, disenable any perfect the laws and regulations perform their functions.

In dealing with employment discrimination litigation, the principle of inversion of burden of proof is commonly used internationally. The statement is that after the prosecution makes a claim, they don't need to prove the existence of discrimination. However, the defense shall undertake the burden of proof to prove the inexistence of discrimination. If the defense can not prove the inexistence of discrimination, the court shall rule in favor of the plaintiff, that is the "shift the burden of proof. In any case the burden of proof is favor of the workers. If the burden of proof is shifted to the employers, which is the victim just need to prove that he is treated by discrimination, it can be presumed that the discrimination exists in employers. The employers must overturn the assumption of discrimination with evidences to prove the legitimacy of their actions. If he can not provide the objective and effective evidence to prove that the differential treatment is reasonably necessary, the discrimination can be ruled to come into existence.

**SIXTH.-** The employment situation in China is quite severe. China is faced with the worlds' largest employment war. China creates employment opportunities for 26% of labor of the world population with 9.6% of the world's natural resources, 9.4% of the capital resources, 1.85% of the knowledge and technical resources, as well as 1.83% of the international resources. In other words, there is no other country in the worlds like China that provides more than 700 million of employments.

Under the background of such employment crisis, issues of discrimination in employment in China is more notable. In the field of employment in China there is a lot of discrimination: Sex, age, disabilities, health, political affiliation, residence, height and appearance, released prisoners, ethnic, religious, sexual orientation, etc..

Moreover, with the continuous development of the society, there appear a lot of types of discriminations that are beyond imagination and comically, for example, constellation, blood type, Zodiac discrimination.

When the EU continued to establish and modify a variety of related protocols and directives in order to deal with increasingly complex employment discrimination, China did not have even one specific law and regulation to respond to employment discrimination. Anti-employment discrimination provisions dispersed in Constitution, Labor law, Law on the Protection of Disabled Persons, Law of the Protection of Rights and Interests of Women, Law of Employment Contracts, Law of Promotion of Employment. In addition, in some regulations and local laws which have less effective, there are some provisions about anti-discrimination. In addition, all of these laws still lack relevant relief mechanism. Anti-discrimination in employment in China has just started.

**SEVENTH.-** Both in Europe and China, there are a lots of types of employment discrimination. In order to form an effective comparison and reference, the text selects the three main types of discrimination: gender discrimination, age discrimination and disable discrimination, which entirely exist in the EU and China, to analyze.

**EIGHTH.-** The legal practice of anti-**gender discrimination** has the longest history and richest content in EU existing anti-discrimination frame. It exerts deepest and broadest influence to the building of anti-discrimination to others countries and

areas.

**The sources of law of anti-gender discrimination:** *Treaty establishing the European Community* is the earliest and the most far-reaching source of law of EU anti-gender discrimination.

Art. 21 of *Charter of Fundamental Rights of the European Union* provides:“ any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.”

Directives are the richest sources of anti-sex discrimination law with the most abundant achievements. EU has formulated 18 directives directly related to sex discrimination. In addition, there are a lots of case laws and decisions.

**Three stages for forbidding gender discrimination in employment:** equal treatment, positive action and mainstreaming stage.

**The equal treatment between women and man in the employment:**

1. Equal work/ work of equal value equal pay is the first domain that got attention for equality between sexes, and they are also the base for equality between sexes. The EU also has the richest law in this domain: up to now, the *EC Treaty* and *Directive 75/117/EEC*, *Directive 79/7/EEC*, *Directive 96/97/EC*, *Directive 97/80/EC*, *Directive 2006/54/EC* and a series of other directives that have made some complete provisions in equal work, equal pay.

2. In order to achieve equal treatment, EU established various directives: *Directive*

76/207/EEC, *Directive 79/7/EEC*, *Directive 96/97/EC*, *Directive 2002/73/EC*, *Directive 2006/54/EC*. Now this *Directive 2006/54/EC* is one of the core laws in the EU anti-sex discrimination laws. Its purpose is to take an important role in securing the substantial and comprehensive equality of men and women. It contains provisions to implement the principle of equal treatment in relation to: “(a) access to employment, including promotion, and to vocational training; (b) working conditions, including pay; (c) occupational social security schemes. It also contains provisions to ensure that such implementation is made more effective by the establishment of appropriate procedures.”

3. That obtain equal opportunity is the precondition of achieve equal treatment. EU specifically put forward “equal opportunity” in *Directive 2006/54/EC*. In the first art. 1 *Directive of 2006/54/EC*, it points out that the purpose of this *Directive* is to ensure the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. It stresses the importance of equal opportunities in employment, and it also provides the range of equality.

4. The laws about the equal treatment of social security are *Directives 79/7/EEC*, *Directive 2002/73/EC*, *Directive 2006/54/EC*, etc. In *Directive 79/7/EEC*, the purpose of this *Directive* is the progressive implementation, in the field of social security and other elements of social protection of the principle of equal treatment for men and women in matters of social security

**The exceptions to equal treatment:** firstly, different treatment based on a characteristic related to sex; secondly, the protection for the pregnant women and mothers; thirdly, positive action.

Pregnancy and parental leave: At present, except *Directive 2002/73/EC*, the EC also has other two directives related to the pregnancy and parental leave: *Directive*



92/85/EEC and *Directive 96/34/EC* (repealed by Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC ). The former one is about the protection for the women in the pregnancy, being in the labor and in nursing. The latter one is about the issue of parental leave because of the birth of the children.

In *Directive 2010/18/EU*, the period of parental leave is extended from three months to at least four months. It also changes the principle of non-transferable leave to be adjusted flexibly. The *Directive* also provides that the way to have the leave could be determined through the negotiation of the employer and employee. It could be taken for once or for stages. In this new directive, it also provides that for a laborer with a fixed period of working contract, the period of time provided in the contract should be taken as the standard to judge whether one owns the qualification of taking the leave.

**Sexual harassment:** Directive 2002/73/EC is the first time that EU makes the definition for the sex harassment legally, and considers it as a form of sex discrimination. This Directive could be divided into two: One is harassment, or harassment related to the sex of a person. If the unwelcomed action is related to a person's sex, and its purpose or effect will encroach a person's dignity, resulting an insulted, adversary, abased, or humiliated atmosphere, then this forms the harassment. The other is sexual harassment. Any unwelcomed action related to sex, no matter in the oral form or non-oral form or physical conduct, as long as its purpose or effect will encroach a person's dignity, resulting an insulted, adversary, abased, or humiliated atmosphere, then it is the sexual harassment. According to this Directive, harassment and sexual harassment are both a form of sex discrimination. And they should be banned. The resistance and obedience of a person to these kinds of harassment can not be used to affect the judgment proves.

Gender discrimination and social gender exclusion in the labor market: The gender discrimination in the labor market is a typical phenomenon of social gender exclusion. EU and China differ greatly in their stage and level of anti-discrimination. China simply learns or copies the EU law and social policies, which can not solve the problem of discrimination in the labor market. Economics research and social science research on gender discrimination in the labor market can perfectly make up for the limitation of legal researches.

**NINTH.- Age discrimination** is not as obvious as gender or racial discrimination. Taking age as the limit of admittance requires judging whether its reasons are reasonable enough to determine if it makes discrimination. Both age discrimination and age limit have a common characteristic-differential treatment. As a matter of fact, the scope of age discrimination is obviously narrower than that of age limit. When age limitation is unreasonable or illegal, it becomes age discrimination. Therefore, determining whether age limit is reasonable is of great importance to distinguishing age limit from age discrimination.

**Feature of age discrimination:** 1. Age discrimination involves each age group, not only senior; 2. Age discrimination might occur in each link of employment. It exists in not recruitment, but also salary, training, promotion, dismiss and retirement. 3. Age discrimination is closely related with employers' preferences. 4. Different industries hold different discriminations toward age groups. 5. Age discrimination exists in different employing units, public sector and private sector.

**The source of law of anti-discrimination:** 1. Since *Treaty of Amsterdam*, age has been officially listed into the scope of anti-discrimination which is protected by laws. In art. 13, the types of prohibited discrimination included age discrimination. 2. Art. 21 of

*Charter of Fundamental Rights of the European Union* prohibits any discrimination based on age is prohibited. Prohibition of age discrimination becomes an important rule of community law. 3. European Union formulated a general framework for equal treatment in employment and occupation: *Directive 2000/78/EC*, which prohibits new types of discrimination, including age. This is also one of the most important laws of European Union in prohibiting age discrimination in employment.

Subjects involved in this *Directive* cover a wide range, including all individuals of public and private departments in European Union, including public institutions. In this *Directive*, the groups that enjoy age protection are not confined to seniors, or certain age groups. It protects not only seniors but also youngsters and middle-aged persons equally. Under the guidance of European Union framework, each member country has not imposed limitations on the age range of staff. In addition, in the art. 11 provides: “Member States shall introduce into their national legal systems such measures as are necessary to protect employees against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment.”

**Exceptions of differentiated age treatment:** With respect to other discriminations, age discrimination has more exceptional regulations as follow:

1. When adopting superficial neutral standard on differentiated treatment, if the regulation, standard or behavior is objectively impartial, and appropriate approaches are adopted to realize legal objectives, it does not constitute age discrimination.
2. The measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and

freedoms of others, do not make discrimination.

3. Member States may provide that this *Directive*, in so far as it relates to discrimination on the age ground, shall not apply to the armed forces.

4. Member States may provide that a difference of treatment which is based on a characteristic related to any of the age grounds shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

5. With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the age ground.

It is these exceptions that allows the flexibility in dealing with different conditions of different member countries when applying this *Directive*, and facilitates each member country and organization in reaching a consensus on complicated age issue, thus bringing age discrimination into the scope of employment discrimination that should be prohibited.

Moreover, in order to deal with age discrimination, European Union has been taking the initiative to formulate social policies and hold social activities to confront age discrimination. The year 2012 is determined to be the European Year of Active Aging and Solidarity between Generations. Besides, age discrimination is also prohibited in express legal terms of European Union.

**Compulsory retirement age:** As a policy with differences, retirement age receives

different attitudes and regulations from each country. Accordingly, in this *Directive*, any article about compulsory retirement age is not added to this *Directive*, nor is there any specific article that states whether European Union agrees with compulsory retirement policy.

In China, there's no law or regulation prohibiting age discrimination. Art. 5 (2) of Employment Promotion Act (draft), which was published in 2007, listed age discrimination into the scope prohibited by laws, according to which: "workers' employment shall not be discriminated because of such factors as nation, race, gender, religious belief, age and physical disability." However, in Employment Promotion Act that was finally executed, age discrimination was deleted from the categories of anti-discrimination.

**TENTH.-** As different countries differ in their definition of disabled people, the data targeted at disabled persons in the investigation are also different. From an overall perspective, however, disabled persons could not get equal opportunities compared with the ordinary ones. Reason for this result mainly comes from the **discrimination on disabled persons** in various fields apart from the condition confinement of disabled persons themselves.

Convention on the Rights of Disabled Persons defines "**discrimination based on disability**", referring to any difference, exclusion or restriction based on disability. Its purpose or effect is to recognize, enjoy or exercise all human rights and basic freedom on the basis of harm or cancellation of equality to others in politics, economy, society, culture, citizen and all other fields. Discrimination based on disability includes all forms of discrimination, including refusal of providing reasonable convenience; "reasonable convenience" refers to necessary and appropriate modification and adjustment

according to specific demands without causing excessive or inappropriate burden, in order to guarantee that disabled persons could enjoy or exercise all human rights and basic freedom on the basis of equality to others.

According to European Disability Strategy 2010-2020 data, until the year of 2010, EU disabled population has reached 80 million, more than 1/6 of the European population. The average employment rate of European disabled persons is below 50%.

Such a low employment rate of disabled persons, apart from their own ability loss, greatly results from discrimination on disabled persons in employment. Data of Special Eurobarometer 317 indicates that 53% of Europeans believe there to be discrimination on disabled persons in their countries.

**The source of law of anti-disability-discrimination:** There are provisions about prohibiting disability discrimination, such as art. 19 of Treaty of Lisbon, art. 21 of *Charter of Fundamental Rights of the European Union* and *Directive 2000/78/EC*. In addition, EU has already signed *Convention on the Rights of Disabled Persons of the United Nations*, and formulated the concrete explanation of application of this *Convention* in *Council Decision 2010/48/EC*. This *Convention* enjoys legal power in EU and constitutes one of the sources of law forbidding employment discrimination on disabled persons.

In *Directive 2000/78/EC*, there are provisions about forbidding any kind of disability discrimination in the field of employment, including direct and indirect harassment. This *Directive* does not make a clear provision about the definition of disability or clearly points out what groups belong to the protection category of forbidding disability discrimination. The judgment in European Court, however, makes a definition of it. In 2006 in *Chacon Navas* the Court defined disability: “a limitation

which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life.”

The definition of disability made by EU has the following points asking for attention, as followed: 1. Disease is not disability. 2. Disability not only includes physically visible impairment, but also includes intellectual and mental impairment. 3. The objects protected in *Directive* in forbidding disability discrimination are not confined to disabled persons only.

This *Directive* covers all public sectors and private sectors in the community, including public institutions. The same as the equal employment of normal persons, disabled persons' employment protection includes all employment periods and links. Equal employment of disabled persons protected by this *Directive* shall not apply to the armed forces

Reasonable convenience provisions in this *Directive* are the most effective and practical protection to disabled persons, as well as the key to realize equal employment of disabled persons. Without reasonable convenience measure, it is impossible even if employers want to employ disabled persons. Without appropriate and convenient place, equipment, and work time, it is impossible for disabled persons to participate in work, not to mention promotion.

According to the investigation made by Employment Promotion Website of disabled persons in 2009, more than 90% of disabled persons strongly feel the hardship and torture in seeking a job in the market. Moreover, the investigation report also mentions that among all the external factors affecting the employment of disabled persons, discrimination ranks first. About 51.23% of disabled persons have selected it.

All through the 20 years from 1990 until now, China has gradually formed a legal system that guarantees the disabled persons. *Law on the Protection of Disabled Persons*, *Regulations on Disabled Education*, *Regulation on Employment of Disabled Persons*, *Taxation Reduction Policy of Disabled Persons* and a series of particular policies and regulations have made provisions of rehabilitation, education, employment, cultural life, social environment, labor protection, auxiliary career of disabled persons.

The Chinese government representatives signed *Convention on the Rights of Disabled Person* on July 30, 2007, and passed this *Convention* to be implemented by the highest legislative body of the country on June 26, 2008. It brings the policy of disabled persons in China the transition opportunity and prompts the career of Chinese disabled persons to make a big step forward.

**ELEVENTH.- Advantages of EU in anti-employment discrimination:** 1. Fine legal system of anti-employment discrimination and explicit fundamental principles in legislation and practice; 2. Overall and thorough legislation of anti-employment discrimination; 3. Rational and effective relief system; 4. Non-governmental organizations, citizens and society partner participation in EU anti-employment discrimination and so on.

**Shortcomings of anti-discrimination legislation of EU:** 1. The legal documents of anti-gender employment discrimination are too dispersive and complex, and some have already been outdated. 2. It is indecisive between the "positive action" and balance between the interests of employers and employees. 3. The separate legislation of anti-gender discrimination in employment is not conducive to solving the problem of multiple discrimination and so on.

**TWELFTH.-shortages of anti-employment discrimination legislation in China,**



as followed:

1. Lack of an explicit definition of employment discrimination; 2. Legislation system is imperfect and legal provision of employment discrimination lacks operability: A.lack of unified and effective legislation. B. Level legislative of lots government rules, regulations and the local laws is low, which include provisions of anti-discrimination employment. C. The provisions of legal judgment and punishment of employment discrimination boast shortcomings; 3. Lack of corresponding approach of relief; 4. The proofing responsibility distribution is unequal; 5. Constitution has not been completely judicialized, and the corresponding litigation system has not been established; 6. The existing security supervision system is not perfect; 7. Lack of the specialized agencies of equal opportunities; 8. lack of positive safeguard measures, etc..

**THIRTEENTH.-** In view of the serious problems and shortcomings existing in anti-employment discrimination in China and combined with the advanced experience of EU anti-employment discrimination, the corresponding legal countermeasures are put forward below:

1. Add, delete and integrate the corresponding legal documents to further establish and improve China's legal system of anti-employment discrimination.

A. *Law on the Protection of Rights and Interests of Women, Labor Law, Employment Promotion Law, Labor Contract Law and Law on the Protection of Rights and Interests of the Disabled* should be further refined and improved. The provisions in these laws to prohibit discrimination in employment and to protect the rights and interests of the disadvantaged groups are too principled and abstract, which lack operability in the real life. When were discriminated , the victims cannot relieve their rights through these legal documents. Therefore, the main legislations of

anti-discrimination employment of EU should be drawn lessons from. The existing legislations should be refined and improved to bring it operability.

B. It is the formulation of a specialized *Anti-employment Discrimination Law*. China should draw experience from EU. It is of great importance to formulate a unified anti-discrimination legislation in order to better handle the possible complicated and varying phenomenon of discrimination that may appear in the future. In this way, it could prohibit the phenomenon of discrimination on the one hand. On the other hand, it could effectively handle the problem of multiple discriminations. Moreover, it could prevent from the situation of one law for one thing in the anti-employment discrimination and the intense conflicts of various specialized legislations.

C. Make the Well-directed and staged policies. EU pays full attention to policy making. Since 1980s, nearly every 4.5 years EU will make a staged program to guide the non-discrimination work. The staged policy will improve the shortcomings of the previous work and adopt a well-directed direction or measures toward the conditions of discrimination in a particular time. The discrimination problem cannot be solved in one day. We have to adopt well-directed and staged policy guidelines to gradually advance the goal of employment equality.

2. Draw experience from EU, reasonably determine the main contents of anti-employment discrimination and clearly define the related concepts and standards.

A. By drawing experience from EU, the behaviors of discrimination could be divided into direct discrimination, indirect discrimination, harassment and instruction to discriminate against persons.

B. In the legislation of anti-employment discrimination, discrimination criteria

should be explicitly stipulated. Only by clearly stipulating the discrimination criteria can we determine whether the employers' behavior really constitutes employment discrimination and can we distinguish discrimination from the treatment of reasonable distinction.

C. A reasonable and effective legal responsibility mechanism should be established. The establishment of the appropriate and effective legal responsibility mechanism can have a deterrent and restrictive function on the employing units to effectively prevent from the occurrence of discrimination.

### 3. Effective relief approach

There are no rights without reliefs. The lack of effective relief approaches is the major problem existing in the current discrimination in China. In order to solve this problem, the following measures could be adopted:

A. Special-purpose anti-employment discrimination organizations could be set up, added with the public interest litigation. These organizations can lodge complaints on behalf of victims to help the victims realize the equal employment right.

B. There should be clear provisions defining that when the laborers' equal employment rights are violated, they can realize judicial relief through the lawsuit, rather than the labor arbitration. Judicial relief is the last and most powerful defense guaranteeing the civil rights. When the laborers suffer from discrimination in employment, they have the right of filing civil lawsuits in order to achieve the equal employment right. The judge could decide the illegal behaviors of the employers and give appropriate compensation to the victims according to the requirements of the party involved, as well as the practical situation. They can also be ordered to pay punitive

compensation when necessary.

C. Inversion of burden of proof should be implemented. In the face of the strong employing unit, the infringed workers are often in a vulnerable position, and it is generally very difficult to get evidence of employment discrimination. In accordance with the general rules of civil litigation, it is very difficult to win, which makes it become the reason why a lot of female workers do not want to file the lawsuits. However, the rule of onus proof conversion makes workers brave enough to file a lawsuit in the face of employment discrimination, which has become the powerful weapon of anti-employment discrimination.

4. Encourage citizen participation in anti-gender employment discrimination and arouse citizens' consciousness of rights and develop the initiative of non-governmental organizations.

The state should allow the establishment of all kinds of non-governmental organizations committed to anti-discrimination. The third party position and non-profit nature of non-governmental organizations determine that it could play an active role both in the anti-gender employment discrimination or other fields of anti-employment discrimination. At the appropriate time, equal opportunities could be established to strengthen the supervision and evaluation on employment.

It should realize the organized interaction and competition of a variety of institutions, social groups and organizations. In addition to various government agencies responsible for the implementation of employment equality set up by EU, non-governmental organizations also play a positive role in the process of promoting the development of employment equality. At the same time, from a part of the cases above, it could be seen that all kinds of trade union organizations play an important role in the

process of guaranteeing employment equality. These institutions, social groups and organizations are not isolated. Rather, in the process promoting employment equality, they have constant competition and interaction. NGOs of China have a late start and poor development, and the same is true for trade unions and other organizations. To eliminate discrimination and achieve equality in employment can not be realized by the government alone. A healthy modern civil society is needed, which is also the direction of reference and efforts of China.

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## RESUMEN Y CONCLUSIONES EN ESPAÑOL

**PRIMERA.-** En época de post-crisis económica global, bajo la presión inflacionaria con tendencia marcadamente decreciente, el empleo en situación cada vez más grave, la persistencia del desempleo agregado, el envejecimiento de la población, el cambio climático y la bancarrota económica de algunos países, la discriminación laboral se ha convertido en un problema muy elevado en todo el mundo, incluidos la Unión Europea y China.

Teniendo en cuenta los éxitos en la lucha contra la discriminación laboral en Europa, logrados a través de sesenta años de experiencias tras el fin de la Segunda Guerra Mundial, Europa ha sido una de las regiones más desarrolladas en lo que concierne a la investigación de la discriminación laboral, mientras China únicamente ha comenzado a emprender acciones contra la discriminación laboral lentamente, desde hace apenas unos años.

En 2008, el “Dictamen del grupo de expertos sobre el anteproyecto de Ley contra discriminación laboral” fue promulgado por el Instituto de Derecho Constitucional de la Universidad de Ciencia Política y Derecho de China.

En 2009 y 2010, durante el periodo anual de la Asamblea Nacional Popular, el mismo Instituto presentó la moción y propuesta legislativas respecto a este tema a los dos Congresos respectivamente.

En este sentido, cabe señalar que se tomaron las Leyes y los Reglamentos en materia de lucha contra la discriminación laboral de la Unión Europea como una de las principales referencias y bases al elaborar el Dictamen anteriormente mencionado. Merece la pena estudiar y aprovechar atentamente la amplia experiencia de la Unión Europea en este



ámbito. El mayor problema en relación a la lucha frente a la discriminación laboral en China consiste en la falta de una Ley específica contra la misma.

La presente tesis trata de observar y analizar longitudinalmente la estructura general de la lucha contra la discriminación laboral en la Unión Europea, a fin de ofrecer estas experiencias y las referencias necesarias para las investigaciones relativas a este tema en China.

**SEGUNDA.-** A pesar del complicado entorno económico y político en el interior y el exterior, con los constantes esfuerzos realizados por los legisladores, los poderes ejecutivos, las organizaciones no gubernamentales, los académicos y los ciudadanos para luchar contra la discriminación laboral, Europa ha llegado a ser la zona más desarrollada en todo el mundo por su sistema contra la discriminación en la vida laboral y también en otros aspectos. De manera general, el proceso del desarrollo del sistema contra la discriminación laboral se puede dividir en cuatro etapas.

-- La primera etapa se sitúa entre el final de la Segunda Guerra Mundial hasta principios de los años setenta. El Tratado firmado con el fin de crear la Comunidad Económica Europea contiene ya cláusulas que prohíben la discriminación basada en el origen nacional y que protegen la libertad de circulación de los ciudadanos. En cualquier caso, las políticas en esta etapa cuentan con una finalidad básicamente económica.

-- La segunda etapa abarca desde los años setenta hasta los años noventa del pasado siglo. En esta fase, considerando la estricta y paulatina integración europea, se establecieron muy pocos documentos programáticos y declaraciones. Sin embargo, a un tiempo teoría y práctica contra la discriminación se iba difundiendo en las sociedades del ámbito de la comunidad europea, de ahí que se estimulara un diálogo en la sociedad civil cada vez más amplio, así como que se aplicaran una serie de políticas concretas, lo cual incluye una serie de aspectos básicos:

1.- Se comprendieron profundamente los diversos tipos de discriminación. Los académicos, los políticos y la sociedad no sólo prestaron la atención a la igualdad de género, sino también a la discriminación racial, a la discriminación contra las personas con discapacidad y a la discriminación por edad.

2.- Se expandieron distintas perspectivas políticas.

3.- Los principios de actuación evolucionaron desde la simple reivindicación del derecho a la igualdad ante la ley hasta la aplicación de políticas públicas de apoyo y creación de instituciones de asistencia respecto de los grupos sociales discriminados.

-- La tercera etapa se extiende entre los años 2000 y 2009. En 2000, fueron sucesivamente aprobadas dos Directivas en materia de no discriminación: Directiva 2000/43/CE y Directiva 2000/78/CE. Ambas establecieron las normas mínimas para proteger los derechos de los ciudadanos contra la discriminación en el territorio de la Unión Europea, obligando a los Estados a crear los organismos especializados de promoción de la igualdad.

El año 2004, se publicaron el “Libro verde sobre la política social” y el Libro Verde sobre “Igualdad y no discriminación en la Unión Europea ampliada”.

En el año 2005 fue presentada la “Estrategia marco contra la discriminación y por la igualdad de oportunidades para todos”, en la cual la Unión propone siete enfoques en lo que concierne a la de la lucha contra la discriminación en futuro.

El mes de octubre del año 2006 vio la luz la “Decisión núm. 1672/2006/CE del Parlamento Europeo y del Consejo, de 24 de octubre de 2006”. Además, ese mismo año se presentó la Directiva 2006/54/CE.

En el año 2007, además de las nuevas medidas y políticas adoptadas a través de la proclamación del “Año europeo de la igualdad de oportunidades para todos”, cabe señalar que en el “Informe sobre el empleo en Europa 2007” aparece un párrafo de énfasis sobre el empleo entre los jóvenes.

La crisis económica mundial de 2008 afectó en gran medida a la Unión Europea, y como consecuencia de ello se vio debilitada la creación de empleo, reaccionando la Unión Europea con el relanzamiento de la “Estrategia de Lisboa”.

En 2009 la Unión Europea puso en marcha las medidas de control a corto plazo sobre el empleo. A pesar de que dichas medidas no poseen una finalidad directa de lucha contra la discriminación laboral sirven para informar oportunamente acerca de las condiciones en relación con la cuestión.

-- En fin, la cuarta etapa constituye el principio de una nueva era, pues a partir del año 2010 la Unión Europea recuperó el entusiasmo por luchar contra la discriminación laboral. Es más, propuso una nueva estrategia política, “Europa 2020”, para la próxima década, cuya finalidad no sólo es superar la crisis sino también recuperar el crecimiento. De tal forma, la lucha contra la discriminación laboral también ha entrado en una nueva fase. El 8 de marzo, la Directiva 2010/18/CE, que incluye la estrategia para la igualdad entre mujeres y hombres, sustituyó a la Directiva 96/34/CE.

**TERCERA.-** Actualmente, en la Unión Europea cada Estado miembro debe acomodarse a las exigencias de las normas comunitarias en materia de lucha contra la discriminación en el empleo, la formación y la igualdad de trato en el trabajo. A diferencia del sistema internacional de los derechos relativos a otros tipos de discriminación, los Estados miembros han tenido que elaborar nuevas leyes contra la discriminación laboral y realizar modificaciones sobre todos los textos legales conforme a la legislación de la Unión Europea, admitiendo el efecto indirecto de la aplicación del derecho comunitario.

Sin embargo, por otra parte, las directivas de la Unión se admiten y aplican directamente en los procedimientos judiciales dentro de los Estados, gozando así del efecto directo. Además, todas las directivas contra la discriminación de la Unión Europea se aplican tanto para el sector público como privado. En fin, la Unión Europea estableció un marco general para la lucha contra discriminación para que todos los Estados miembros puedan seguirlo, hecho que le permite ser aprovechada también por los países y regiones tanto en la legislación como en la práctica judicial.

**CUARTA.-** La “acción positiva”, expresión que también se conoce en diferentes países y regiones europeos como “acción afirmativa” (*affirmative action*) o “discriminación inversa” (*reverse discrimination*) es el término que se da a una acción que pretende establecer políticas y ofrecer ciertos recursos que se dirigen a un determinado grupo social con el objetivo de compensar a colectivos tradicionalmente desfavorecidos o discriminados.

Existe mucha polémica alrededor de los postulados de la “acción afirmativa”, puesto que el tratamiento preferencial para los grupos minoritarios puede ir acompañado de un deterioro en las condiciones de vida de otros grupos sociales, teniendo en cuenta los limitados recursos disponibles. Así pues, hay que ser muy prudente antes de iniciar las medidas de “acción positiva”, y comprender la distinción entre ella y la discriminación. Si la “acción positiva” obstruye a la disponibilidad de igualdad de oportunidades de otros grupos, no debe ser legalizarla. No obstante, si se proponen objetivos razonables, y si las actuaciones se dirigen exclusivamente a los grupos vulnerables, entonces es oportuno reconocerla como un instrumento muy importante para la lucha contra la discriminación.

En resumen, es necesario conseguir constantes avances, modificarla y mejorarla conforme a nuevos propósitos y necesidades a lo largo del tiempo, hasta derogarla en un

futuro para que llegue a realizarse verdaderamente la igualdad entre todos los grupos sociales.

**QUINTA.-** En la práctica, existen muchas dificultades respecto a la exigencia de los tribunales de probar la intención discriminatoria, especialmente en el caso de la discriminación indirecta. Resulta muy importante, por tanto, aplicar correctamente el reparto de la carga de la prueba, que puede determinar la decisión final de los procedimientos. Una regulación inapropiada del reparto de la carga de la prueba puede hacer fracasar para las víctimas de discriminaciones el medio más fiable para proteger sus derechos e impedir que leyes y reglamentos se apliquen de manera adecuada.

En cuanto a los litigios por discriminación en el empleo, cabe señalar como, generalmente, se aplica “la inversión de la carga de la prueba” en el mundo. El demandante no tiene que demostrar la existencia del hecho sino simplemente reclamarlo, pues la legislación atribuye la carga de la prueba al demandado que niega la existencia del hecho afirmado por el demandante.

Cuando la parte demandada no pueda hacerlo, el Tribunal se pronunciará a favor del demandante. Sea como fuere, este reparto de la carga de prueba favorece a la parte demandante, al ser el empleador quien deba aportar los elementos probatorios. En otras palabras, el demandante debe acreditar el trato desigual que se haya producido, lo cual permite deducir la posible apariencia de discriminación en el lugar de trabajo. La parte demandada tiene que justificar y demostrar la decisión adoptada y probar que su actuación tiene causas legítimas. Y cuando la parte demandada no es capaz de justificar el carácter justo y proporcionado del trato diferenciado, se podrá constatar la existencia de la discriminación.

**SEXTA.-** La actual situación del empleo en China es bastante grave, pues el país está

afrontando la guerra del empleo más grande del mundo. China crea las oportunidades de empleo de un 26% de la población laboral del mundo, con un 9,6% de los recursos naturales mundiales, un 9,4% de los recursos de capital, un 1,85% del conocimiento y los recursos técnicos y un 1,83% de los recursos internacionales. Es decir, en el ámbito laboral no existe ningún país como China, cuyo mercado de trabajo ofrece más de 700 millones de empleos.

Sin embargo, ante un escenario como el de la crisis del empleo, los problemas de discriminación en el empleo en China se vuelven más notables, pues existe un elevado número de causas de discriminación: el sexo, la edad, la discapacidad, la salud, la afiliación política, la residencia, la altura y el aspecto, los presos liberados, la étnica, la religiosa, la orientación sexual, etc.

Además, con el desarrollo continuo de la sociedad, aparecen numerosos tipos nuevos de discriminación cuyo origen parece exceder la imaginación y, si no fuera por sus consecuencias, podrían resultar casi cómicos, por ejemplo, la constelación, el tipo de sangre o el signo del zodiaco.

Mientras la UE ha continuado estableciendo y modificando su amplia variedad de protocolos cada vez más complejos relacionados directamente con el fin de luchar y tratar la discriminación en el empleo, China no tenía ni una ley específica ni una regulación para responder a la discriminación laboral. Las medidas de lucha contra la discriminación en el empleo dispersaron diferentes previsiones en la *Constitución*, la *legislación laboral*, la *Ley sobre la Protección de las Personas con Discapacidad*, la *Ley de la Protección de los Derechos e Intereses de las Mujeres*, la *Ley de Contratos de Trabajo*, la *Ley de Promoción del Empleo*. Por otra parte, en algunas normas y leyes locales que tienen menor eficacia hay algunas previsiones sobre la no discriminación. Además, todas estas leyes carecen todavía de mecanismos de aplicación y defensa relevantes. La lucha contra la discriminación en el empleo en China simplemente acaba

de empezar.

**SÉPTIMA.-** Tanto en Europa como en China existen diferentes tipos de discriminación en el empleo. Con el fin de desarrollar una comparación y referencia eficaz, este estudio selecciona para su análisis los tres principales tipos de discriminación: la discriminación por género, la discriminación por edad y la discriminación de los discapacitados, pues ambas se manifiestan en la Unión Europea y en China.

**OCTAVA.-** La práctica legal de la lucha contra la discriminación por género tiene una larga historia y un contenido más rico en la Unión Europea, ejerciendo una profunda y amplia influencia en la construcción de un sistema de lucha contra la discriminación en otros países y áreas.

**Las fuentes del derecho en la lucha contra la discriminación por género:** El Tratado de la Comunidad Europea constituye la más antigua norma de referencia y la fuente de amplio alcance más profunda de la normativa en la lucha contra la discriminación por género en la Unión Europea.

El artículo 21 del Acta Constitutiva de los *Derechos Fundamentales de la Unión Europea* establece que cualquier discriminación basada en el sexo, raza, color, motivos étnicos u orígenes sociales, características genéticas, lengua, religión o convicciones, políticas o de cualquier otro tipo, pertenencia a una minoría nacional, patrimonio, nacimiento, discapacidad, edad u orientación sexual estará prohibida.

Las directivas son la fuente más rica de la normativa en la lucha contra la discriminación por sexo, y las que poseen más abundantes logros. La Unión Europea ha formulado numerosas directivas directamente relacionadas con la discriminación sexual. Además, hay una gran cantidad de jurisprudencia y Decisiones en la materia.

**Tres etapas para prohibir la discriminación de género en el empleo:** la igualdad de trato, la acción positiva y la etapa actual.

**La igualdad de trato entre mujeres y hombre en el empleo:**

1.- A igual trabajo o trabajo de igual valor, debe corresponderle igual salario. Esta es la primera medida que llamó la atención sobre la igualdad entre sexos, siendo también la base para el inicio de la igualdad. La Unión Europea también tiene la legislación más rica en este ámbito: hasta ahora, el *Tratado de la Comunidad Europea* y las *Directivas 75/117/CEE, 79/7/CEE, 96/97/CE, 97/80/CE, 2006/54/CE* fundamentalmente, pero también otra serie de ellas han previsto disposiciones completas respecto a la máxima señalada: a igual trabajo, igual salario.

2.- Con el fin de lograr la igualdad de trato, la Unión Europea aprobó distintas directivas: *Directiva 76/207/CEE, Directiva 79/7/CEE, Directiva 96/97/CE, Directiva 2002/73/CE, Directiva 2006/54/CE*, siendo ésta última una de las normas nucleares de la lucha contra la discriminación por sexo en el territorio de la Unión. Su propósito es asumir un papel determinante a la hora de asegurar la igualdad sustancial y completa entre hombres y mujeres. Contiene previsiones a implementar relativas al principio de igualdad de trato en relación con: a) el acceso al empleo, incluida la promoción, y la formación profesional; b) las condiciones de trabajo, incluida la retribución; c) los planes profesionales de seguridad social. También contiene preceptos cuyo objeto es garantizar que dicha aplicación sea más eficaz mediante el establecimiento de los procedimientos adecuados.

3.- Obtener la igualdad de oportunidades es la condición previa para lograr la igualdad de trato. La Unión Europea ofrece específicamente “igualdad de oportunidades” en la *Directiva 2006/54/CE*. Su primer artículo señala que el objetivo de esta Directiva es garantizar la aplicación del principio de igualdad de oportunidades e igualdad de trato



entre hombres y mujeres en asuntos de empleo y ocupación, de forma que regula la importancia de la igualdad de oportunidades en el empleo, proporcionando también rango de igualdad.

4.- Las normas sobre la igualdad de trato en materia de Seguridad Social son, entre otras, las *Directivas 79/7/CEE, 2002/73/CE y 2006/54/CE*. El objetivo de la primera de ellas era la implementación progresiva en el área de Seguridad Social y otros elementos de la protección social de la igualdad de trato para hombres y mujeres en dicha materia.

**Las excepciones en la igualdad de trato:** en primer lugar, el trato diferencial basado en una característica relacionada con el sexo; en segundo lugar, la protección para las mujeres embarazadas y las madres; en tercer lugar, la acción positiva.

El embarazo y la excedencia por paternidad. En la actualidad, además de la *Directiva 2002/73/CE*, existen otras dos directivas relacionadas con el embarazo y la excedencia por paternidad: la *Directiva 92/85/CEE* y la *Directiva 96/34/CE* (derogada por la *Directiva del Consejo 2010/18/UE* de 08 de marzo 2010 aplicando del Acuerdo Marco revisado sobre el permiso parental concluido por BUSINESSSEUROPE, la UEAPME, el CEEP y el CES). En ellos se recoge la protección de las mujeres durante el embarazo, el desempeño de la actividad laboral o en la hospitalización, además de cuestiones sobre el permiso parental por nacimiento de hijos.

En la *Directiva 2010/18/UE*, el período del permiso parental se ve extendido de tres meses a un mínimo de cuatro. También cambia el principio del permiso no transferible, para poder ajustarse al mismo de una forma más flexible. La Directiva también establece que la manera de obtener el permiso se podría determinar a través de la negociación entre empleador y empleado, pudiendo utilizarse de una sola vez o por etapas. La nueva norma también establece que para un trabajador con un contrato de trabajo temporal, el período de duración del mismo se debe tomar como referencia para

determinar si se posee la capacidad para acceder a este tipo de permiso.

**El acoso sexual:** La *Directiva 2002/73/CE* es la primera que establece una definición legal del acoso sexual, considerándolo como una forma de discriminación. La *Directiva* se podría dividir en dos bloques: el primero giraría en torno al hostigamiento o el hostigamiento relacionado con el sexo de una persona, pues si la acción censurable está relacionada con esta cuestión, y su propósito o su efecto invadiera la esfera de la dignidad de la persona, resultando un insulto, humillación, agresión o una atmósfera de trabajo en estos términos, la norma viene a considerarlo como acoso.

El segundo hace referencia al acoso sexual. Cualquier acción desagradable o acosadora relacionada con el sexo, sin importar su forma oral, no oral o conducta física, siempre que su finalidad o efecto invadieran o vulneraran la dignidad de la persona en los términos antes señalados, entonces se habla de acoso sexual.

Según esta Directiva, tanto el acoso como el acoso sexual son una forma de discriminación, y deben ser prohibidos. La resistencia o la obediencia de una persona a estas distintas formas de acoso no pueden ser utilizadas para afectar o alterar la prueba en un juicio.

**La discriminación por género y la exclusión por género social en el mercado laboral.** Esta forma de discriminación por género en el mercado laboral es un fenómeno típico de la exclusión social por género. La Unión Europea y China se diferencian enormemente en su evolución y en el nivel de protección otorgado en esta materia. China simplemente aprende o copia la legislación europea y sus políticas sociales, que no pueden resolver el problema de la discriminación en su mercado laboral. Los economistas investigan también la discriminación por género en el mercado de trabajo como forma de compensar la limitación de las investigaciones legales.

**NOVENA.- La discriminación por edad** normalmente no resulta tan obvia como aquellas basadas en cuestiones de género o raciales. En este punto surge el problema de la edad como límite de admisión, hecho que requiere juzgar si las razones de la misma son lo suficientemente justificadas para analizar y considerar si se produce algún tipo de discriminación. Tanto la discriminación por edad como la imposición de límites de edad tienen un tratamiento común y características diferenciales.

En este sentido, el alcance de la discriminación por edad es obviamente más estrecho. Cuando la limitación de edad no resulta razonable o es ilegal, se convierte en una discriminación por edad. Por tanto, la determinación de la razonabilidad de dichos límites es básica a la hora de distinguir lo que es legal de los que supone una discriminación.

**Características de la discriminación por edad:**

- 1.- La discriminación por edad involucra a cada grupo de edad, no sólo a los de mayor edad.
- 2.- La discriminación por edad puede ocurrir en cada eslabón del empleo. Existe tanto en la contratación como en el salario, la formación, la promoción, el despido o la jubilación.
- 3.- La discriminación por edad está estrechamente relacionada con las preferencias de los empleadores.
- 4.- En diferentes industrias se manifiestan diferentes discriminaciones relativas a los grupos de edad.
- 5.- La discriminación por edad existe en diferentes unidades de empleo, y tanto en el sector público como el sector privado.

### **Las fuentes legislativas de las normas sobre no discriminación:**

1.- Desde el *Tratado de Amsterdam*, la edad está oficialmente incluida en el listado de la lucha contra la discriminación, quedando protegida por su legislación. En su artículo 13, entre los tipos de discriminación prohibidos se incluye la discriminación por edad.

2.- El artículo 21 de la *Carta de los Derechos Fundamentales de la Unión Europea* prohíbe cualquier discriminación basada en la edad, convirtiendo así esta prohibición en una importante regla del derecho comunitario.

3.- La Unión Europea formuló un marco general para la igualdad de trato en el empleo y la ocupación, la *Directiva 2000/78/CE*, que prohibió nuevos tipos de discriminación, entre ellos la edad, constituyendo de tal forma una de las normas más importantes de la legislación europea en este ámbito.

Los sujetos amparados por esta *Directiva* cubren un amplio elenco, abarcando a todos los individuos de las empresas y departamentos públicos y privados en la Unión Europea, incluidas las instituciones. En esta *Directiva*, los grupos que gozan de la protección por su edad no se limitan a los mayores o a grupos de edad determinados, ya que se protege no sólo a las personas mayores, sino también a los jóvenes y las personas de mediana edad.

Bajo las premisas del marco legal trazado por la Unión Europea, los países miembros no han impuesto limitaciones en el rango de edad de los trabajadores. Además, su artículo 11 dispone que los Estados Miembros deben introducir en sus sistemas legales nacionales las medidas que sean necesarias para proteger a los empleados en contra del despido o cualquier otro trato desfavorable por parte del empleador como reacción a una reclamación presentada dentro de la empresa o a cualquier proceso judicial destinado a exigir el cumplimiento del principio de igualdad de trato.

**Excepciones en el tratamiento diferenciado por razón de la edad:** Con respecto a otras discriminaciones, la discriminación por edad tiene más regulaciones excepcionales, en concreto:

1.- Cuando se adopta una norma estándar neutral sobre trato diferenciado, si el reglamento, la norma o la conducta es objetivamente imparcial y se considera apropiada su adopción para alcanzar los objetivos legales, ésta no constituirá la discriminación por edad.

2.- Las medidas que se establezcan a través de los derechos nacionales. Estas son, en una sociedad democrática, necesarias para la seguridad pública, para el mantenimiento del orden público y la prevención de ofensas penales, para la protección de la salud y para la protección de los derechos y las libertades de los demás.

3.- Los Estados Miembros podrán disponer que esta *Directiva*, en cuanto que aborda la discriminación por motivos de edad, no se aplique a las fuerzas armadas.

4.- Los Estados Miembros podrán igualmente disponer que un trato diferenciado basado en una característica relacionada con la edad no constituirá una discriminación en aquellos supuestos en los cuales, por razón de la naturaleza de las actividades profesionales desarrolladas o del contexto en el cual se llevan a cabo, dicha característica constituya un genuino y determinado requisito profesional, siempre y cuando el objetivo perseguido sea legítimo y el requisito proporcionado.

5.- Con la intención de garantizar la plena igualdad en la práctica, el principio de igualdad de trato no tiene que impedir a ningún Estado Miembro el mantenimiento o la adopción de medidas específicas para prevenir o compensar las desventajas que puedan producirse por razón de la edad.

Estas excepciones, que permiten cierta flexibilidad respecto a las diferentes condiciones fijadas por los distintos países miembros a la hora de aplicar esta *Directiva*, facilitan a cada país y a la Unión Europea la posibilidad de alcanzar consensos sobre la cuestión de la edad, de forma tal que se llegue aun acuerdo respecto a lo que se debe y lo que no se debe prohibir.

Además, con el fin de tratar la discriminación por edad, la Unión Europea ha tomado la iniciativa de formular las políticas sociales y celebró distintas actividades para hacer frente a este tipo de discriminación. Así, el año 2012 se declaró como Año Europeo del Envejecimiento Activo y la Solidaridad Intergeneracional.

**La edad de jubilación obligatoria.** Como una política con diferenciaciones, la edad de jubilación recibe distintos tratamientos y regulaciones legales en cada Estado. En consecuencia, cualquier artículo sobre la edad de jubilación obligatoria no se incluye en esta *Directiva*, ni tampoco artículos específicos en los cuales la Unión Europea se pronuncie sobre si está o no de acuerdo con las políticas de jubilación obligatoria.

En China, no hay ninguna ley o reglamento que prohíba la discriminación por edad. Únicamente en el artículo 5 (2) de la Ley de Promoción del Empleo (draft), que fue aprobada en 2007, figura la discriminación por edad como algo prohibido por las normas, en tanto según el mismo “el empleo de los trabajadores no podrá sufrir discriminaciones a causa de factores tales como la nación, raza, sexo, creencia religiosa, edad y discapacidad física”. Sin embargo, en la Ley de Promoción del Empleo la discriminación por edad ha sido eliminada de las categorías de la lucha contra la discriminación.

**DÉCIMA.-** Ante las distintas definiciones de persona con discapacidad que existen en cada país, los datos dirigidos a estas personas en la investigación también son diferentes.

Desde una perspectiva general, sin embargo, las personas con discapacidad tienen mayores dificultades para conseguir la igualdad de oportunidades en comparación con los que no la padecen. La razón de este resultado proviene principalmente de **la discriminación a las personas con discapacidad** en diversos ámbitos, aparte de la propia situación de confinamiento o alejamiento social de las propias personas con discapacidad.

La Convención sobre los Derechos de las Personas con Discapacidad define **la discriminación basada en la discapacidad**, refiriéndose a cualquier diferencia, exclusión o restricción basada en la misma. Su propósito o efecto pretende reconocer, disfrutar o ejercer todos los derechos humanos y las libertades básicas sobre la base de una alteración de la igualdad con los demás en política, economía, sociedad, cultura, ciudadanía y el resto de áreas presentes en la sociedad. La discriminación basada en la discapacidad incluye todas las formas de discriminación, incluida la negativa de proveer la ventaja razonable. En este sentido, “comodidad razonable” se refiere a la necesidad y la modificación apropiada y el ajuste de acuerdo a las demandas específicas sin causar una carga excesiva o inadecuada con el fin de garantizar que las personas discapacitadas puedan disfrutar o ejercer todos los derechos humanos y las libertades fundamentales sobre la base de la igualdad respecto a las demás personas.

Según los datos de la Estrategia Europea sobre Discapacidad 2010-2020, hasta el año de 2010 la población de personas con discapacidad de la Unión Europea ha alcanzado 80 millones, más de una sexta parte de la ciudadanía, situándose la tasa media de empleo de estas personas en Europa por debajo de 50%.

Esta baja tasa de empleo, aparte de por su propia pérdida o disminución de capacidad, deriva en un gran porcentaje de forma directa de la discriminación en el acceso al empleo sufrida por este sector de la población. Los datos del Eurobarómetro Especial 317 indican que un 53% de los europeos considera que existe discriminación sobre las

personas con discapacidad en sus respectivos países.

**La fuente legislativa de la lucha contra la discriminación por discapacidad.** Existen diferentes disposiciones sobre prohibición de discriminación por discapacidad, como los artículos 19 del *Tratado de Lisboa*, 21 de la *Carta de los Derechos Fundamentales de la Unión Europea* o la *Directiva 2000/78/CE*. Además, la Unión Europea ha firmado la *Convención sobre los Derechos de las Personas con Discapacidad* de las Naciones Unidas, y se formuló la explicación concreta de la aplicación de este *Convenio* en la *Decisión del Consejo 2010/48/CE*. Este Convenio tiene poder legal en el territorio europeo y constituye una de las fuentes de la ley que prohíbe la discriminación laboral contra las personas con discapacidad.

En la *Directiva 2000/78/CE* se contemplan previsiones sobre la prohibición de cualquier tipo de discriminación por discapacidad en el ámbito del empleo, incluido el acoso directo e indirecto. Ahora bien, esta norma no establece ningún precepto claro sobre la definición de discapacidad ni señala qué grupos pertenecen a la categoría protegida por su discapacidad.

Por su parte, el Tribunal Europeo sí ha venido a realizar una definición en un pronunciamiento del año 2006, señalando que se trata de una limitación la física, mental o por impedimentos psicológicos que dificulta la participación de la persona interesada en la vida profesional.

Cabe destacar los siguientes aspectos en la definición de discapacidad realizada por la Unión Europea: 1.- La enfermedad no constituye en sí misma discapacidad. 2.- La discapacidad no sólo incluye el impedimento físico visible, sino también incluye el deterioro intelectual y mental. 3.- Los bienes protegidos en la *Directiva* al prohibir la discriminación por discapacidad no se limitan sólo a las personas con discapacidad.



Esta *Directiva* abarca todos los sectores públicos y privados existentes en la comunidad, incluidas las instituciones públicas. Lo mismo que en el ámbito de la igualdad en el empleo de las personas no discapacitadas, la protección del empleo de las personas minusválidas incluye todas las fases del empleo. Esta igualdad a favor de las personas discapacitadas no afectará, en cualquier caso, a las fuerzas armadas.

Las previsiones de esta *Directiva* buscan la protección más eficaz y práctica posible para las personas de este grupo social, así como las claves para encontrar la igualdad en el empleo. En este sentido, sin medidas adecuadas y razonables, parece imposible lograr la igualdad, incluso cuando los empresarios quieran contratar personas con discapacidad. Sin un lugar apropiado y conveniente, el equipamiento adecuado, y un tiempo del trabajo adaptado a sus necesidades, resulta muy difícil para estas personas participar con normalidad en el trabajo, por no mencionar la promoción en el mismo.

Según la investigación realizada para la Promoción del Empleo de la página web de las personas discapacitadas en 2009, más del 90% de las personas con discapacidad sienten la dureza que supone la búsqueda de un puesto de trabajo en el mercado. Además, el reportaje de investigación también menciona que entre todos los factores externos que afectan a la contratación de personas con discapacidad, la discriminación ocupa en el primer lugar. En torno al 51,23% de las personas con discapacidad ha constatado tal realidad.

A lo largo de los años transcurridos desde 1990 hasta la actualidad, China ha formado gradualmente un sistema jurídico garantista para las personas con discapacidad. *La Ley sobre la Protección de las Personas con Discapacidad*, *los Reglamentos sobre la Educación Minusválida*, *el Reglamento para el Empleo de las Personas Discapacitadas*, *la Política de Reducción de Impuestos de los inhabilitados* y otra serie de políticas específicas y reglamentos concretos han previsto cuestiones y normas sobre rehabilitación, educación, empleo, vida cultural, entorno social, protección laboral y

acerca de la carrera auxiliar de las personas discapacitadas.

Los representantes del gobierno chino firmaron la *Convención sobre los Derechos de las Personas Discapacitadas* el día 30 de julio de 2007, y la misma pasó a ser implementada por el máximo órgano legislativo del país en fecha 26 de junio de 2008. La política de las personas con discapacidad en China ofrece una oportunidad de transición y provoca que las personas discapacitadas chinas puedan entrar en la carrera para dar un gran paso hacia adelante.

**UNDÉCIMA.- Ventajas de la Unión Europea en la lucha contra la discriminación en el empleo:**

- 1.- Un sistema legal desarrollado en la lucha contra la discriminación en el empleo y unos principios fundamentales explícitos tanto en la legislación como en la práctica.
- 2.- Una legislación general y minuciosa en la lucha contra la discriminación en el empleo.
- 3.- Un sistema protección y resarcimiento racional y eficaz.
- 4.- La participación y el apoyo de las organizaciones no gubernamentales, los ciudadanos y otros sectores de la sociedad en la lucha contra la discriminación en el empleo.

**Desventajas de la legislación en la lucha contra la discriminación de la Unión Europa:**

- 1.- La legislación de la discriminación en la lucha contra la discriminación por género son demasiado dispersos y complejos, estando ya algunos de ellos anticuados.

2.- La indecisión entre la “acción positiva” y el equilibrio entre los intereses de los empleadores y los empleados.

3.- La legislación separada en la lucha contra la discriminación por género en el empleo no conduce a resolver el problema de la discriminación múltiple.

**DUODÉCIMA.-** La escasez de la legislación en la lucha contra la discriminación en el empleo en China se caracteriza por los siguientes aspectos:

1.- La falta de una definición explícita de la discriminación en el empleo.

2.- El sistema legislativo es imperfecto y las provisiones legales en la lucha contra la discriminación laboral carecen de operatividad por: A. La falta de legislación unificada y eficaz. B. El nivel legislativo de un buen número de normas gubernamentales, reglamentos y leyes locales es bajo, incluyendo las provisiones en la lucha contra la discriminación en el empleo. C. Las disposiciones respecto a la actuación en los tribunales y el castigo por la discriminación laboral cuentan con deficiencias.

3.- La falta de fórmulas de compensación o resarcimiento.

4.- La distribución de la carga de la prueba por responsabilidad es desigual.

5.- La Constitución no se ha judicializado completamente y, en consecuencia, el sistema de litigios correspondiente no ha sido establecido.

6.- El sistema de supervisión de seguridad existente presenta imperfecciones.

7.- La ausencia de organismos especializados en la igualdad de oportunidades.

8.- La falta de medidas de salvaguardia positivas.

**DECIMOTERCERA.-** A la vista de los graves problemas y deficiencias existentes en la lucha contra la discriminación en el empleo en China y en combinación con la experiencia avanzada en este ámbito de la Unión Europea, se ofrecen una serie de contrataques legales o posibles acciones frente a tal situación:

1.- Agregar, eliminar e integrar la legislación correspondiente para establecer más a fondo y mejorar el sistema legal de China en la lucha contra la discriminación en el empleo.

A. *La Ley sobre la Protección de los Derechos e Intereses de la Mujer, el Derecho Laboral, La Ley de Promoción del Empleo, La Ley de Contrato de Trabajo y la Ley sobre la Protección de los Derechos e Intereses de las Personas con Discapacidad* debe ser revisadas, refinadas y mejoradas. Las previsiones que prohíben en estas leyes la discriminación en el empleo y protegen los derechos e intereses de los grupos desfavorecidos son demasiado abstractos, careciendo de operatividad en la vida real. Producida la discriminación, las víctimas no pueden ver compensados o resarcidos sus derechos por vía de estos textos legales. Por tanto, deben extraerse las oportunas lecciones de la legislación en la lucha contra la discriminación en el empleo de la Unión Europea. La legislación ya existente deberían ser refinada y mejorada para poder hacerla realmente operativa.

B. En la formulación de una *Ley contra la discriminación en el empleo* especializada China debe aprovechar la experiencia de la UE. Resulta de gran importancia para formular una legislación unificada con el fin de manejar mejor el fenómeno complejo y variable de la discriminación, actual o que pueda aparecer en el futuro. De esta manera, se podría prohibir la discriminación por un lado y, por otro, se podría manejar el

problema de la discriminación múltiple con eficacia. Además, se podría evitar que la situación de una norma sobre no discriminación en el empleo provocara conflictos con otras legislaciones especializadas.

C. Implementar políticas bien dirigidas y periódicas. La Unión Europea presta una atención completa a la elaboración de estas políticas. Desde 1980, aproximadamente casi cada 4,5 años las instituciones europeas desarrollan un programa por etapas para orientar los trabajos y acciones sobre no discriminación. Una política periódica mejorará las deficiencias detectadas en las medidas tomadas anteriormente y podrá adoptar una dirección adecuada y medidas contra las condiciones discriminatorias en un momento concreto. El problema de la discriminación no puede ser resuelto en un solo día. Se tienen que adoptar en la dirección correcta y periódicamente directrices políticas para avanzar poco a poco en el objetivo de la igualdad en el empleo.

2.- Utilizar la experiencia de la Unión Europea y determinar de forma razonable los contenidos principales de la lucha contra la discriminación en el empleo, definiendo claramente conceptos y normas relacionadas.

A. Aprovechando la experiencia de la Unión Europea, los comportamientos discriminatorios podrían dividirse en la discriminación directa, la indirecta, el acoso y las instrucciones dadas con objeto de discriminar a las personas.

B. En la legislación sobre no discriminación en el empleo, los criterios en torno a la consideración de discriminación deberían ser estipulados explícitamente, pues únicamente al hacerlo así se podría determinar si una conducta del empleador constituye realmente discriminación en el empleo y, logrando también con ello distinguir la discriminación a partir de un trato razonable para proceder a efectuar ciertas distinciones.

C. Deben establecerse mecanismos de responsabilidad legal razonables y eficaces, pues éstos, junto a un mecanismo de responsabilidad judicial efectiva, pueden tener un efecto disuasorio y restrictivo para prevenir eficazmente la discriminación.

### 3.- Métodos para un resarcimiento eficaz.

Resulta difícil el ejercicio de los derechos reconocidos sin la existencia de un resarcimiento legal por su vulneración. La falta de métodos eficaces en este ámbito es el principal problema que existe en materia de discriminación actualmente en China. Con el fin de resolver este problema, se pueden adoptar las siguientes medidas:

A. Con fines especiales en la lucha contra la discriminación en el empleo se podrían establecer procesos especiales de interés público. Las organizaciones podrían presentar quejas en nombre de las víctimas para ayudarlas a exigir y realizar su derecho a la igualdad en el empleo.

B. Deben desarrollarse disposiciones legales claras definiendo los supuestos en los cuales los derechos de la igualdad en el empleo de los trabajadores puedan haber sido violados, dándose cuenta del resarcimiento por ello a través de la vía judicial, más que del arbitraje laboral. El amparo judicial es el último y más poderoso método de defensa para garantizar los derechos civiles. Cuando los trabajadores sufran discriminación en el empleo, deben tener el derecho a presentar pleitos civiles con el fin de lograr el derecho a la igualdad. El juez podría decidir sobre las conductas ilegales de los empleadores y dar indemnizaciones adecuadas a las víctimas según unos requisitos fijados. Los culpables también pueden ser compelidos a pagar una indemnización punitiva cuando sea necesario.

C. La inversión de la carga de la prueba debe ser contemplada por la legislación. Los trabajadores cuyos derechos hayan sido violados se encuentran frecuentemente en una

posición más vulnerable, y es generalmente muy difícil obtener evidencias de la discriminación. De acuerdo con las reglas generales de la litigación civil, será complicado ganar el caso, circunstancia que habitualmente se convierte en la razón por la cual muchos trabajadores decidan no iniciar acciones legales. Sin embargo, las reglas de la inversión de la carga de la prueba obligatoria pueden hacer que éstos presenten sus demanda ante los tribunales, lo que la convierte en una arma poderosa en la lucha contra la discriminación en el empleo.

4. Fomentar la participación ciudadana en la lucha contra la discriminación laboral por género y despertar la conciencia de los ciudadanos y el desarrollo de la iniciativa de las organizaciones no gubernamentales.

El Estado debe permitir el establecimiento de todo tipo de organizaciones no gubernamentales comprometidas con la lucha frente a la discriminación. Su posición de tercero y el carácter no lucrativo de estas organizaciones determinan que podrían jugar un papel activo tanto en esa lucha como en otras áreas de la discriminación laboral. La igualdad de oportunidades podría establecerse con objeto de fortalecer la supervisión y la evaluación en el empleo.

Debe darse cuenta de la interacción organizada y la competencia de una variedad de instituciones, grupos sociales y organizaciones. Además de los diversos organismos gubernamentales a cargo de la implementación de la igualdad de empleo establecida por la Unión Europea, las organizaciones no gubernamentales también juegan un papel positivo en el proceso de promover el desarrollo de la igualdad en el empleo. A un tiempo, las organizaciones sindicales también pueden jugar un papel importante en el proceso de garantizar la igualdad de empleo.

Estas instituciones, grupos sociales y organizaciones no están aisladas. Por el contrario, en el proceso de la promoción de la igualdad laboral, tienen una competencia e

interacción constante. Las ONGs de China tienen un inicio tardío y escaso desarrollo, al igual que los sindicatos y otras organizaciones. La eliminación de la discriminación y el logro de la igualdad en el empleo no puede ser realizado solamente por el gobierno. Se necesita una sociedad civil moderna y saludable, que también sea una dirección de referencia para los esfuerzos a llevar a cabo en China.