

9 Individual rights protection or social management?

Equal employment laws and policies in China

Su Lin Han

Introduction

The principle of equality and nondiscrimination has long been embraced by the Chinese Constitution and prescribed by many of the country's equal employment laws and policies. Despite such commitment, China has not implemented key equal employment laws and policies aimed at protecting specific disadvantaged groups such as women and people with a disability. Chinese courts routinely refuse to handle employment discrimination lawsuits. Government regulators rarely take enforcement actions against employers for discriminatory employment practices. Much of the enforcement difficulties can be attributed to a lack of clear judicial and legislative guidance for courts to handle discrimination claims. The lax enforcement by government regulators also reflects the issue's low policy priority. However, even more inherent obstacles stem from the government's distrust of the use of private enforcement in individual rights protection cases. The government's overarching goal of maintaining social control and stability is often at odds with the decentralized nature of privately-initiated litigation of individual rights claims. This distrust is not new and emanates from the PRC's history of preferring collective, non-adversarial approaches to dispute resolution. But it has blunted the

government's resolve to overcoming significant legal deficiencies that prevent a proper functioning of its existing judicial mechanism for resolving individual discrimination claims. Instead, the government continues to rely on traditional 'top-down' social management tools to marshal the resources of a centralized political and bureaucratic machinery outside the legal framework to tackle the country's employment discrimination problem.

As China's leadership turns to its brand of 'rule of law' as a new strategy to improve governance and bolster the Party's political legitimacy, a central concern is how to improve the delivery and benefits of rule of law to an increasing 'rights conscious' populace through stronger enforcement of individual rights protection promised by existing laws. The challenge is how this can be accomplished given the unmistakable signal of the CPC's 4th Plenum of the Party-state's determination to maintain a firm grip on issues containing the potential to impact on social stability. This chapter argues that alternative enforcement models which enhance the role of the government in delivering its promise of individual rights protection may be a workable compromise between the government's strong desire to manage employment discrimination as a collective social issue on the one hand, and the ability of private citizens to benefit from legalized individual rights protection on the other hand. Accomplishing such paradoxical goals, however, will be a difficult balancing act.

China's challenges in enforcing employment discrimination laws and policies

Historically, implementation of China's longstanding principle of equality and nondiscrimination was carried out as a part of the state's central planning function - outside the legal framework. Under China's centrally planned economy, the state owned, managed and regulated all businesses called *danwei*. It was able to enforce equal employment policies, most notably gender equality and protection measures, through a centralized worker allocation system, uniform hiring and firing rules, and informal dispute resolution mechanisms within each *Danwei* directly supervised by government regulators.¹

As Yueh shows in Chapter 5, the introduction of market-based reforms in the late 1970's ushered in rapid growth of a vibrant private sector and a burgeoning labor market in China, along with a diminished central planning role of government in regulating employment relations. Employers, including government and state-owned companies, now have more autonomy in hiring and firing decisions. At the same time, employment discrimination has proliferated. This has resulted in increased labor tension and rising demand from a more rights conscious workforce to have grievances heard and claims resolved.

Such pressure has led to the adoption of several important national legislations to protect equal employment rights of special disadvantaged groups such as women and people with disabilities. Most notable is the 2008 *Equal Employment Promotion Law* (EPL).² In addition to providing administrative penalties-based public enforcement, the EPL opened the door for private rights of action against employment discrimination by allowing workers to sue their employers in court.³ Private enforcement of statutes through court

litigation has a long tradition in many legal cultures and has played a major role, for example, in the enforcement of U.S. federal civil rights statutes and the development of U.S. equal employment discrimination laws.⁴ The introduction of private rights of action by the EPL and other Chinese laws, such as recent anti-trust laws, reflects the influence of international legal development and the progression of rule of law in China over the past decade and evidenced in more tolerance for non-state actors to play a bigger role in enforcing legal protections. At the same time, this new ‘tolerance’ carries major challenges to the state’s long-standing practices of top-down control and management of rights protection issues with broader social stability implications.

Limited Private Enforcement

Since the adoption of the EPL, there has been an uptick in employment discrimination lawsuits, often brought by younger, more educated plaintiffs with the support of public interest lawyers. According to one study, approximately 70 antidiscrimination cases were brought or accepted by courts between 2008 and 2011, compared to 20 or so of such cases between 2000 and 2007.⁵ However, major legal and political hurdles have prevented court litigation from gaining sufficient traction in China to become an effective private enforcement tool of employment discrimination laws.

For example, notwithstanding the EPL’s express authorization for individuals to file employment discrimination claims with China’s Basic People’s Courts, many courts refuse to accept even the filing of such claims. A common explanation for such rejection is that

employment discrimination is not included in the list of ‘permitted civil causes of action’ issued by China’s Supreme People Court.⁶ Among the successful filings, a substantial number involved plaintiffs who were carriers of Hepatitis B (HBV carriers),⁷ but their underlying causes of action were often violations of privacy rights, not employment discrimination.⁸ Gender and disability cases are rare, and they too tend to be accepted where causes of action are ‘violation of personal rights’ rather than employment discrimination.⁹ Chinese courts also struggle with a lack of legal and judicial guidance on substantive legal issues such as what constitutes ‘employment discrimination’ and who bears the burden of proof. Neither the EPL nor any other laws defines ‘employment discrimination’. Questions also remain as to whether the burden of proof, which generally rests on plaintiffs in civil lawsuits, can be shifted to defendant employers in employment discrimination cases.¹⁰

Even more daunting for private enforcement are political challenges. The decentralized nature of privately-initiated litigation which is essential to a ‘bottom-up’ approach to enforcing individual rights claims is inherently at odds with the government’s long-standing ‘command-and-control’ approach to managing systemic social problems which places a premium on the state’s ability to maintain social control and order. The alliance between discrimination victims and nongovernmental rights advocacy in bringing the so-called “impact litigation” in employment discrimination appears to have heightened political sensitivity about private litigation. This is due, in part, to the perceived threat of private litigation to state control of the direction and outcome of social changes that are an inevitable consequence of such litigation.

Chinese courts, which have thus far enjoyed limited independence in the adjudication of individual cases and whose decisions are directly influenced by the state's political agenda and policy priorities, are unable and unwilling to take the lead in resolving individual employment discrimination claims as it is an area fraught with political sensitivity. Instead, the general attitude of courts toward discrimination cases has been characterized as 'restraint' and 'judicial non-activism'.¹¹ Since 2008, the Supreme People's Court has twice amended its list of permitted civil causes of actions. Yet 'employment discrimination' has not been listed. Nor has the High Court issued any judicial interpretation or guiding cases to clarify the outstanding legal issues for lower courts.

Victims of employment discrimination currently have few non-judicial alternatives for bringing their claims. Despite improvements to China's labor arbitration, proceedings are generally closed to employment discrimination claims as the scope tends to be limited to disputes arising out of *existing labor contracts* and labor relations.¹² This precludes claims against discriminatory *hiring* practices. The prospect of bringing a separate employment discrimination action for labor arbitration, as opposed to an auxiliary claim to labor contract dispute, is also dim as neither the EPL nor the labor arbitration law expressly authorizes such claims to be handled through labor arbitration.¹³

Weak Administrative Enforcement

Under the EPL, China's Ministry of Human Resource and Social Security (MOHRSS), often referred to as the 'relevant labor administration department in charge', is responsible

for overseeing compliance. This includes establishing a complaints handling system to accept and verify complaints and to take action against violations.¹⁴ However, the prevailing view among Chinese academics (e.g. Liu Minghui 2014: 46) and likely also held by MOHRSS, is that the EPL has failed to grant specific labor supervisory authority necessary for MOHRSS to take administrative enforcement action against employment discrimination.¹⁵ The available evidence suggests that in practice, MOHRSS rarely accepts or investigates employment discrimination complaints. For example, in 2012, female college students from eight Chinese cities filed complaints with the local MOHRSS offices alleging gender discrimination by 267 employers for posting ‘male only’ hiring ads online. Only 30 per cent of their complaints received a response from MOHRSS and only one employer was issued a fine. The students alleged that most MOHRSS offices were unwilling to handle their complaints.¹⁶

Two recent high-profile court decisions, hailed by domestic media as China’s first ‘gender and residency discrimination’ cases, underscore the challenges and uncertainty faced by private litigants. The first is a 2013 gender discrimination lawsuit ended in a court settlement. It involved a female college graduate accusing a private employer, whose job advertisement specifically excluded ‘female applicants’, of gender discrimination. The plaintiff’s initial complaint to the local MOHRSS office was rejected and her subsequent administrative appeal of the agency’s decision also denied.¹⁷ Her civil lawsuit against the employer for gender discrimination in violation of the EPL was ‘in limbo’ for over a year before a Beijing local court accepted her case.¹⁸ The reasons given for the court’s delay was the need to seek higher-level approval, ostensibly on the ground that employment

discrimination was ‘not a permitted cause of action’. The ‘sensitive’ nature of the lawsuit was not mentioned, but is a more likely explanation. When the case was finally settled, the plaintiff received an apology from the employer who also paid RMB 30,000 (US\$5,000) into a gender equality fund. In the second 2014 case, another female college graduate brought an employment discrimination claim against a MOHRSS office in Nanjing for excluding job applicants who did not have ‘local residency status’.¹⁹ The plaintiff failed to convince three local courts and a labor arbitration tribunal to accept her case. When the case was finally accepted by the order of an appeals court, the plaintiff was required to amend her cause of action from ‘employment discrimination’ to ‘violation of personal rights’ because local judges were unable to find legal precedents or existing rules regarding her discrimination claim. The case was settled in favor of the plaintiff who received RMB11,000 (US\$1,800) in compensation.

Ineffective Policy Response

Although employment discrimination is well-entrenched, it has not commanded the same policy priority as other social stability ‘hotspots’ in China. For example, in labor relations, MOHRSS has been preoccupied with volatile and higher-profile issues such as low employment rates for new college graduates and back-pay for rural migrant workers.²⁰ It has not been until recently that employment discrimination began to catch the attention of top-level policymakers as a contributing factor to high unemployment among recent college graduates. Yet the government’s policy response remains characterized by top-down mobilizing of political and bureaucratic machinery, as opposed to promoting individual

assertion of rights claims through existing judicial and administrative enforcement channels.

Since the mid-2000s, the perennial difficulty faced by millions of Chinese college graduates in finding suitable employment captures national attention each graduation season. According to MOHRSS, during the first half of 2014, only 7 per cent (560,000) of that year's 7.27 million graduates received job offers before graduation, making it 'the worst hiring season in history'.²¹ A recent Peking University study analyzing the employment data of 350,000 new college graduates born in the 1990's found their employment rate to be as low as 14.3 per cent.²² In addition to these dismal statistics is strong employer preference for hiring male graduates. For example, female graduates accounted for 48 per cent of graduates in 2013.²³ Yet the All China's Women's Federation reports that more than 90 per cent female graduates in 2013 experienced gender discrimination in their job searches; over 70 per cent reported not being offered a job because of gender.²⁴

The employment status and discrimination issues impacting such a large, educated youth population that is active on China's social media raises 'social stability' concerns for the state. This concern was most recently illustrated in the arrest of five young women's rights activists around International Women's Day on 8 March 2015 for drawing public attention to the prevalence of sexual harassment.²⁵ Yet for years, the official response by MOHRSS and other central government ministries has been limited to promotion of employment of college graduates by sponsoring job fairs, job training programs and hiring-incentives for

employers.²⁶ Recently, however, a few high-level Party and government documents have singled out employment discrimination as a root cause of the unemployment problem and a possible solution. For instance, the Party's Third Plenum *Decision* (2013) included 'elimination of employment discrimination' as part of the overall strategy for promoting employment of college graduates.²⁷ In 2014, China's State Council issued a notice for improving college graduate employment, calling all regions and all relevant government departments to 'proactively adopt measures to promote equal employment [and to] prohibit employers from setting discriminatory [hiring] requirements on the basis of ethnicity, race, gender, religious beliefs and residency status'.²⁸ Numerous lower level government policy documents echoed such calls, including a 2013 directive from the Ministry of Education prohibiting employers from imposing gender and residency status requirements at college job fairs.²⁹

These documents do not specifically refer to the role of public and private enforcement tools provided by existing employment discrimination laws even though these are essential for reaching the government's policy goals of 'correcting discriminatory practices'. This 'absence' reflects official ambivalence towards using rule of law, especially through private court litigation, to address individual grievances against employment discrimination. These documents also show that despite repeated official rhetoric about reining in employment discrimination, the government's social management options have not been sufficiently adaptive to China's changing labor market conditions under which many employment decisions are no longer subject to state control. The Chinese public, especially female college graduates bearing the brunt of discrimination at the workplace, have little

confidence that the new government rhetoric is enough to stem China's tide of employment discrimination.³⁰

China's affirmative action plan on the employment of workers with a disability is another example of ineffective government anti-discrimination policy. Official statistics reveal that current level of unemployment amongst China's disabled urban residents (which accounts for 35 per cent of the country's 85 million disabled population) exceeds 10 per cent. This compares to a 5 per cent unemployment rate in the general population.³¹ For those with a mental disability, the employment rate is less than 10 per cent. By law (which codifies a government affirmative action policy adopted since the early 2000s), all employers in China are required to staff no less than 1.5 per cent of their workforce with disabled workers. Failure to comply may result in administrative fines to employers to be paid to various locally-managed disabled worker employment-guarantee funds.³² Recent studies by the China Disabled Persons Union and others reveal extensive noncompliance among employers. For instance, more than 90 per cent of employers opted to pay the fine and only 4.7 per cent of Beijing's 445,000 employers reported hiring disabled workers.³³ The extent of non-compliance has sparked a public outcry against both the apparent failure of the affirmative action policy and the suspected misuse by officials of the funds intended to improve employment prospect for disabled workers.³⁴ Such policy response which relies primarily on administrative fines for enforcement, even when the fines are substantial and uniformly levied, have failed to have either punitive or deterrent effects on discriminatory employment practices against people with a disability. It merely puts a price tag on the 'business cost' of discrimination by employers.

Improving public enforcement: a workable compromise for rights protection in China?

Many challenges faced by China in enforcing employment discrimination laws and policies reflect its internal political constraints on individual rights advocacy, and the failure of the authoritarian state's 'command-and-control' social management strategies to solve contemporary social problems. In particular, the difficulties for private court litigation to take root as an important enforcement tool is a direct result of the Party-state's unwillingness to cede any real control of the management of a systemic social problem to nongovernmental actors. In comparison, private litigation has been effectively used to enforce equal employment rights laws and advance social changes elsewhere. In countries such as Europe and the United States, its success is predicated upon two basic premises: A willingness of the state to 'deputize private litigants and their attorneys to enforce the law' and the ability of an independent judiciary to shape laws and public policies through court decisions.³⁵ Both are currently substantively missing in China's political landscape.

Despite China's 2015 launch of judicial reforms to reduce Party and government officials' interference in courts' adjudication of individual cases (see Qianfan Zhang in Chapter 1), their primary focus appears to be mainly for improving courts' capability and efficiency in resolving legal disputes, and not to boost independence of the judiciary, which is to remain loyal to the Party's political prerogatives.³⁶ The Party leadership makes it clear that under its brand of 'rule of law', which must serve as the 'ballast for social order and stability', rights claims of the masses can only be asserted through 'legally sanctioned channels' and

‘stirring up trouble’ as a way of resolving conflicts is not to be tolerated.³⁷ Amidst the recent rise in government crackdowns on the activities of nongovernment rights advocacy groups and public interests lawyers, which specifically targets those involved in ‘workers’ rights, legal advocacy, and discrimination’,³⁸ whether legal advocacy of equality and nondiscrimination rights will remain ‘legally sanctioned’ is far from politically settled. This uncertainty will likely affect the viability of court litigation as a private enforcement option in China, at least in the near term. Yet as the state faces mounting pressure to develop better governance tools to replace its outdated social management regime, a central question must be answered: Whether, in the absence of a robust private enforcement alternative, China’s administrative enforcement system can be reformed to fit the leadership’s current rule of law narrative while still offering improved individual rights protection?

Experience from a range of jurisdictions with longer histories of laws protecting equal employment rights suggests that private enforcement litigation, although well-established since the advent of civil and human rights legislation in recent decades, is a relatively new phenomenon.³⁹ Public enforcement administered by government agencies has also been widely used as an alternative, or complementary mechanism, to achieve the twin policy objectives of protecting individual rights and combating employment discrimination. In the United States for example, Title VII of the *Civil Rights Act* was adopted in 1964 to prohibit workplace discrimination. While the law relies on private court litigation as a major enforcement mechanism,⁴⁰ it also authorizes the establishment of a special government administrative agency, the Equal Employment Opportunity Commission (the EEOC) to lead public enforcement and implementation of federal equal employment protection laws

and policies. Today, the EEOC reviews nearly 100,000 private discrimination claims annually through its administrative claims handling process.⁴¹ Its investigative and prosecutorial powers focus on a smaller number employment discrimination cases involving more egregious and systemic violations. Similar administrative enforcement models have been adopted in a number of other jurisdictions, including the United Kingdom, Australia, Hong Kong and Taiwan, to complement private court enforcement, reflecting the different statutory and policy priorities based on local conditions.

Several key features of the EEOC and similar administrative enforcement models elsewhere may be of particular relevance in exploring public enforcement alternatives for China's employment discrimination laws:

- *Government as first responder to privately-initiated claims.* In the United States, the EEOC is the entry point for filing all federal employment discrimination claims, which must be filed and reviewed by the EEOC before they are permitted to proceed to private litigation in court. The EEOC's administrative claims handling and resolution process allows the government to identify, investigate, and prioritize discrimination complaints based on neutral findings of merits. It also allows the government to facilitate speedy resolution of claims through an informal mediation process at an early stage without finding fault. When EEOC investigations find violations, the agency will seek voluntary conciliation between employers and employees. The threat of government prosecution if conciliation is unsuccessful can, of course, 'incentivize' employers to settle. EEOC-monitored settlements can

include remedies such as back-pay and reinstatement, as well as injunctive relief to force employers to correct discriminatory conduct and prevent future violations. The EEOC's administrative claims proceedings are privately-initiated and the government is bound by a statutory obligation to receive, investigate and conciliate charges of employment discrimination.⁴² From the perspective of an individual claimant, the EEOC not only provides an easily accessible and low cost forum for impartial determination of their discrimination claims, but the government can also become a powerful ally in advocating their rights once employer violations are found.

- *Government as public advocate for equal rights protection.* As the chief public advocate and enforcer of federal employment discrimination laws and policies, the EEOC has the authority to bring public interest lawsuits against employer violations on behalf of and for the benefit of individual claimants. In recent years, the EEOC has focused this aspect of its enforcement efforts on selectively litigating cases which involve systemic discrimination affecting classes of workers, a strategy that has enabled the agency to achieve broader societal impact by targeting patterns of employment practices in specific industries or sectors.
- *Government as leader in promoting social change through collaborative governance and voluntary compliance.* The EEOC also implements the government's equal employment protection and antidiscrimination laws and policies through non-adversarial education and outreach initiatives. The agency partners

with nongovernmental rights advocacy groups and employers to improve compliance by proactively identifying problem areas and providing best practice guidelines. This collaborative governance approach focuses on problem-solving by promoting nongovernmental stakeholder participation and voluntary compliance. The U.S. jargon is that this helps create a ‘win-win solution’ for the government, employers and workers.

Administrative enforcement practices in Hong Kong and Taiwan similar to the EEOC have been used in two recent local experiments in China: In 2012, Shenzhen adopted China’s first gender equality legislation which provided for the establishment of an administrative enforcement agency specialized in implementing the new law, including handling individual gender-based employment discrimination claims.⁴³ In Hebei Province, an EEOC-like multi-agency equal employment promotion commission was established in 2012 by a local municipal government to handle employment discrimination claims and to promote nondiscriminatory employment practices through public education and outreach to workers and employers.⁴⁴ These experiments appeared to be driven by strong local interests to explore public enforcement alternatives for improving equal employment rights protection for women. Their experience draws attention to the benefits and challenges of adopting an effective public enforcement model in China.

Administrative claims process as an attractive public enforcement option

Having an administrative claims process dedicated to handling employment discrimination complaints can be an attractive public enforcement alternative for both workers and local

governments in China. By placing an affirmative duty on a government agency to receive, investigate and resolve individual complaints, the process takes away the uncertainty faced by victims of discrimination in China who have few options for filing their equal employment rights claims. At the same time, the process allows local governments to channel and prioritize potentially numerous and volatile individual complaints through orderly disposition and provides them with an early opportunity to mediate and resolve the disputes which can often escalate if left unresolved. Experience of the EEOC and other similar agencies shows that just by having a government investigator listen to such complaints helps to alleviate much of the workers' frustration even before their claims are resolved. This possible 'social stability' function of the administrative claims resolution process can be attractive to local Chinese government officials as their performance evaluations often hinge on their ability to resolve and reduce local disputes.

Public interest litigation as a potent enforcement tool

The enhancement of the public enforcement system also has the potential to pave the way for the government to expand its enforcement power through public interest litigation. Although China remains strongly averse to class action lawsuits initiated by private litigants, recent law and policy changes, including the newly-revised *Civil Procedures Law*, the Party's 4th Plenum documents and the Supreme People's Court newly-released interpretation of the *Civil Procedures Law*, indicate the government's increasing interest in using public interest lawsuits - initiated by government or quasi-government entities - to tackle issues which have broad societal impact and which will likely involve state actors as defendants. At this stage, such legal and policy shift appears to be limited to environmental

protection and food safety cases but may open the door for discrimination issues in the future. An EEOC-like enforcement agency tasked with the specific mandate to combat employment discrimination could be an ideal vehicle for such public interest lawsuits. It would not only allow the state to selectively target ‘vested interests’ represented by government and state-owned employers and the most egregious discriminatory employment practices affecting large classes of workers, but give the state better control over the direction and outcome of social changes brought by such litigation.

Collaborative governance as an effective regulatory tool for voluntary compliance and discrimination prevention.

Market-based economic reforms have changed the dynamics of labor regulation in China, challenging the traditional state command-and-control regulatory model for implementing and enforcing nondiscrimination policies in the workplace. The need for adopting more innovative regulatory tools is more urgent for Chinese local governments, which are simultaneously tasked with implementing competing central policy mandates to promote economic and job growth on the one hand, and maintain social stability on the other hand. There is a growing recognition of the more complex and interdependent relationship between local governments and private sector actors, and a need to incentivize rather than penalize employers to induce compliance. A more collaborative governance process would allow local governments to recalibrate conventional state-centric, penalty-driven regulatory approaches by transforming their role from *enforcer* to *leader of problem solving* processes. This change would rely more on employer and nongovernmental stakeholders’ participation and voluntary compliance for achieving the policy goal of discrimination prevention.

Public-private collaboration as an alternative avenue for nongovernmental rights advocacy

Experience in Hebei and Shenzhen suggests that a more participatory model of public enforcement can provide an alternative but limited platform for nongovernmental rights advocacy in a challenging political environment.⁴⁵ Under such a model, nongovernment actors were shown to be able to contribute to the design and institutional capacity-building of the new employment discrimination agency. They could lend legal expertise to facilitate claims filing and settlement negotiation, partner with the government to help identify discriminatory practices and propose solutions to ensure better voluntary compliance. In addition they were able to assist the government in public outreach and awareness-raising amongst grassroots constituents. Future public interest litigation may be a new opportunity for nongovernment rights advocacy to work in conjunction with the government to identify and address common concerns.

Notwithstanding the potential benefits of an improved public enforcement mechanism, the Shenzhen and Hebei experience spotlights obstacles for developing such a system under China's restrictive political environment and complex government bureaucracy. First, local reform initiatives can suffer if there is a lack of high-level government endorsement to help remove government bureaucratic barriers against the creation of a new agency. Political cover is often a prerequisite to ensure policy consistency and priority for longer-term structural reforms to be institutionalized. Under China's government *bianzhi* system, which controls budgetary and personnel allocations for government agencies, the creation of a

new government agency is subject to separate central government *bianzhi* approval in addition to legislative authorization. Such *bianzhi* approval can be particularly difficult to obtain where local reforms lack high-level, central endorsement. Local governments can sidestep the *bianzhi* issue by creating new agencies pursuant to local government executive orders. The problem is, of course, that such entities lack their own budgets and personnel, and must rely on the political backing of incumbent local leaders. Such an arrangement is difficult to sustain due to cyclical changes in local government leadership and subsequent policy re-prioritizing.

Second, local experiments are often subject to limitations imposed by existing national laws. This can make implementation difficult. For example, under the EPL, administrative enforcement powers are vested solely in labor supervision authorities. Without statutory authorization, an EEOC-like new agency would lack the enforcement power to investigate claims or to force settlements by employers when violations are found. In Hebei, the new equal employment promotion commission was successful in stopping overt gender discrimination hiring practices at local job fairs by issuing legal opinions advising employers of their violations.⁴⁶ However, the commission must leverage the local MOHRSS office's labor supervision authority to compel employers to respond to specific charges or to launch investigations of alleged employment discrimination practices.

At the time of writing, shifting political winds in China and increasing government animosity toward nongovernment advocacy of nondiscrimination rights is casting long shadows over local commitments to experiment. In an area that requires local governments

to execute the politically delicate task of enforcing individual rights protection, without being perceived as jeopardizing its ultimate goal of maintaining social control and stability, the political balancing is particularly daunting. In such uncertain political climate, it is much safer for local officials, as with court officials, to steer clear of taking affirmative actions to respond to right claims and to stay within more familiar territory of promoting equality and nondiscrimination policies through job training and general outreach programs.

Conclusion

Combating workplace discrimination is a continuing challenge worldwide. China is no exception. While significant progress has been made in the PRC by adopting laws and policies against employment discrimination, enforcement has been stymied by political constraints. The individual exercise of equality and nondiscrimination rights through private rights of action and nongovernmental rights advocacy face historical and ideological opposition. Yet the state's existing regulatory tools are clearly outdated, unable to respond effectively to discriminatory employment practices under changing market conditions.

If China's current rule of law initiative is to be taken seriously, alternative enforcement models, at the very minimum, must be considered. Advancing individual rights protection through an administrative enforcement process that puts the government at the helm of resolving individual discrimination claims and steering changes in employment practices through a more participatory regulatory regime may be one workable alternative.

Experience internationally has demonstrated the efficacy of such a public enforcement model. Experiments in Hebei and Shenzhen also show promises of such a model to complement or be used as an alternative to private court enforcement in China.

Whether an enhanced public enforcement mechanism can achieve its intended goals within China's complex political and social context will depend on many factors. This is especially so with respect to ensuring meaningful *individual* rights protection. These factors include: (1) high-level political commitment and priority for the government to entertain privately-initiated employment discrimination claims - through a dedicated administrative claims process; (2) sufficient official tolerance of nongovernmental assertion and advocacy of individual rights within defined channels, such as the administrative claims process described above, to allow citizens to benefit from rights protection as promised by law; (3) statutory enforcement powers necessary for a new equal employment agency to investigate and resolve individual complaints and to prosecute egregious employment practices impacting classes of workers; (4) well-defined legal principles and standards governing the procedural and substantive parameters of the administrative claims process - to ensure government accountability and fairness; and (5) willingness of the new agency to embrace collaborative governance as a new regulatory tool to engage nongovernmental stakeholder participation and increase voluntary compliance.

Notes

-
- ¹ See Yan Tian, 'Rethinking the Modern Origins of China's Anti-Discrimination Legislation', *Peking University Law Journal*, vol. 24, no. 3 (2012), pp. 560-77. (<http://journal.pkulaw.cn/ContentPDFType.aspx?isDL=rd&id=159373>).
- ² Other laws include the 1995 Labor Law, the 2005 Law on the Protection of Women's Rights, and the 2008 Law on the Protection of Disabled Persons.
- ³ See Article 62 of the EPL.
- ⁴ See Steven Burkank, Sean Farhan, and Herbert Kritzer, 'Private enforcement of Statutory and Administrative Law in the United States (And Other Common Law Countries)' (2011), in *PROCEDURAL JUSTICE* 197-318 (Peter Gottwald and Burkhard Hess, eds. 2014); U of Penn Law School, Public Law Research Paper No. 11-08.
- ⁵ See Zhou Wei, 'The Development of China's Anti-discrimination Law', *Tsinghua Law Journal*, Vol. 6, No. 2 (2012) (<http://166.111.104.103/homepage/uploads/files/zhouwei%281%29.pdf>).
- ⁶ See Supreme People's Court, 'Stipulations on Causes of Actions in Civil Cases (2008 and as amended in 2011)'. See also Liu Minghui, 'Lack of Legislation Reflected in the First Legal Case of Gender-Based Discrimination', *Collection of Women's Studies*, Volume 2, 2014, p. 44.
- ⁷ The inclusion of 'carriers of infectious disease viruses' as a protected class under the EPL is the result of successful public pressure mounted by activists representing China's approximately 100 million HBV carriers. Employers are now prohibited from imposing illegal health screening requirements on job applicants who are HBV carriers. More recently, this protection has been invoked by carriers of the AIDS virus against discriminatory hiring decisions based on their HIV status (see http://www.legaldaily.com.cn/index/content/2014-10/09/content_5791355.htm?node=20908).
- ⁸ See Zhou Wei, *ibid.*
- ⁹ See Zhejiang News, 14 November 2014, <http://zjnews.zjol.com.cn/system/2014/11/14/020357961.shtml>, reporting that cause of action as "violation of personality rights" in a recent court decision on gender-based employment discrimination.

-
- ¹⁰ See Liu Chunling, 'Difficult Burden of Proof Issues in Gender-Based Employment Discrimination Cases and Solutions', *China Women's News*, 19 September 2012. (<http://acwf.people.com.cn/n/2012/0919/c99013-19044852.html>).
- ¹¹ See Zhou Wei, *ibid.*, at p. 25.
- ¹² See Law on the Mediation and Arbitration of Legal Disputes (2007), Article 2.
- ¹³ See Yan Tian, *ibid.*
- ¹⁴ See Article 60 of the EPL.
- ¹⁵ Liu Minghui (2014: 46) calls for amending Article 11 of the State Council Regulations on Labor Security Supervision to include employment discrimination within MOHRSS' labor supervisory authority. MOHRSS can, however, issue minor fines against illegal employer health screening of HBV carriers pursuant to its own EPL implementing regulations (see MOHRSS 2007, 'Provisions on Employment Service and Employment Management', Article 68).
- ¹⁶ See http://news.xinhuanet.com/legal/2013-01/26/c_114510501.htm.
- ¹⁷ See Liu Minghui, *ibid.* at p. 46.
- ¹⁸ See *China News Weekly*, 2 August 2013, <http://news.sina.com.cn/c/sd/2013-08-02/164227846264.shtml>.
- ¹⁹ See *Xinan Evening News*, 8 August 2014, <http://news.qq.com/a/20140806/064939.htm>.
- ²⁰ See *Finance.china.com.cn*, 9 March 2012, <http://finance.china.com.cn/roll/20120308/575863.shtml>.
- ²¹ See *Huaxia Times*, 2 August 2014, http://finance.ifeng.com/a/20140802/12846723_0.shtml. The same report explained that the 7 per cent rate captures only those who signed up with employers prior to graduation, as opposed to the first-time employment rate of approximately 70 per cent reported by the Ministry of Education as of 1 July 2014. However, that 70 per cent number includes those who are self-employed, those who continue with graduate studies in China and abroad, and those who find employment abroad. The report goes on to say that according to the Ministry of Education statistics, approximately 2.3

million college graduates (about one third of the graduates) plan to attend graduate school or study abroad during the same period.

- ²² See China News Network, 30 July 2014, <http://finance.chinanews.com/it/2014/07-30/6441526.shtml>.
- ²³ See People's Daily Online, 15 May 2013, http://www.chinapeace.gov.cn/2013-05/15/content_7642910.htm.
- ²⁴ See People's Daily Online, *ibid.* and Guangming Daily, 5 May 2014, http://news.xinhuanet.com/edu/2014-05/05/c_126460827.htm.
- ²⁵ See Stanley Lubman (9 April 2015) 'Detained Female Activists Illustrate Contradiction in Chinese Law Reforms', *The Wall Street Journal*.
- ²⁶ See Huaxia Times, *ibid.*
- ²⁷ See Chinese Communist Party Central Committee Decision Concerning Several Major Issues in Comprehensively Deepening Reform (2013), paragraph 43, http://news.xinhuanet.com/politics/2013-11/15/c_118164235.htm.
- ²⁸ See General Office of the State Council, 'Notice Regarding Employment and Job Creation for 2014 Graduates from Regular Institutions of Higher Learning' (13 May 2014, http://www.gov.cn/zhengce/content/2014-05/13/content_8802.htm). A similar notice was issued in May 2013. See http://www.gov.cn/zwggk/2013-05/16/content_2404378.htm.
- ²⁹ See <http://www.chinanews.com/edu/2013/05-22/4841996.shtml>.
- ³⁰ See Guangming Daily, *ibid.*, quoting a recent study by the Communications University of China indicating that more 80 per cent of female graduates question the effective implementation of these policies.
- ³¹ See Caixin Online, 1 October 2014, <http://china.caixin.com/2014-10-01/100735095.html> and Legal Daily, 3 December 2013, http://gongyi.ifeng.com/news/detail_2013_12/03/31748755_0.shtml.
- ³² See Article 33 of the Law on Protection of Disabled Persons and the State Council Regulation on Employment of Disabled Persons (amended in 2008).

-
- ³³ See Caixin Online, 5 June 2014, <http://china.caixin.com/2014-06-05/100686574.html> and New Beijing Daily, 25 August 2011, <http://gongyi.163.com/11/0825/11/7CA3HSAD00933KC8.html>.
- ³⁴ It is estimated that in 2010, Beijing collected RMB500 million (US\$82 million) and Shenzhen collected RMB5 billion (US\$820 million) since 2005. See <http://china.caixin.com/2014-06-05/100686574.html>.
- ³⁵ See Sean Farhang, *The Litigation State: Public Regulation and Private Lawsuits in the United States* (Princeton University Press, 2010), Chapter 1 ‘An Introduction to Private Enforcement Regimes’, p, 4 at <http://press.princeton.edu/chapters/s9350.pdf>.
- ³⁶ See Meng Jianzhu, Secretary of the CPC Central Political and Legal Committee, ‘Improving the System of Judicial Management System and Operation of Judicial Powers’, People’s Daily, 7 November 2014, <http://legal.people.com.cn/n/2014/1107/c42510-25990066.html>, distinguishing the ‘independent exercise of adjudicative power by Chinese courts’ under the leadership of the Party from ‘Western-style judicial independence’.
- ³⁷ See Wang Yongqing, Secretary-General of the CPC Central Political and Legal Committee ‘Better Use of Rule of Law Thought and Rule of Law Methods to Implement Legal Political Work: Deepening study of the spirit of a series of Xin Jinping’s important speeches’, People’s Daily, 28 July 2014, <http://theory.people.com.cn/n/2014/0728/c40531-25351145.html>.
- ³⁸ See New York Times, 26 February 2015, <http://www.nytimes.com/2015/02/27/world/asia/in-china-civic-groups-freedom-and-followers-are-vanishing.html>.
- ³⁹ See Farhang, *ibid.* at p. 4.
- ⁴⁰ *Ibid.*
- ⁴¹ See EEOC charge and litigation statistics, <http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm> and <http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm>.
- ⁴² It is important to note that whether the EEOC finds discrimination or not, an individual claimant retains the right to litigate his or her discrimination claim in court.

-
- ⁴³ See Nanfang Daily, 'Shenzhen to Establish Gender Equality Promotion Agency' (29 June 2012, http://news.ifeng.com/gundong/detail_2012_06/29/15651201_0.shtml).
- ⁴⁴ See reports of the Hebei experiments by Worker's Daily, 28 October 2012, <http://politics.people.com.cn/n/2012/1028/c70731-19412192.html> and China Women's Journal, 20 March 2014, <http://acwf.people.com.cn/n/2014/0320/c99013-24685120.html>.
- ⁴⁵ See Hebei Legal Daily, 13 June 2013, http://szbz.hbfzb.com/html/2013-06/13/content_25913.htm?div=-1, describing collaborative efforts among the local municipal government, the All China Women's Federation (the Party's official women's organization), and nongovernment public interest lawyers in the Hebei experiment.
- ⁴⁶ See Hebei Workers Daily, 29 June 2013, http://www.hbgrb.net/epaper/images/2013-06/29/7B/WQZX7bWQZX7BC629_0001.PDF.