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Re-employment of the Young-Old People in China: Reflection on the Legal Protection

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Abstract: In the context of population ageing, young-old people aged 60-69 are considered the main force in the re-employment strategy in China. However, dilemmas exist in the reality. After a summary of previous researches, it is clear that young-old people have less job opportunities and get less salary compared with their younger competitors. Moreover, there is no work-related safeguard for these workers. To further explore the issue, this article focuses on the current legal system and theories in the academic field as to the recognition of labor relationship and prohibition of age discrimination. It turns out that, retirement as an obligation has blocked recognizing labor relations in a natural and reasonable manner by disregarding the parties' autonomy and the natural characteristics of labor relationship; On the issue of age discrimination, the meaning and role of age discrimination in the current legal system are still not clear. Combined with experience learned from Japan, suggestions can be further given: Retirement should no longer be ruled as an obligation as it is not in line with the reality; On this basis, the recognition of labor relationship should be reset with a purpose of respecting parties' autonomy and following natural characteristics of labour relations; All the young-old workers should be equipped with work-related injury insurance as inclined protection of elderly people. Furthermore, the importance of regulations on age discrimination in line with other measures is usually underestimated. In order to achieve substantive equality in the workplace, the author holds that the judgement standard of age discrimination should be clarified as soon as possible and an age discrimination review system and a punishment mechanism should be established.

Keywords: Re-employment, Labour relationship, Legal protection, Age discrimination

1. Introduction

Population ageing is one of the major problems across the globe in the 21st century. According to the United Nations, the proportion of people aged 60 and above is growing faster than any other age groups. The change of population structure caused by population ageing has a significant impact on social development and the development patterns of the future society. Therefore, multiple measures are taken in each country to cope with the population ageing problem. Programs such as "delaying retirement" "encouraging immigration" and "encouraging childbirth" are putting forward as crucial population strategies. Furthermore, it is argued by the United Nations that in terms of population policies, those featuring "active ageing", namely, the process of optimizing opportunities for health,

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participation and security in order to enhance quality of life as people age, will be a global trend in the long run [1].

As the most populous country in the world over the past few decades, it never occurred to China that the change of population structure and population ageing would come at such a fast pace. According to the seventh population census in China, the number of Chinese elderly people, namely, those aged 60 and above, has reached 280 million, accounting for 19.8% of the total, which has far exceeded the internationally-recognized standard of population ageing [2]. Currently, China has entered a period of negative population growth. This dramatic shift of population structure is a wake-up call for Chinese policy-makers. In such a context, the Central Government Work Report of 2023 has taken the strategy of coping with population ageing actively as a priority and several documents have been issued by the authority in recent months in order to encourage the re-employment of young-old people. Such policies can be regarded as the latest strategy to deal with its devastating population problems.

Young-old people in this article refer to the elderly people aged between 60 and 69 years old. They are thought as elderly people while compared to the others, they are much younger. Currently, this special group of people are considered as the main force in the re-employment strategy in China. A typical feature of them, generally speaking, is that they have been above the retirement age (for male 60 years old and for female 50 or 55 years old). Therefore, they are also parts of "overage workers" called by many Chinese scholars when it comes to the similar legal issues. Under the current compulsory retirement system, retirement becomes a watershed of workers' legal status, which is the reason why this group is completely different from those ordinary workers in the legal sense. Against such a background, this article mainly discusses the legal protection of those young-old people. Specifically, what should be considered when it comes to the legal protection of them? How to achieve the purpose of protection in a reasonable manner, while maintaining the rule of law and social balance? How to achieve the real equality? After a review on the current regulations and theories and practices, this article tries to give a different insight into these problems. For a start, to answer these questions in a convincing way, this article will summarize the current situations and dilemmas of these special group.

2. Situations and the Dilemma of re-employment of young-old people

2.1. General Situations for re-employment of young-old people

At present, there has already been a large number of elderly people in the job market after retirement. Some common characteristics can be concluded based on previous researches. Firstly, there has been a large number of young-old people at work, with a survey estimating that nearly 51.04 million overage workers in China are at present in the job market. Secondly, those young-old people are often employed outside the official system, most of whom are working at the primary industry. Other young-old people are mainly working at the service industry and those labor-intensive jobs like cleaner, the security guard, and nurses are the top three choices by those workers. Thirdly, it is noteworthy that with the boom of we-Media and self-employment economy, more and more elderly people choose to follow new trends. A typical example is the live-streaming e-commerce. It is surveyed that young-old people account for 20% of the total live -streaming hosts, which is seen as a new trend of elderly people reentering the workplace. Apart from that, most of the young-old workers are temporary workers, with rather low stability of work. The dilemmas young-old people are facing currently are reflected in the following three aspects:

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2.2. Little Job Opportunity

Older job seekers tend to have lower odds of getting hired and staying in the workplace. Firstly, the older job-seekers are less preferable than their competitors in the job hiring process. According to the World Health Organization's World Report on Ageism in 2021, it is a common practice for employers to take age factors into account in the recruitment process, and workers aged under 40-55 are likely to be discriminated in the job market [3], not to mention people aged more than 60. Secondly, older job-seekers are often restricted to a limited scope of jobs in the job market and thus the opportunities of getting a job decrease to a great extent in essence. Thirdly, young-old people are blessed with less chances of promotion and more possibilities of being fired during their work. In fact, such a decision by the employer does more harm than good to enterprises and workers. The restriction on the recruitment age by the employer is based on the subjective speculation rather than objective factors, which greatly reduces the possibility of recruiting eligible workers and leads to an increase of recruitment costs on time and money.

2.3. Unequal pay for equal work

As a typical problem in terms of employment discrimination, unequal pay for equal work refers to that employers have a deferential treatment on the workers with the same job and show direct or indirect discrimination on certain workers due to their gender, race and age. It is also called compensation discrimination in The Equal Pay Act of 1963 in the United States. Overage workers, who are less preferable in the job market, are the typical victims of such a problem. An empirical research shows that even if the young-old people are equipped with adequate working ability, their wages are still significantly lower than the hourly wages of normally employed workers. And even if the scope of researching subjects expands to include meal allowances and accommodation subsidies, the difference between the young-old workers and the ordinary workers is still significant: After excluding the influence of multiple factors such as gender, work experience and the education level, the employment salary of over-age workers is about 10% less than that of other workers. This demonstrates a severe phenomenon of paying discrimination [4]. In addition, except for salary aspect, there is significant difference regarding various quantitative welfare benefits between overage workers and ordinary workers.

2.4. No Work-related safeguard

Once the young-old people get injured in the workplace, it is hard to be recognized as work-related injuries and therefore almost no compensation is granted for these victims. In the current legal system, the main guarantee for the ordinary workers is the insurance against work-related accidents, the fundamental purpose of which is to protect the personal interests of workers. It is stipulated in the Regulations on Work-Related Injury Insurance that, in the event of a work-related accident, the medical fees and other expenses paid by the worker shall be paid by the work-related injury insurance fund, provided that the relevant conditions for the determination of the accident have been met. Since the application of the Work Injury Insurance Regulations is based on the premise of labor relationship, this typical legal protection clause is not applicable to young-old workers, who can only establish service relations with employers after retirement pursuant to Labor Contract law. To deal with such a problem, the State Council, the Supreme People's Court, the Ministry of Human Resources and Social Security have issued relevant documents together four times from 1981 to 2016 in order to provide separate regulations. However, the separate regulations have set strict conditions for the subjects and special requirements for recognition of work-related injury and in practice, these judicial opinions have led to great practical difficulties of injury recognition. The current pattern is that after being recognized as work-related injuries, over-age workers are entitled to raise a claim for

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compensation by way of civil litigation and asked the employer rather than the insurance company to pay for it. Nevertheless, burdens on both employers and workers have actually increased in such a situation. It is too demanding for these elderly people to be aware of collecting evidences and protecting their rights via litigations. As a result, very few over-age workers actually receive compensation for work-related injuries as in the course of litigation, they are often not dismissed by the courts due to insufficient proof and defective evidence. Apart from that, for many injured workers, it costs too much to wait for the long process of litigation to get the compensation as hospital treatment expenses.

3. A review on current legal system and academic theories

In terms of the current regulations, the legal protection related to young-old people can be basically summarized in two aspects: the recognition of labor relations and the prohibition of age discrimination. By reviewing the specific provisions in these two aspects can the author find the problems behind the dilemmas in reality.

3.1. The recognition Labour relations in the current legal system

Overall, a dichotomous model has been adopted in Chinese labor field, with one being a labor relationship, governed by Labour Law and the other a service relationship, governed by Civil Law. As for the substantive difference, the parties in a labor relationship are generally fixed, with one side the employer, the other side the workers. Comparatively, the relationship between the parties in a service relationship is much more flexible, with generally equal status, much like a cooperation relation. In terms of the status of the subject, there exists an economic subordination and subordination in identity between the two sides in a labour relationship. Comparatively, the relationship between two sides in a service relationship is generally equal.

For young-old people, however, they can only establish service relationship with the employer. As stipulated in the Chinese labour Contract law (Hereinafter referred as Labour Contract Law), Where a worker begins to enjoy basic old-age insurance benefits according to law, the labor contract shall be terminated. Meanwhile, based on the provisions of Article 44 (2) of the Labor Contract Law and Article 21 of the Regulations for the implementation of the Labor Contract Law, judicial decisions can mainly be categorized into two different judgment standards, with one "basic pension insurance treatment" standard and the other "retirement age" standard. Overall, it is determined that young-old people after retirement cannot establish labor relationships with employers [5]. In Chinese Labour Law, the recognition of labour relations is the foundation for protecting the employees' rights, including wages, insurance and etc. As it turns out, even the Labor Contract Law includes explicit provisions on regulating "different pay for the same work" and "recognition of work-related injuries and protection of rights and interests", young-old people still suffer from these unfair treatments since these provisions are not applicable to them. Therefore, the denial of the labor relations of the elderly in re-employment has always been recognized as a core factor that leads to the loss of rights and interests of the elderly in the workplace.

3.2. A review on the current theories: Is a change on labour relationship a feasible way

In the academic field, scholars tried to explain what the type of labour relationship of overage workers ought to be based on the rule of law, with various theories developed. Generally speaking, there are mainly the following three theories that can be summarized:

(1) Service relation theory: According to the theory of service relations, overage workers do not belong to the workers stipulated in the Labour Law. No matter whether there is a consensus on labour relations between the job-seekers and the employers and whether there exist labor relations in essence,

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they cannot establish labor relations with the employers, but only service relations. The reason for the service relationship theory is that retirement is not only a right, but also a compulsory obligation, and over-age workers will naturally lose their labor status in the Labour Law when they reach the retirement age [6]. The current regulation in the legal system is quite close to this theory in essence.

(2) Labour relation theory: According to the theory of labour relations, young-old people belong to the workers covered in the Labour Law, and they can establish normal labor relationship with the employer. The reason for the labor relationship theory is that labor is a right stipulated in the Constitution, and the law only regulates the minimum age for one participating labour work without the maximum age limit. It is illegal if one deprives the right of young-old people who retire and re-enter the job market to establish labor relationship with the employer [7].

(3) Special labour relation theory: The special labor relationship theory departs from the traditional dichotomous model of the Labour Law, which holds that a special labor relationship should be reached between young-old people and the employer, and that young-old people should enjoy part of the treatment of the labor relationship, such as insurance against work-related injuries. However, since retirement is an obligation in China, young-old people are no longer the subjects of Labour Law after retirement, and therefore they cannot establish a standard labor relationship. The special relations are aimed at maintaining the balance between the rights of young-old people and the pressure of the employers [8].

By comparing with different theories can the author find problems behind the controversy. The service relation theory and special labour relation theory have disregarded the principle that the establishment of a legal relationship shall follow both parties' own will, which is in violation of the fundamental principle of autonomy of meaning in Civil law. It is widely-acknowledged that the establishment of labor relations is a result of the autonomy of workers and employers [9]. That is to say, the questions of the substance of the relationship between the young-old people and the employer should conform to the principle of parties' autonomy in private law field, and there should not be too much intervention. On this basis, the consent of the parties should be fully respected. The compulsory recognition of service relationship or special labour relationship, however, has disregarded the consent of the two parties. This practice not only violates the fundamental principle in the Labour Law and Civil Law, but also makes it difficult for young-old people to re-enter the workforce.

On this basis, changing labour relationship artificially for whatever reasons is not a feasible way. The criterion for distinguishing between labor relations and service relations should be the substantive difference, one of which, for example, is the existence of subordination mentioned above. This must be treated as a prerequisite for recognizing the labour relationship as the existence of subordination is the inner characteristics of it. Specifically speaking, labor subordination includes personality subordination and economic subordination. In a labor relationship, workers have dependence on employers and they need to obey the employers on the work arrangement; In a service relationship, the two parties are usually equal. And one does not have to obey the management of the other party, and the party is only accountable for exercising reasonable care in accordance with the principle of good faith. This is why service relationship is included in the scope of civil law rather than the Labour Law. From this perspective, both the doctrine of forcibly identifying all over-age workers as labor relations, and the doctrine of creating a special labor relationship in order to seek neutrality, are artificial changes that ignore the essential considerations of labor relations.

To further explore the reasons for the disputes, a question is worth thinking: What is the main controversy that leads to different theories on the labour relationships? By comparing the different opinions can the author find that, unlike the labor relationship theory, which insists that retirement will not affect the labor qualification of young-old workers, both the service relation theory and the special labor relationship theory has in essence admitted that retirement has an influence on the labor qualifications of young-old workers. And the main argument behind this controversy is that in the

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design of the current legal system, retirement is still a mandatory obligation. It is a necessity for workers to retire when they reach the age of 60. If one wants to protect the rights and interests of young-old people through analyzing labor relations, the obligation of retirement is an insurmountable barrier [10].

3.3. The ambiguous regulation on age discrimination in current legal system

Another legal regulation is mainly reflected in the provisions of prohibition of discrimination. In general, the current regulation on the issue of age discrimination is rather vague and ambiguous. The fundamental legal source of the prohibition of discrimination can be found in the Constitution of the People's Republic of China (Hereinafter referred to as Constitution) Article 42, which stipulates that Citizens of the People's Republic of China have the right and duty to work. The State shall, through various channels, create conditions for employment, strengthen Labour protection, improve working conditions and, on the basis of the development of production, raise remuneration for work and welfare benefits. By analyzing the text can we clearly find there is no restriction on the ages of a worker. Therefore, the Constitution should have fundamentally empowered all citizens to work and grant them with full legal protection, regardless their ages. However, as it turns out, the core value emphasized in this Constitutional norm remains merely a matter of principle, without any specification by other basic laws and regulations. The Labour Law serves as the basic law in the labour field, thus in theory it shall specify the Article 42 in Constitution as a of general constitutional principle. However, there are no expressive terms in the current Labour Law indicating the prohibition of age discrimination in the workplace, not to mention the specific statute to confirm the responsibility of constituting age discrimination in the workplace. The Article 12 in the Labour Law is understood as the prohibition of unlawful practices in the labour field in general, which stipulates that Workers shall not be discriminated against in employment because of their nationality, race, sex or religious belief. The loophole of the law leaves a space for employers to set an unreasonable age requirement at will, which causes inequality in the employment field in substance.

At the same time, at the judicial level, the author finds that there exist confusion and contradictions on the meaning and criteria of age discrimination. How to define whether a specific behavior constitutes a discriminatory practice or not? In practice, the plaintiff often fails to raise a claim based on age discrimination while the judges cannot explain the reasons for this dismissal. This controversy mainly derives from the lack of universal definition of age discrimination and thus an unclear understanding of age discrimination. Initially proposed by the Robert Butler, age discrimination refers to the stereotyped prejudice against the elderly in American society at that time and the unreasonable discrimination based on such prejudice [11]. It both includes disparate treatment (direct discrimination) and disparate impact (indirect discrimination). It is often the case that the employer excludes the elderly job-seekers based on their age without considering their ability, experience and the work performance. In China, however, what is only widely held is that age discrimination is a violation of the right to equal employment of the elderly people, with no specification for judging whether a specific practice constitutes age discrimination or not. For example, it is hard to define whether the job requirements with a preference to job-seekers' ages constitute an age discriminatory practice. Not only does the vague standard have an impact on the justice, but also it has led to an arbitrary increase of claims based on age discrimination since the plaintiffs have no clear idea on the age discrimination either. In practice, it is common for young-old people to raise a claim that they have been discriminated due to their ages in the workplace. It is nevertheless difficult to find out the truth and give a justified answer.

Besides, the legal position and role of age discrimination are still not clear. When it comes to the current dilemma of young-old people, it is argued by some scholars that age discrimination is the main obstacle behind the dilemmas of the employment of young-old workers [12]. In many countries,

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multiple measures are taken to prohibit age discrimination and thus to promote the re-employment of elderly workers. In China, however, what is the consequence if one constitutes an age discrimination to its employee in Chinese Labour Law? In practice, the plaintiff often cites age discrimination as a factual basis, for example, with the aim of claiming avoidance of contract and damages in tort. In the cases with job-seekers at the recruitment stage, they may claim for monetary compensation from the employer. For employees at the hiring stage, they wanted to claim age discrimination to establish the existence of a labor contract between themselves and the employer, or to invalidate some of the employer's legal actions by claiming age discrimination. As for the legal basis, age discrimination may be understood as a basic principle of Labour Law or Civil law in the current judicial practice. The basic principles are the underpinning provisions of the law and are decisive in legal disputes. In this way, however, age discrimination has become a hegemonic clause in the legal sense of the word. wherever age discrimination is touched upon, it may lead to decisive legal consequences. This leads to no possibility of distinguishing the diverse extents of diverse age discriminatory practices in different cases. As the judgement standards of an age discriminatory practice are inherently vague, would it be harmful to equality and fairness between employees and employers if there is no distinction between different discriminatory practices? What should be the position of "age discrimination" in Labour Law and civil law? This is still worth discussing in the academic field.

4. Reconstruction: legal protection for the young-old people

4.1. Experience from Japan:How the greyest country promotes its overage workers

Experience can be learned from Japan in the legislative level as it has a similar social structure and economic condition with China. According to the Japan Institute for Labor Policy and Training in 2014, 75.4% of the male overage workers and 45.8% of female workers aged 60-64 are still in the job market [13]. Therefore, those aged 60-69 are the main force in the elderly's job market in Japan, which is quite similar to the situations of "re-employment of the elderly" strategy in China currently. On this basis, the Japanese model draws on the fact that, it is an inevitable and common practice to delay retirement and promote the re-employment of the young-old and the legal system shall keep pace with this. Japan's legal reforms regarding the employment of the elderly are aimed at creating a "society of lifelong employment," emphasizing the "extension of the employment age" and the "promotion of senior employment". The Employment Countermeasures Act, which was amended in 2007, emphasizes "extending the employment age" and "promoting senior employment" more than combating age discrimination and protecting the right to work of the elderly. Overall, Japan's policy has gained fruitful result in recent decades, with the largest proportion of overage workers aged 65 and above compared to other countries. There are mainly three points that can be extracted from Japan's legal system.

(1) Retirement is not ruled as an obligation. The content of Japan's employment policy for the elderly is not a mandatory postponement of retirement, but a right to guarantee that the elderly who are above the retirement age can receive pensions. Under the design of Japan's flexible retirement system, the age for receiving the national pension in Japan is 65 years old, and it is not a necessity to terminate the labor relationship when receiving the pension and when people live up to the retirement age. Besides, it is also possible to receive the pension in advance or at an extended period of time when the elderly people return to the job market. This was designed to be more humanized and to meet the diversified employment needs of the elderly. Under the background of Japan's lifelong labor system, what is worth noticing is that the relationship between the elderly and the employer is similar to the labor relationship rather than the service relationship in the Chinese Labour Law. The employment rights and interests of the elderly are well protected under Japan's regulations.

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(2) Insurance against work-related injuries is not bound with the recognition labour relationship. In Japan, insurance against work-related injuries is known as labor disaster insurance, which is a system to provide necessary insurance benefits for workers or their survivors who are affected by business disasters or commuting disasters. Since the 1950s, Japan has begun to issue relevant legal documents. By now it has almost had industrial injury insurance system completed. Japan has a mandatory industrial injury insurance system, which is managed by a government agency. Enterprises with more than five employees must pay industrial injury insurance for their employees. Besides, it does not distinguish between so-called labor relations and labor relations in terms of such a basic insurance.

(3) The prohibition of age discrimination is an important issue that is clarified and specifically regulated. In Japan, age discrimination is not just a social phenomenon mentioned in daily newspapers, it can indeed serve as a guarantee of its re-employment strategy. Although "establishing a society of lifelong employment" seems to be given priority to in Japan's population policy, that does not mean attention has not been paid to age discrimination problems. In order to eliminate age discrimination in the workplace, the Japanese government amended the Employment Measures Act twice, in 2001 and 2007 [14]. In the amendment in 2001, companies are obliged to remove the age limit when recruiting and hiring employees, but the actual effect was not satisfactory. Therefore, in the 2007 revision, the word "obligated" was removed and replaced with the phrase "prohibiting companies from setting age limits", which further emphasizes the mandatory nature of this article. The current article 10 clearly stipulates that: Whenever it is considered necessary, as prescribed by Ordinance of the Ministry of Health, Labour and Welfare, in order for workers to make effective use of their abilities, an employer must provide workers with equal opportunities in recruitment and hiring, regardless of their age, pursuant to the provisions of Ordinance of the Ministry of Health, Labour and Welfare. Similarly, it is stipulated in article 18 of the Act on Stability of Employment for Senior Citizens that, when an employer recruits or employs workers and sets an upper age limit for applicants (limited to not more than 65 years of age) for unavoidable reasons, the employer must explain the reasons for said limitation to the job seekers, pursuant to a method specified by Ordinance of the Ministry of Health, Labour and Welfare. Thus, age discrimination in recruitment is clearly prohibited by law.

4.2. Back to China: How can young-old people be protected in a reasonable way

4.2.1. Reset: Back to the nature of recognition of labour relationship

As is mentioned above, the main obstacle behind the disputes on labour relationship lies in that retirement is regarded as a compulsory obligation in the current legal system. This article holds that retirement as a compulsory social obligation can no longer correspond to the social reality. Over the past, the reasons for the retirement ruled as a mandatory obligation lies in two aspects: First, for the maintenance and replacement of the country's entire labor resources, the compulsory retirement system can alleviate the shortage of labor supply and leave space for young workers so as to boost productivity. Secondly, as for those employers, the retirement system enables them to complete the replacement of old and new labor positions without having to pay the corresponding economic compensation when the workers grow old, and thus the employers do not have to bear the large-scale increase in labor costs caused by the decline in labor efficiency of the overage workers. However, in order to achieve these purposes, workers must really withdraw from the labor market when they reach retirement age. It turns out that, those elderly people did not quit from the job market in the recent decade. Moreover, under the current official policy of promoting the re-employment of young-old people, more emphasis is placed on the participation of over-age workers in the labor market. Therefore, the elderly people should not quit as they are fundamental in the re-employment strategy.

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From the perspective of collaboration and coherence of different legal documents in a legal system, it is also necessary to define retirement as a pure right as opposed to an obligation. At present, some laws have explicitly included provisions on an active response to population ageing. A typical example is the Law of the People's Republic of China on the Protection of the Rights and Interests of Elderly People, which ruled in its article 1 that "This Law is enacted in accordance with the Constitution with a view to protecting the lawful rights and interests of the elderly, developing undertakings for the elderly and promoting the Chinese nation's virtues of respecting, supporting and helping the elderly. Article 4 stipulates that "Actively dealing with the ageing population is a long-term strategic task for the country." In this sense, defining retirement as a right is also conducive to strengthening the synergy with other laws in essence, which is rather beneficial to the whole legal system. In conclusion, retirement should not be ruled as a compulsory obligation.

On this basis, in terms of recognizing labor relationship between the young-old people and enterprises, the first is to consider the declaration of intentions from both parties, and then it should be in line with the natural characteristics of labour relations and service relations. Specifically, the key to whether or not a labor relationship has been reached between a worker and an employer is the existence of subordination between the two. Those young-old people, who not are protected by the Labour Law, may have economic subordination and subordination in identity to their employer. However, unlike the other ordinary workers, they can establish only service relations, which is unfair and violates the inner value of Labour Law.

Nevertheless, the adjustment of labor relations does not mean that young-old people can be fully protected. Moreover, it should not be considered as a possible way to protect young-old people by changing their labour relationships. The adjustment of labor relations is more to conform to legal principles, whose starting point is different from that of protecting over-age workers. Young old people should not be forced to be recognized as a labour relationship or a special labour relationship just because they should be protected by the Labour Law. This idea would be contrary to the fundamental essence of the Labour Law. In addition, under the present institutional framework of the dichotomous model of Labour Law, if the dichotomous model of Labour Law is to be changed, it should still be judged in accordance with the natural characteristics of Labour Law [15]. In other words, the dichotomous model of Labour Law should not be broken just because a special group needs to be protected. For example, in the context of current prosperity of gig economy, it is likely to break the dichotomous model of Labour Law since the new labour patterns have posed a challenge on the natural characteristics of labor relations in the dichotomous model. A gig economy is a labor market that relies heavily on temporary and part-time positions filled by independent contractors and freelancers rather than full-time permanent employees. These workers in odd jobs often do not have full personality affiliation or economic affiliation, and thus the relationship they establish with the employer may not be a standard labor relationship. To sum up, it is based on jurisprudential necessity that the determination of labor relations should conform to the natural characteristics of labor relations. Although when it comes to the legal protection of young-old people, it is not and should not be adequate, but the change of the current system is a necessity in a legal sense, and for sure can be a good step for the legal protection of young-old people.

4.2.2. Unhook: Insurance against work-related injuries for all the overage workers is a necessity

Young-old workers, regardless of the types of relationships they have established with the employer, should be equipped with insurance against work-related injuries. The reality is that, despite the readjustment of the labor relationship of young-old people based on the natural characteristics of the labor relationship, there is still a large number of them, who cannot establish labor relationships. According to the China Labor Statistics Yearbook, in 2019, self-employed workers and domestic

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helpers accounted for 68% of the employed population aged 60-64 in total. If no protection is given to these workers, it would be contrary to the basic principle of caring for the elderly as a vulnerable group. Moreover, this would also make it difficult to implement the current policy. Therefore, some basic rights for a worker should not be bound with the labor relationship and the young-old workers should be guaranteed with insurance against work-related injuries. This would not result in an excessive burden on the employer, as the work-related injury insurance policy will ensure that the costs of work-related injuries are borne by the insurance company to a certain extent. Quite to the contrary, if not, the costs of work-related injuries will be borne by the employer utterly. This practice can make the best of both worlds, with a necessary inclining protection for the young-old people while alleviating the potential burden on the employer.

4.2.3. Synergy: How can consensus turn to equality

Even if parties' autonomy is fully respected, how can it turn to an indicator of equality? The changes of labour relationship as well as a compulsory insurance will be unlikely to achieve substantive equality. By this point, the employer still enjoys the freedom of recruitment and employment and they can still exclude young-old people from gaining a dream job by stealth. Dilemmas faced by the young-old people may still exist, in a more invisible way. With the purpose of protecting young-old people in essence, age discrimination should be clearly regulated in line with measures [16].

From the perspective of judiciary, a starting point to prohibit age discrimination as soon as possible can be the extensive interpretation of Labour Law. In terms of the general provisions on the prohibition of discrimination in Article 12 of the Labour Law, age should be added to the objects of the prohibition of employment discrimination by expanded interpretation of this article and thus it can serve as a fundamental principle for the disclosure of age discrimination [17]. From the perspective of teleological interpretation, the Labour Law is aimed at protecting the legitimate rights and interests of workers, since young-old people are indeed at work, they should be treated as the ordinary workers. After that, there must be regulations by the written law to ensure the consistency of judicial opinions as opposed to extensive interpretations and judicial opinions by the judges. After all, there are a still large number of young-old people who would not be covered in the Labour Law.

On this basis, the meaning of age discrimination shall be clarified. The line between an age discriminatory practice and a non-discriminatory practice should be clearly drawn and it should be consistent with the general understanding of the society. On the one hand, it should be admitted that employers do have the right to set requirements based on their justified need; On the other hand, it is vital to detect the illegal and disparate treatment hidden behind the plausible job requirements. Only by setting a clear criterion can we achieve this balance. After a review on cases, some judicial decisions are insightful and can be the foundation for the further discussion. Overall, three judicial opinions can be summarized from the judicial decisions.

The first judgement standard is whether the age requirement in a job requirement is necessary for the job or not. It is lawful for jobs with special nature to have special requirement including age. Such jobs with special requirement are usually featured with high demand of physical fitness and professional skills, for example, the firefighter. However, it should be restricted in a reasonable scope. If the age requirement is proved unnecessary, then the job-hunter may constitute age discrimination; The second judgement standard is whether there is a supposed link between age and one's capability by the employer. The supposed link between one's age and capability is believed a sole stereotype without reasonable basis. Specifically, if the elderly employee is fired or comparatively under-treated because of their capabilities rather than their ages, it cannot be identified as a discriminatory practice. And otherwise, it is. Another standard is whether age is a decisive factor behind the differential treatment to the elderly workers. The court holds that, if there are other reasons for the differential treatment and can be proved legal and reasonable, it may not constitute an age discriminatory practice.

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On the contrary, if one is excluded in the recruitment competition mainly because of his age rather than other factors, then it may constitute age discrimination.

The three opinions are insightful in defining an age discriminatory practice, which can be learned from in the legislation process. As for the first opinion, the job requirement should be regulated within a scope, which achieves equity between the employer and the job-seeker. As for the second opinion, the judge has grasped the essence of age discrimination. According to the Oxford dictionary, age refers to the number of years that a person has lived or a thing has existed. By interpreting from the surface, there is no reason for people to discriminate simply on a matter of time. Thus, what should be noticed is that age discrimination does not originate from people's mind of discriminating on one's age; It stems from a supposed link between ages and one's capability. As for the third opinion, it focuses on the role age discrimination plays in discriminatory practices. That opinion is quite similar to the idea of anti-discrimination law in the United States, which tells disparate treatment and disparate impact apart. However, the specific standard of testing whether age is a decisive factor behind the differential treatment is still rather vague. In America, they have created a scrutiny standard test in the process of school admission to find out whether race is a decisive factor behind the disputing behavior [18]. Although by now, the affirmative action in America has been on a heated debate and to some extent been disapproved by the Supreme court in the SFFA hazard case, the complete and detailed practice of testing discrimination is still worth learning.

Thirdly, the position and role of the prohibition of age discrimination should be clarified. Is it a declaratory or a substantive provision? If it is a substantive provision, should it be applied as a fundamental principle with a direct negative effect, or should it be refined into specific legal provisions that establish penalties in varying degrees? In fact, age discrimination is a rather subjective concept, A discriminatory practice in one's mind may be the equality in the other. At the same time, discrimination has become more and more vague and invisible in recent years. Under such circumstances, it would be an arbitrary decision if it is still regarded as an absolute hegemonic clause and basic principle. In the author's opinion, a review mechanism for age discrimination should be established, and an age discrimination review system shall be established and conducted by the labor arbitration authorities or courts. If they find that the employer has discriminatory practices in the process, Specific judgments should be made depending on the degrees of the discrimination. It may first come at an administrative punishment, and then compensations for the victimized workers based on civil actions. An effect of invalidation of the established legal relationship between the parties should be considered at last.

5. Conclusion

In the face of population ageing, young-old people in the workplace need to be well-protected. Reflecting on the current regulations, this article has found that recognition of labour relationship needs to be reset, and the prohibition of age discrimination should be clarified. What should be emphasized is that the alteration of labour relationship of the young-old people should neither be considered as an adequate nor a necessary condition for the legal protection of young-old people, it just needs to be reset to follow the natural characteristics of labour relationship and the parties' autonomy. Meanwhile, other difficulties faced by the young-old people like the insurance against work-related injuries should not necessarily be bound with the recognition of labour relationships. The work-related injury insurance can be unbound with the labour relationship and be granted to all the young-old workers. Besides, if one wants consensus to turn to equality, age discrimination is a vital issue to be prohibited in a proper way.

Meanwhile, what should be noticed in the long run is that the promotion of re-employment of young-old people is not barely a legal matter. Instead, it is more fundamentally, a social issue. That is to say, measures from different aspects should be taken altogether in order to tackle the issue in the

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long run. For example, considering the system with Chinese characteristics, there are state-owned enterprises and private enterprises in the current market economic system. Requirements can be set for state-owned enterprises to recruit young-old people for specific positions; For private enterprises, which are more independent and freer to recruit members, targeted preferential policies such as tax exemptions and bonuses can be set to encourage them to recruit suitable young-old people. Apart from a restriction on employers' discriminatory practices, improving the vocational education of the elderly is a good way to effect a permanent cure. When young-old workers are indeed accepted based on their capabilities, dilemmas will vanish without any voice.

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