

On the Protective Mechanism of the Right to Employment of Persons with Disabilities in China

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In the world, there are 650 million persons living with disabilities. Persons with disabilities have suffered from discrimination in their life. The discrimination on the basis of disability in employment has been prominent and persistent all over the world. Most of persons with disabilities are either unemployed or have been dissuaded from seeking work for the misconception of their incapacities and independence. Some employers refuse to hire persons with disabilities, especially those with mental or intellectual disabilities, because of the prejudiced attitudes that these people may be dangerous to others and customers may be offended or feel uncomfortable on seeing them. Some employers are reluctant to hire persons with disabilities since they worry about the costs of providing accommodations in workplaces. In addition, physical barriers, such as the inaccessibility to public transportation, housing and workplaces, make it very difficult for persons with disabilities to step into the mainstream labour market. As a result, the unemployment rate among persons with disabilities is twice or three times higher than that of the nondisabled.

I . Brief introduction to the right to employment of persons with disabilities

Do persons with disabilities have a right to work? The answer to the question requires some preliminary comments on each of the question's key constituent terms⁽¹⁾. In the Americans with Disabilities Act, a disability is broadly defined as “a physical or mental impairment that substantially limits one or more of the major life activities of an individual⁽²⁾.” Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments

(1) Leslie Pickering Francis and Anita Silvers: *Americans with Disabilities-Exploring Implications of the Law for Individuals and Institutions*. Routledge (2000) 174.

(2) Steven A. Holmes: House Approves Bill Establishing Broad Rights for Disabled People, *New York Times*, May 23, 1990, A10.

which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others⁽³⁾. However, characterizing the right to work is a complex matter. Generally speaking, rights are potential claims by (or on behalf of) someone to some thing (an object or a liberty to act) against someone else⁽⁴⁾. The rights are moral or legal, and *prima facie*⁽⁵⁾ or absolute. According to Gregory S. Kavka, the right to work of persons with disabilities is a moral right concerning economic matters and should be protected and embodied in the law. The right is *prima facie* rather than absolute because it can in principle be overridden by competing rights or other considerations. However, it is a “strong” *prima facie* right and a small gain in social utility or economic efficiency is not enough to override this right. The right to work is the right to participate as an active member in the productive processes of one's society, insofar as such participation is reasonably feasible⁽⁶⁾. Most importantly, the right to work is a right to employment; it is a right to earn income, not simply a right to receive a certain income stream or the resources necessary to attain a certain level of welfare⁽⁷⁾.

One of the earliest international acknowledgements of the right of persons with disabilities to work opportunities was made by the International Labour Organization in 1944. It was unequivocally stated in a comprehensive and far-seeing Recommendation that “whatever the origin of their disability, they should be provided with full opportunities for rehabilitation, specialized vocational guidance, training and retraining, and employment on useful work⁽⁸⁾.” Four years later, the right to work of everyone, including persons with

(3) Article 1 of the *Convention on the Rights of Persons with Disabilities*.

(4) *Supra* note. 1, at 174.

(5) A *prima facie* right is overridable by competing considerations, while an absolute right is not. See Gregory S. Kavka, “Disability and the Right to Work,” *Social Philosophy and Policy* 9: 262 (1992).

(6) *Supra* note. 1, at 175.

(7) The employment need not be with a profit-making firm. Paid work in governmental, nonprofit or charitable organizations could serve the purpose. Even unpaid employment might vindicate a disabled person's right to work if (1) the job is seen by the person and others as tied to the person's skills and abilities, and thus can play a role in promoting self-respect; and (2) the person has adequate financial resources from other sources, for example, from family or government programs. See Leslie Pickering Francis and Anita Silvers: *Americans with Disabilities-Exploring Implications of the Law for Individuals and Institutions*. Routledge (2000) 190.

disabilities, was affirmed in Article 23 of *the Universal Declaration of Human Rights* that states “Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment. Everyone, without discrimination, has the right to equal pay for equal work. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection. Everyone has the right to form and to join trade unions for the protection of his interests⁽⁹⁾.” *The International Covenant on Economic, Social and Cultural Rights* reiterated the earlier provisions in binding treaty form⁽¹⁰⁾. *The International Covenant on Civil and Political Rights* does not deal specifically with employment, but it does contain a provision prohibiting discrimination on any ground. “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, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status⁽¹¹⁾.” Although disability is not explicitly included in either Covenant among the prohibited grounds of discrimination, it is encompassed by the term “or other status⁽¹²⁾.” Another provision relevant to the right to work is Article 8 of the *Covenant*, which focuses on the right of everyone not to be held in slavery or servitude, as well as to be free from forced or compulsory labour except in certain limited circumstances. In other international

(8) Employment (Transition from War to Peace) Recommendation No.71, 1944.

(9) Article 23 of *the Universal Declaration of Human Rights*.

(10) States Parties to *the International Covenant on Economic, Social and Cultural Rights* (Article 6, 7, and 8) are required to recognize the right of everyone to work, which includes the right to opportunity to gain ones living by work freely chosen or accepted, and undertake to safeguard that right. Steps to be taken to achieve the full realization of that right include vocational guidance, training and productive employment. States Parties also commit themselves to equal pay for work of equal value without distinction of any kind, safe and healthy working conditions, and equal opportunity for everyone to be promoted in employment to an appropriate higher level, subject to no considerations other than those of seniority and competence.

(11) Article 2 of *the International Covenant on Civil and Political Rights*.

(12) UN Committee on Economic, Social and Cultural Rights, General Comment No.5. 1994.

instruments on human rights⁽¹³⁾, the right to work is addressed, too. In a further reaffirmation of the right, “the World Conference on Human Rights”, meeting in Vienna in 1993, in a direct reference to persons with disabilities, emphasized that “every person is born equal and has the same right to life and welfare, education and work, living independently and active participation in all aspects of society. Any direct discrimination or other negative discriminatory treatment of a disabled person is therefore a violation of his or her right⁽¹⁴⁾.” Based on these international instruments, the right to work and employment is stated in Article 27 of *the Convention on the Rights of Persons with Disabilities*. In accordance with this article, States Parties need to recognize the right of persons with disabilities to work on an equal basis with others and prohibit discrimination on the basis of disability in all matters of employment, including the “conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions⁽¹⁵⁾.” Furthermore, States Parties must ensure the provision of “reasonable accommodation” to persons with disabilities in the workplace.

The legislation on guaranteeing the right to work of persons with disabilities originated from the passage of *the Fess-Smith Vocational Rehabilitation Act* in the United States of America in 1920. It created a broad-based federal program to provide vocational assistance to civilians with disabilities. The program provided federal funds at a 50 percent matching rate to state rehabilitation agencies for counselling, vocational training, and job placement services for people with physical disabilities⁽¹⁶⁾. After the Second World War, a great number of nations, including China, have made the laws and regulations concerned and provided legal guarantee for realizing the right to employment of persons with disabilities.

(13) The other international instruments on human rights, which contain the provisions on the right to work and employment, are as follows: *the Declaration on the Rights of Mentally Retarded Persons* (1971); *the Convention on the Rights of the Child* (Article 32); and *the 1993 UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities* (Rule 1, 3, 4, 5, 6, 7, and 19).

(14) *Vienna Declaration and Program of Action* was adopted by the World Conference on Human Rights on June 25, 1993.

(15) Article 27 of *the Convention on the Rights of Persons with Disabilities*.

(16) [http:// education.stateuniversity.com / pages / 2316/People-With-Disabilities-Federal-Pro](http://education.stateuniversity.com/pages/2316/People-With-Disabilities-Federal-Pro).

II. The existing legislative system for guaranteeing the right to employment of persons with disabilities in China

At present, the legislation on guaranteeing the right to employment of persons with disabilities in China is composed of the following laws and regulations. In *the Constitution of the People's Republic of China*, it is provided that “Citizens of the People's Republic of China have the right as well as the duty to work. Work is the glorious duty of every citizen who has ability to work. The State provides necessary vocational training to citizens before they are employed⁽¹⁷⁾.” In Article 45 of the Constitution, it is provided that “The State and society help make arrangements for the work, livelihood and education of the blind, deaf-mute and other disabled citizens.”

In Article 3 of *the Labor Law of the People's Republic of China*, it is provided that “Laborers have the right to be employed on an equal basis⁽¹⁸⁾.” Article 14 of the law provides that “Any special stipulation in laws and regulations on the employment of persons with disabilities, ethnic groups, and demobilized soldiers shall be observed.” Article 29 of the law provides that “The employer shall not revoke labour contracts in accordance with stipulations in Article 26 and Article 27 of this law if any of the following cases occurs to its employees: (1) Those who are confirmed to have totally or partially lost their labour ability due to occupational diseases or work-related injuries.” Article 73 provides that “Employees shall be entitled to social insurance treatment in any of the following cases: (1) retire; (2) suffer disease or injuries; (3) become disabled during work or suffer occupational diseases.”

In *the Employment Promotion Law of the People's Republic of China*⁽¹⁹⁾, there are provisions on the promotion of employment of persons with

(17) Article 42 of *the Constitution of the People's Republic of China*.

(18) Article 3 of *the Labor laws of the People's Republic of China* provides that “Laborers have the right to be employed on an equal basis, choose occupations, obtain remunerations for labor, take rests, have holidays and leaves, receive labor safety and sanitation protection, get training in professional skills, enjoy social insurance and welfare treatment, and submit applications for settlement of labor disputes, and other labor rights stipulated by law”.

(19) The law was adopted at the 29th Session of the Standing Committee of the Tenth National People's Congress of the People's Republic of China on August 30, 2007 and came into force on January 1, 2008.

disabilities. In Article 17 of the law, it is provided that “The State encourages enterprises to increase posts of employment, support the unemployed and persons with disabilities for employment, and provide preferential treatment in taxation for enterprises and personnel as follows: ...(3) enterprises that employ persons with disabilities in a prescribed proportion or employ them in centralization; ...(5) persons with disabilities who operate their own business.” In Article 29, it is explicitly stated that “The State guarantees the right to work of persons with disabilities. The people's government at all levels shall make overall plan and create conditions for the employment of persons with disabilities. Discrimination against persons with disabilities in hiring shall be prohibited.” Article 55 of the law provides that “The people's government at all levels shall carry out special supportive measures to promote the employment of persons with disabilities. Enterprises shall arrange for persons with disabilities in accordance with the prescribed proportion set by the State. Concrete methods shall be set by the State Council.”

In the existing legislation, *the Law of the People's Republic of China on the Protection of Persons with Disabilities* is a specific law aiming at guaranteeing the rights of persons with disabilities. Its fourth chapter focuses on guaranteeing the right to employment of persons with disabilities, which is composed of eleven provisions covering the duty of the State, social organizations, enterprises, public institutions, and private entities, and specific measures carried out in China. Article 30 provides that “the State shall protect the right of persons with disabilities to employment and the people's government at all levels shall formulate overall plans on employment for persons with disabilities and create conditions for their employment.” The principle for guaranteeing the right to employment is stipulated in Article 31 as “preferential policies as well as protective and supporting measures shall be adopted to gradually create more stable and appropriate employment environment for persons with disabilities through multiple channels, at various levels and in a variety of forms”. From Article 32 to Article 35, it is stipulated that the State, social organizations, enterprises, public institutions and private entities shall arrange for persons with disabilities in urban and rural areas to work by setting up welfare workshops, introducing a quota scheme of employment to provide jobs for persons with disabilities, and encouraging and supporting persons with disabilities to set up their own businesses. According

to Article 36, a series of preferential policies shall be carried out for guaranteeing the right to employment of persons with disabilities. For instance, the State shall implement preferential tax treatment for enterprises and employers who have fulfilled or over fulfilled their quota obligations to employ workers with disabilities, welfare institutions and self-employed disabled workers. They shall be provided with assistance in production management, technology, capital, materials and workplace, etc. The authorities concerned shall give priority to persons with disabilities who apply for licenses for self-employment. To the persons with disabilities engaged in various kinds of labor in rural areas, the agencies concerned shall provide assistance in getting technical guidance and farm materials. In Article 37, it is stipulated that persons with disabilities shall be provided with employment services and vocational guidance and training free of charge. In order to prevent persons with disabilities from forced or compulsory labor, it is stipulated in Article 40 that “no organization or individual shall force persons with disabilities to work through violence, threat or illegal restriction to personal freedom”.

In order to guarantee the right to employment effectively, *the Regulation on the Employment of Persons with Disabilities* was adopted at the 169th executive meeting of the State Council on February 14, 2007 and came into force on May 1, 2007. The Regulation consists of six chapters on General Provisions, Duties of Employers, Protective Measures, Employment Services, Legal Liabilities, and Supplementary Provisions.

In Chapter One, the guidelines of combining centralized employment with decentralized employment of persons with disabilities are emphasized. The people's government at or above the county level shall incorporate the employment of persons with disabilities into the plan for national economy and social development, formulate preferential policies and specific supporting and protection measures, and create conditions for the employment of the disabled⁽²⁰⁾. In addition, the government shall strengthen the overall plan and comprehensive coordination for the employment of persons with disabilities. The agencies in charge of the work on persons with disabilities in the people's government shall be responsible for organizing, coordinating, guiding and urging relevant agencies to do a good job in the employment of persons with

(20) Article 2 of *the Regulation on the Employment of Persons with Disabilities*.

disabilities⁽²¹⁾. China Disabled Persons' Federation and other local organizations shall be responsible for specifically organizing, implementing and supervising the work on the employment of persons with disabilities according to the laws and regulations or upon authorization of the government⁽²²⁾.

In Chapter Two, duties of employers are enumerated in the six provisions. The proportion for an employer to hire persons with disabilities shall not be lower than 1.5% of the total number of its staff members. The specific proportion shall be prescribed by the people's government of the province, autonomous region, or municipality directly under the Central Government⁽²³⁾. In case the proportion is less than the prescribed one, the employer shall pay the employment security fund for persons with disabilities. Welfare workshops for persons with disabilities, blind massage centers and other welfare entities launched by governments and the society, shall arrange the employment of persons with disabilities in a centralized manner with a proportion of 25% or more of persons with disabilities of their full-time employees⁽²⁴⁾. According to Article 13 and Article 14, the employer shall provide the disabled employees with suitable working conditions and protection, shall not discriminate them in promotion, conferring of professional titles, social insurances and welfare, and shall carry out necessary training for them.

Chapter Three is composed of six provisions on protective measures for the employment of persons with disabilities. In Article 15, the people's government at or above the county level shall adopt measures to develop the posts and the community-based services for guaranteeing the right to employment of persons with disabilities. As far as the employment security fund for persons with disabilities is concerned, it is emphasized in Article 16 that “It shall be lawfully collected and incorporated into budget and specially used for the vocational trainings of persons with disabilities, the service and assistance to their employment. It should not be embezzled, misappropriated, held back or privately divided.”

In Chapter Four, duties of the State, the agencies concerned, and the employment service institutions are explicitly mentioned. It is stipulated in

(21) Article 5 of *the Regulation on the Employment of Persons with Disabilities*.

(22) Article 6 of *the Regulation on the Employment of Persons with Disabilities*.

(23) Article 9 of *the Regulation on the Employment of Persons with Disabilities*.

(24) Article 11 of *the Regulation on the Employment of Persons with Disabilities*.

Article 22 that “the employment service institutions affiliated to China Disabled Persons' Federation and other local organizations shall provide services to persons with disabilities free of charge as follows: to release information on employment, to organize vocational trainings, to provide vocational psychological counseling and vocational rehabilitation trainings, and to provide necessary help for the self-employed persons with disabilities.” At the end of this chapter, it is stipulated in Article 24 that “in case of any dispute between a disabled employee and the employer, the local legal aid institution shall provide legal assistance for the disabled employee.” This provision is significant to the disadvantaged disabled employee in claiming for their rights.

Chapter Five addresses the liability for violating the regulation. In Article 25, it provides that “In violation of the present regulation, the functionaries of relevant administrative agencies who abuse their functions and powers, neglect their duties, and engage in malpractices for selfish ends, shall be investigated for criminal responsibilities according to law if a crime is constituted, or shall be given punishment if the offenses do not constitute a crime.” Pursuant to the following three provisions of this chapter, those who graft, embezzle, detain or allocate employment security fund for persons with disabilities, shall take corresponding responsibilities for their behavior. The employers that fail to pay employment security fund for persons with disabilities shall be given warning by financial agencies and required to pay it within a set period.

The last chapter of this regulation contains two supplementary provisions on the definition of “employment of persons with disabilities” and the date for the regulation to come into effect.

III. Administrative policies and practices on guaranteeing the right to employment of persons with disabilities in China

Pursuant to the laws and regulations, the government and the agencies concerned have issued a series of administrative rules and carried out a lot of measures to protect and promote the employment of persons with disabilities, which can be summarized as the following aspects.

1. To arrange the employment of persons with disabilities in a prescribed proportion

In *the Law of the People's Republic of China on the Protection of Persons with Disabilities*, the guideline of “combing centralization with diffusion” is

applied to the employment of persons with disabilities. The government and the society shall set up welfare workshops for persons with disabilities, massage institutions and other welfare entities to arrange centralized employment of persons with disabilities. With respect to the arrangement of diffused employment of persons with disabilities in a prescribed proportion, preferential policies and supportive measures have been made and carried out in practice. In May, 1995, China Disabled Persons' Federation issued *Several Proposals on Promoting the Employment of Persons with Disabilities in a Prescribed Proportion* and put forward guiding opinions on obligation, proportion, and liabilities for the work. In accordance with the document, all state organs, social groups, enterprises, public institutions or private entities, and joint ventures or foreign enterprises shall arrange the employment of persons with disabilities in a prescribed proportion or submit employment security fund for persons with disabilities in case they hire persons with disabilities in a proportion less than the prescribed one set by the people's government of provinces, autonomous regions or municipalities directly under the Central Government. In the document, the proportion is proposed to be between 1.5% and 2%. The enterprises that submit employment security fund should work out a plan on the number, types of work and specific requirements for the skills of persons with disabilities and submit it to the agency that is in charge of providing service for the employment of persons with disabilities. It is also proposed that persons with disabilities who reach the legal age of employment and have the desire to work and certain capability to work be employed in the prescribed proportion. As to the calculation of the proportion, it is proposed that the base of the proportion should be the total number of the staff, including full-time staff, contract-system labourers, part-time labourers with a contracted working time of more than one year. To employ one blind labourer or a labourer with severe physical impairment shall be regarded as the arrangement of two persons with disabilities.

In 1999, the General Office of the State Council of the People's Republic of China issued *the Notification of Several Proposals on Further Promoting the Employment of Persons with Disabilities*, which was jointly drafted by the Ministry of Labour and Social Security, the State Planning Commission, the Ministry of Civil Affairs, the Ministry of Personnel, the State Administration of Taxation, the State Administration for Industry and Commerce and China

Disabled Persons' Federation. The first requirement of the notification is “The people's government at all levels and the agencies concerned should take the employment of persons with disabilities in a prescribed proportion as the key task, and make concrete plans for the work.” The second requirement is “State organs, social groups, enterprises, urban and rural economic entities should arrange the employment of persons with disabilities in accordance with the proportion prescribed in the administrative rules issued by the local province, autonomous region or the municipality. And those that hire persons with disabilities less than the prescribed proportion should pay employment security fund in accordance with *the Provisional Rules of the Ministry of Finance on the Administration of the Employment Security Fund for Persons with Disabilities*.” The third requirement is “The employers should sign labour contracts with disabled labourers and arrange for them to do suitable work.” At the end of the notification, it is advocated that all the working units positively employ persons with disabilities. To those who arrange for persons with

Province	Proportion (%)	Province	Proportion (%)	Province	Proportion (%)
Heilongjiang	1.5	Shan Dong	≥ 1.5	An Hui	≥ 1.5
Ji Lin	≥ 1.6	Jiang Su	?1.5	Jiang Xi	≥ 1.5
Liao Ning	≥ 1.7	Zhe Jiang	1.5	Gui Zhou	≥ 1.5
Shaanxi	1.5	Guang Dong	≥ 1.5	Hu Nan	≥ 1.5
Qing Hai	1.5	Yun Nan	≥ 1.5	Hu Bei	≥ 1.5
He Bei	1.5	Si Chuan	≥ 1.5	Gan Su	≥ 1.5
He Nan	≥ 1.6	Fu Jian	1.6		
Shan Xi	1.5	Hai Nan	≥ 1.5		
Five Autonomous Regions		Proportion (%)	Four Municipalities directly under the Central Government		Proportion (%)
Tibet		1.5	Bei Jing		≥ 1.7
Xin Jiang		2	Tian Jin		≥ 1.5
Guang Xi		2 (County or city) 1.5 (Autonomous Region)	Shang Hai		1.6
Ning Xia		1.5	Chong Qing		?1.5
Inner Mongolia		≥ 1.5			

disabilities to work in a proportion more than the prescribed one, both the honorary and materialistic awards are to be granted. Whereas, those that refuse to employ persons with disabilities are to be criticized or rectified.

With the issue of these documents, all the provinces, autonomous regions and municipalities directly under the Central Government, have made their own administrative rules on the employment of persons with disabilities in a prescribed proportion. The specific proportion has been prescribed according to the local conditions. Employers who do not hire persons with disabilities according to the prescribed proportion should pay employment security fund for persons with disabilities. The chart above is the concrete proportion prescribed in the administrative rules on the employment of persons with disabilities made by 22 provinces, 5 autonomous regions and 4 municipalities in China.

2. To set up welfare workshops and arrange centralized employment of persons with disabilities

Since 1950s, the State has set up welfare workshops and arranged for a great number of persons with disabilities to work. In addition, preferential policies have been made to reduce or exempt the tax of welfare workshops. In 1989, the Ministry of Civil Affairs issued *the Provisional Rule on Welfare Workshops' Hiring Persons with Disabilities*. In this rule, the term “welfare workshop” refers to the special enterprise that has the nature of social welfare and is set up for arranging centralized employment for the disabled persons with certain capabilities. Both the disabled male who are between sixteen and forty-five years old and the disabled female who are between sixteen and forty years old are qualified to be employed in welfare workshops. “Persons with disabilities” in this rule refer to those who have visual impairments, hearing and speaking impairments, physical impairments, and intellectual impairments. With respect to persons with mental impairment who have certain capability to work, it is provided in Article 8 of the rule that “With the certification of the doctor, persons with mental impairment who have certain capability to work can be arranged for to work in designated areas, such as the rehabilitation workshop attached to mental institutions, industrial and mining enterprises and the rehabilitation facilities in communities.”

In order to encourage welfare workshops to employ more persons with disabilities, the State Administration of Taxation issued *the Notification on*

Levying Circulation Tax of Welfare Workshops which came into effect on January 1, 1994. The notification enumerates several preferential treatments for welfare workshops. Firstly, the welfare workshop that employs persons with disabilities in a proportion not less than 50% of its staff is entitled to the following preferential treatment. All the value added tax paid by the welfare workshop shall be reimbursed after the taxation agency examines it. Secondly, the welfare workshop that employs persons with disabilities in a proportion more than 35% but less than 50% of its staff is entitled to the reduction or exemption of the value added tax in case of loss. The specific percentage of reduction is decided by whether there will be a loss or not. Finally, the welfare workshop that is engaged in service (excluding advertisement) and employs persons with disabilities in a proportion no less than 35% is entitled to the exemption of business tax.

The welfare workshops' employment of persons with disabilities is further promoted by the exemption of construction tax. According to *the Several Rules on Levying and Exempting Construction Tax* issued by the Ministry of Finance, the welfare workshop that employs persons with disabilities in a proportion no less than 50% of its staff is entitled to the exemption of the construction tax.

The welfare workshop, set up by the agencies of civil affairs, streets and the government of communes or towns and employs persons with disabilities in a proportion more than 35% of its staff, is entitled to the exemption of income tax. To those that employ persons with disabilities with a proportion of more than 10% but less than 35% of its staff, half of its income tax shall be reduced.

3. To encourage and support persons with disabilities to start their own business

In Article 19 of *the Regulation on the Employment of Persons with Disabilities*, it is provided that “The State encourages and supports persons with disabilities to find jobs and establish businesses on their own initiatives. Self-employed persons with disabilities shall be given tax preferences, and relevant agencies shall take care of them in the business place, and exempt them from such administrative charges as management charges, registration charges and certification charges.” Apart from the centralized employment and the employment in a prescribed proportion, persons with disabilities have been engaged in making their own business with initiatives, especially since the far-reaching reform in 1978.

In order to promote and support persons with disabilities to start their own business, some preferential policies have been made and implemented all over the country. For instance, in *the Notification of Several Proposals on Further Promoting the Employment of Persons with Disabilities* issued in 1999, it is required that all the agencies of the administration of industry and commerce and the taxation should make and improve the preferential policies on supporting the self-employed persons with disabilities, and giving them preferences in checking and issuing license, dealing with related procedures, and reducing or exempting charges.

In September 1999, the Ministry of Finance, the Ministry of Labour and Social Security, the State Administration for Industry and Commerce and China Disabled Persons' Federation jointly issued *the Notification on Supporting Persons with Disabilities to Start a Business Single-handed or Collectively*. It is required in the notification that the agencies at all levels for administrating industry and commerce should give persons with disabilities who start their own business single-handed or collectively preferences in dealing with the procedures for registration. These persons with disabilities should be granted with the exemption of the administrative charges for registration, market management and certification when they have the certification of persons with disabilities of the People's Republic of China and the certification of local disabled persons' federation with the information on their impairments, level of impairments, their income or that of their family.

4. To reserve posts for persons with disabilities

In *the Regulation on the Employment of Persons with Disabilities*, it is provided in Article 15 that “The people's government at or above the county level shall adopt measures, widen the channels, develop the posts suitable for the employment of persons with disabilities, and safeguard the employment of persons with disabilities.” In order to apply the provision to practice, *the Proposals on Intensifying the Work of Persons with Disabilities in Communities* was jointly issued by the Ministry of Civil Affairs, the Ministry of Education, the Ministry of Public Security, the Ministry of Labour and Social Security, the Ministry of Construction, the Ministry of Culture, the Ministry of Health, the State Administration of Sports, and China Disabled Persons' Federation in 2005. It is required in the notification that the organization of persons with disabilities, named as “the Association of Persons

with Disabilities in Community”, should be set up on the basis of the neighbourhood committee of communities. The association is in charge of contacting with persons with disabilities, being concerned about their conditions and demands, and protecting their rights and interests. Most members of the association are persons with disabilities.

5. To provide training and service for employment of persons with disabilities

According to the administrative rules concerning persons with disabilities, it is required that the Disabled Persons' Federation at all levels put effort to the vocational training for persons with disabilities and provide adequate services and instructions for their employment. In *the Outline of the Work for Persons with Disabilities during the 11th Five-Year Development Program Period 2006-2010* which was worked out by the State Council Working Committee on Disability and ratified by the State Council on June 4, 2006, it is put forward that “Employment guidance and vocational training should be made available to all registered unemployed persons with disabilities or jobseekers with disabilities.” It is further put forward that “Employment service facilities affiliated to federations of persons with disabilities at various levels should be reinforced. Under the guidance of labour and social security authorities, these facilities should comprehensively administrate employment related services for persons with disabilities and provide career consultation and vocational training for persons with disabilities who are self-employed, collectively employed or employed under the quota system. Their services should be expanded and both the quality and efficiency of the services should be enhanced. The information network on employment of persons with disabilities should be built with vigorous efforts and unemployment registration be implemented at large so as to provide all-dimensional services to facilitate the employment of persons with disabilities.” With the implementation of the Outline, a lot of persons with disabilities have been provided with vocational training free of charge all over the country and their ability to work has been improved greatly.

Apart from vocational training, Disabled Persons' Federations at grass roots level, entrusted by the governmental agencies of labour and social security, are in charge of registering the unemployment of persons with disabilities. The demands for employment of persons with disabilities are recorded clearly. Meanwhile, they are engaged in providing necessary and timely information for the employers who are going to hire workers and persons with disabilities who

are looking for jobs. This measure is practical in promoting the employment of persons with disabilities in the competitive labour market.

6. To prevent persons with disabilities from being laid-off and to help them to be reemployed

In 1998, the Central Committee of the Chinese Communist Party and the State Council jointly issued *the Notification on the Work for Safeguarding the Basic Life and Reemployment of the Laid-off Staff of the State-Run Enterprises*. In the notification, it is pointed out that “The model workers, dependents of the soldier and the revolutionary martyr, and persons with disabilities should be prevented from being laid-off.” The government at all levels should make efforts to prevent the disabled from being laid-off. For the laid-off persons with disabilities, necessary assistance should be provided for their employment by means of vocational training and services. With respect to the specific measures, they are drawn up in *the Notification on the Work for Safeguarding the Basic Life and Reemployment of the Laid-off Persons with Disabilities*, which was jointly issued by China Disabled Persons' Federation and the Ministry of Labour and Social Security in May, 1999. The first measure is to carry out measures to prevent the disabled staff from being laid-off. The second one is to give priority in arranging for the disabled laid-off staff to reemployment. The third one is to increase the opportunity for the disabled laid-off staff by means of supportive policies. The last measure requires the employment service facilities affiliated to federations of persons with disabilities at various levels to assist the enterprise in choosing programs, receiving training, applying for licenses, collecting funds and reducing or exempting taxation for the disabled laid-off staff who are willing to work single-handedly or collectively.

7. To support persons with disabilities in rural areas to work

In *the Outline of the Work for Persons with Disabilities during the 11th Five-Year Development Program Period 2006-2010*, it is put forward that “Vocational training and training of applied technology for rural disabled persons should be strengthened in response to market demand and focus on socialised training so as to improve the competitiveness of persons with disabilities in the market. An incentive mechanism should be established and improved to inspire disabled persons to master vocational skills.” In addition, it is emphasized that “Training of applied technology and skills should be

provided for one million persons with disabilities suitable for gainful labour in the central and western rural areas of the country.” In order to make the policy practical in improving the conditions of persons with disabilities in rural areas, the Central Government and the government at all levels have provided specific loans for them to work single-handedly or collectively.

With the legislative mechanism and positive policies, the employment of persons with disabilities in China has developed quickly. A great number of persons with disabilities have realized their right to employment. Their abilities to be economically independent and fully participate in the society have been improved greatly. According to the statistics of China Disabled Persons' Federation, the work for the employment of persons with disabilities made new progress in 2009. Approximately 350,000 persons with disabilities in urban areas were newly employed, including 105,000 through centralized placement, 89,000 through employment in prescribed proportion and 156,000 through various forms of self-employment. At the end of 2009, approximately 4,434,000 persons with disabilities were employed in urban areas while 17,570,000 persons with disabilities in rural areas were working⁽²⁵⁾.

IV. Deficiencies of the existing protective mechanism

1. Laws and regulations are general rather than specific in guaranteeing the equal right to employment of persons with disabilities and in prohibiting discrimination against persons with disabilities in employment.

In Article 42 of *the Constitution of the People's Republic of China*, it is generally provided that “Citizens of the People's Republic of China have the right as well as the duty to work.” However, there is no provision in the Constitution on explicitly prohibiting discrimination by virtue of disability and guaranteeing the equal right to employment of citizens.

In *the Labour Law of the People's Republic of China*, the right to be employed on an equal basis is provided in Article 3. In addition, there are several provisions on discrimination. For instance, it is provided in Article 12 that “labourers shall not be discriminated against in employment due to their nationality, race, sex, or religious belief.” In Article 13, it is provided that “Women shall enjoy equal rights as men in employment. Sex shall not be used

(25) http://www.cdpcf.org.cn/sytj/content/2010-04/01/content_30272785.htm

as a pretext for excluding women from employment during recruitment of workers unless the types of work or posts for which workers are being recruited are not suitable for women according to the regulations of the State.” With respect to the discrimination by virtue of disability, there is no specific provision at all. It is merely provided in Article 14 that “Any special stipulation in laws and regulations on the employment of persons with disabilities, ethnic groups, and demobilized soldiers shall be observed.”

Just as mentioned above, the *Law of the People's Republic of China on the Protection of Persons with Disabilities* is the most comprehensive law on guaranteeing the rights of persons with disabilities. Chapter Four of the law is on the right to employment of persons with disabilities. To prohibit discrimination against persons with disabilities is held to be one of its most important functions. Nevertheless, “discrimination” is not defined clearly in it. What kind of behaviours constitute discrimination against persons with disabilities is not made clear, either. With respect to the standard and procedures for determining discrimination, there is no specific provision at all. The legal liability for discriminating against persons with disabilities is not provided in the law. Most important of all, there is no provision of providing legal remedies for persons with disabilities who are discriminated against in employment. Maybe that is why since it took into effect in 1990, there is no case in which persons with disabilities who are discriminated against attempt to claim for their right to employment in accordance with this law.

As an essential component to ensure the implementation of the *Law of the People's Republic of China on the Protection of Persons with Disabilities*, the *Regulation on the Employment of Persons with Disabilities* came into force on May 1, 2007. What makes people disappointed is that the regulation merely reaffirms the principle of prohibiting the discrimination against persons with disabilities in employment⁽²⁶⁾ and requires “An employer shall provide the disabled employees with the labor conditions and labor protection suitable for their healthy situation; and shall not discriminate against the disabled employees in the aspects of promotion, rise in rank, conferring of professional titles, social insurances and living welfare treatments, etc⁽²⁷⁾.” Frankly speaking, the regulation has no substantive breakthrough in guaranteeing the right to

(26) Article 4 of the *Regulation on the Employment of Persons with Disabilities*.

employment of persons with disabilities because of its lack of specific provisions on the legal liabilities of those who have performed discrimination and on the legal remedies for those who are discriminated against in employment.

2. The preferential policies on promoting the employment of persons with disabilities need to be improved

At present, the government at all levels in China have made preferential policies in order to promote the employment of persons with disabilities. Despite their supportive role in guaranteeing the right, there are still a lot of deficiencies which hinder their positive impact in practice. Just as classified above, these preferential policies have a wide coverage of seven aspects of the employment of persons with disabilities.

As far as the policies on arranging for persons with disabilities to work in a prescribed proportion are concerned, all the provinces, autonomous regions and municipalities directly under the Central Government have, depending on local conditions, determined a definite proportion in the administrative rules concerned. In practice, employers are reluctant to employ persons with disabilities for various reasons. Some employers merely provide insufficient wages for the disabled employees in order to evade paying the employment security fund for persons with disabilities. The disabled employees act as the “token” of the prescribed proportion and are not really employed at all. As a result, it is hard to realize the goals of the policy of employing persons with disabilities in a prescribed proportion. In other words, it is less likely for persons with disabilities to improve their conditions and participate in the society fully even with the implementation of the policy.

Further, it is required in the administrative rules concerning the employment of persons with disabilities in a prescribed proportion that “The employer who hires persons with disabilities in a proportion less than what the people's government of the local province, autonomous region, or municipality directly under the Central Government requires shall pay the employment security fund for persons with disabilities as a punitive measure⁽²⁶⁾.” The amount of the employment security fund is set as the preceding year's average annual wages in the local area. At the end of each year, the employer shall submit the

(27) Article 13 of *the Regulation on the Employment of Persons with Disabilities*.

statistics of the disabled employees and their proportion in the staff to the employment service facilities affiliated to federations of persons with disabilities. After examining the statistics, the employment service facilities shall decide whether the employer should pay employment security fund or not. The payment of the employment security fund aims at encouraging the employer to hire persons with disabilities and provide more opportunities for them to be economically independent and capable of participating in the society. However, the function of the policy has not been brought into full play due to the reluctance of the employers. The employers, who have the disabled employees less than the prescribed proportion, are different in gaining profits. Therefore, the wages of their employees are quite different. The employers, who pay the wages less than the preceding year's average annual one, are reluctant to pay the employment security fund for persons with disabilities because they think it unfair. While the employers who are able to pay the wages higher than the preceding year's average annual one, are willing to pay the employment security fund without any hesitation. Actually, they prefer paying the fund to hiring persons with disabilities because the employment security fund is lower than the actual cost of hiring a person with disabilities. Although the motive of the employment security fund is positive, its effects are unsatisfactory.

With the dramatic social changes in China, the policies on setting up welfare workshops and arranging centralized employment of persons with disabilities by reducing or exempting tax have become inadaptable to the reality. In *the Notification on Levying Circulation Tax of Welfare Workshops* issued by the State Administration of Taxation, it is emphasized that “The preferential treatments are limited to the welfare workshops of civil affairs that conform to the following requirements.” Welfare workshops here refer to the workshops set up by the agencies of civil affairs, streets, and communes or towns before January 1, 1994. The enterprise of foreign investment shall not be included. The welfare workshops set up after January 1, 1994 shall not be entitled to the preferential treatment in taxation unless it is strictly examined and ratified by the agency of civil affairs and the agency of taxation at the provincial level. In addition, the welfare workshops shall not be entitled to the preferential

(28) Article 9 of *the Regulation on the Employment of Persons with Disabilities*.

treatment unless the disabled employees take up no less than 35% of the staff. The disabled employees here refer to the persons with visual impairments, hearing and speaking impairments, physical impairments, and intellectual impairments.

Although they have played a positive role at the beginning, the policies have become impractical with the changing social conditions. At present, the former welfare workshops have carried out reforms and introduced the investment in many forms for development. In addition, some individuals have made their own business by employing persons with disabilities. As a result, the welfare workshops in conventional sense are becoming less and less. Pursuant to the existing principles, a great number of welfare workshops are excluded from enjoying the preferential treatments for reducing or exempting tax, which hinders their employment of persons with disabilities. Another disadvantage of the policies results from the provision that only the welfare workshops that employ persons with visual impairments, hearing and speaking impairments, physical impairments, and intellectual impairments, are entitled to the preferential treatments. It deprives the welfare workshops that employ persons with mental impairments of the preferential treatment, which indirectly affects the employment of these disabled persons. Finally, the policies have been utilized by some sophisticated employers in practice. They pay for some persons with disabilities instead of providing work for them in the workshop in order to enjoy the preferential treatment for reducing or exempting tax. To them, it is profitable because the payment for persons with disabilities is much less than the tax. Therefore, the policies in this field should be adjusted and supervised effectively. Otherwise, the State would suffer from the loss of taxation and the employment of persons with disabilities can not be promoted as expected.

As far as the policies on promoting and supporting persons with disabilities to start their business are concerned, they are positive in practice. A great number of persons with disabilities are engaged in the business suitable to their physical conditions, such as maintaining electric appliances, recycling resources, and retailing, etc. However, the procedures for applying for the loan in some areas are too complicated for persons with disabilities. Some agencies are indifferent to the demands of persons with disabilities and are not efficient in implementing these preferential policies. These factors are regarded as the

disincentives for persons with disabilities to start their own business. To persons with disabilities who have started the business, they are still worried about the future because of the unstable state and the lack of effective security of their business.

With the implementation of the policies on reserving posts, some persons with disabilities have worked in the associations of persons with disabilities in communities. However, the posts in these associations are far less than the demand of persons with disabilities. How to develop more suitable posts for persons with disabilities has been concerned about in the society. In recent years, the amount of the employment security fund for persons with disabilities has been increasing. Although it is specially used for vocational trainings of persons with disabilities, services and assistance to the employment of persons with disabilities, the treasury administrative agencies in some areas permit a portion of the fund be utilized to reserve posts for persons with disabilities. In practice, there are some arguments over the specific utilization of the fund and effective supervision over it.

In order to help persons with disabilities find suitable jobs, the policies on developing training and providing service for employment of persons with disabilities have been made and corresponding measures have been carried out all over the country. With training and service provided by the disabled persons' federation, a great number of persons with disabilities are employed. However, the demand of persons with disabilities for training and service has not been met properly. To be concrete, the contents and methods of training are out-of-date and confined to the stereotyped business of persons with disabilities. In addition, only some persons with disabilities in urban areas are provided with the training while a lot of persons with disabilities in rural areas have no access to it for various reasons. Finally, the abilities of the teachers who are engaged in training need to be improved so as to make the persons with disabilities more adaptable to the dramatically changing society. With respect to the service for employment, there are still some deficiencies. Taking the information as an example, persons with disabilities are less accessible to the information on employment by virtue of their impairments. At present, the comprehensive network for providing necessary and timely information on employment for persons with disabilities has not been set up in the country. The employment services facilities affiliated to federations of persons with

disabilities at all levels are lack of sufficient and useful information on employment. The collection of the statistics on the demand, the abilities of persons with disabilities and the information on employment of the employers has not been paid much attention to by these facilities. As a result, the positive impact of the policies on providing service for the employment of persons with disabilities has been greatly diminished.

With the transformation from planning economy to marketing economy in China, a huge number of employees have been laid-off for the increasing efficiency and productivity. In the fierce competition, persons with disabilities are destined to be disadvantaged laid-offs. Taking the plight of persons with disabilities into consideration, the State Council and the departments concerned have made the policies on preventing persons with disabilities from being laid-offs and helping them to be reemployed. With the implementation of these policies, a great number of persons with disabilities are still confronted with the fate of being laid-offs. The reasons for the unsatisfactory result are as follows. On the one hand, the regulatory document issued by the Central Committee of the Chinese Communist Party and the State Council is not specific enough. In the notification, it is the general advocates rather than specific requirements that are made as the solutions to the existing problem. On the other hand, the document jointly issued by the China Disabled Persons' Federation and the Ministry of Labour and Social Security, is lack of essential requirements for supervising the enforcement of the document, the punishment for the parties who do not conform to the requirements of the document. In all, the function of these policies has been greatly diminished and a lot of persons with disabilities have become laid-off unavoidably. To those laid-off persons with disabilities, it seems very difficult to be reemployed.

With respect to the policies on supporting persons with disabilities in rural areas to work, they are significant in helping them get rid of poverty. A case in point is the policy on training for applied techniques and skills. With the training, persons with disabilities in rural areas who are suitable for gainful labour have already make a fortune. However, the policies on providing loans for persons with disabilities in rural areas are not working well. These policies aim at providing loans for persons with disabilities and the poor rural households with persons with disabilities to alleviate poverty. However, the loans are to be provided by the commercial banks that are in pursuit of profits.

In most cases, these commercial banks sit in the application of persons with disabilities for the loans, which greatly hinders the function of the policies.

V. Improvement of the protective mechanism

Taking the deficiencies into consideration, the protective mechanism on guaranteeing the right to employment of persons with disabilities should be improved in the following aspects.

Firstly, a specific law on prohibiting discrimination against persons with disabilities in employment should be made. In the existing legislation, there is no definition of discrimination and no enumeration of discriminatory behaviours against persons with disabilities in employment. It is impossible for persons with disabilities make a claim for their right to employment in accordance with the existing laws and regulations when they are discriminated against in employment. The specific law should make the fundamental principles clear, including equal employment and prohibiting discrimination against persons with disabilities. In addition, it should define discrimination and discriminatory behaviours in employment, the liabilities for discrimination, and the remedy for discrimination. The law should provide the agency that is in charge of prohibiting discrimination against person with disabilities and its functions and powers. Finally, the law should make a general provision on the behaviours that do not constitute discrimination. In practice, not all of the disparate treatments constitute discrimination. Some treatments should be considered reasonable owing to the special requirements of work.

Secondly, administrative policies and practices should be improved. At present, there is no independent agency that enforces laws against discrimination in workplace and investigates discrimination complaints based on disability in China. It is suggested that an independent agency similar to the Equal Employment Opportunity Commission of the United States of America be established under the laws concerned. The agency should set up branches all over the country and be empowered to file discrimination suits against employers on behalf of alleged victims and to adjudicate claims of discrimination brought against administrative agencies. With respect to the employment security fund, it is proposed that the agencies of treasure and the agencies of taxation be responsible for the collection of employment security fund from the employers that do not employ persons with disabilities in the

prescribed proportion. In addition, effective supervision should be set up for its utilization in providing training or services for persons with disabilities and awarding prizes for the employers who employ persons with disabilities more than the prescribed proportion. The practices for promoting the employment of persons with disabilities in rural areas need to be improved, too. Taking the assistance for person with disabilities in rural areas as an example, it is proposed that the management of poverty-alleviation loans should be strengthened, regulated and evaluated to guarantee the benefits of person with disabilities in rural areas to the largest extent. In areas where conditions are proper, subsidies for poverty alleviation loans from the Central Government may be directly delivered to the loan applicant⁽²⁹⁾.

Finally, the judicial protection should be enhanced for guaranteeing the right to employment of persons with disabilities. In any society, a lawsuit is regarded as the most effective means for providing remedy when the rights are infringed upon. It functions as the guarantee of social justice and equality. If the State does not take its responsibility for guaranteeing the right of persons with disabilities to employment or if the government violates the right, the judicial protection should be resorted to. In China, there is no system similar to “judicial review” of the United States of America at present. Therefore, persons with disabilities are unable to claim for remedy for the violation of the right to employment in accordance with the Constitution. In addition, there is no provision on the implication and scope of “labour dispute” in *the Labour Law of the People's Republic of China*. Discrimination against persons with disabilities in hiring, employment, payment and protection is not included in “labour dispute.” Thus, person with disabilities are unable to claim for remedy in accordance with the Labour law. Being the disadvantaged group, person with disabilities should be provided with efficient and effective judicial protection in China. When they are denied opportunities to employment or confronted with discriminatory behaviours in employment, they can claim for remedy and be compensated for damages.

To sum up, the right to employment is not only essential to persons with disabilities, but also significant to their families and the society. With the

(29) The Outline of the Work for Persons with Disabilities during the 11th Five-year Development Program Period. http://www.cdpf.org.cn/english/lawsdoc/content/2008-04/10/content_84889.htm.

improvement of the existing protective mechanism in China, more and more persons with disabilities can enjoy the right as the nondisabled members of the society. Their ability to live independently and take full participation in the society can be greatly enhanced, too.