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# NANCY GERTNER HUMAN RIGHTS PAPER COLLECTION

## New and Emerging Developments in Gender and Law in China

Compilations of Papers and  
Presentations at the China Gender  
and Law Experts Consultation

September 21–24, 2009  
Wellesley Centers for Women

Introduction by:  
Rangita de Silva de Alwis

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*Please note: articles have been edited only for content.*

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Government Responsibility: Exploration of Paths to Protect Women's Land-related Rights and Interests

## **New and Emerging Developments in Gender and the Law in China**

### **Introduction to the Papers and Gender and Law Expert Group Consultation, September 2009**

**Rangita de Silva de Alwis<sup>1</sup>**

This report is a compilation of the papers presented by Chinese gender and the law experts on new and emerging developments in gender-based law reform in China at a closed-door strategy meeting at Wellesley College in September 2009. The Chinese gender and law experts have both individually and collectively made a significant mark on China's gender and law landscape. The experts were asked to reflect on the new and emerging women and law developments in China in their papers and presentations and assess the most urgent challenges facing women in China in the 21<sup>st</sup> Century; the strengths and weaknesses of those laws; what strategies worked and the dynamics of legal and social change on behalf of women. Although categories overlap, the papers examine, domestic violence, sexual harassment, gender based employment discrimination and rural women's access to land.

The burgeoning gender and law movement in China has undergone some major shifts and strategies and their agendas reflect those changes. The experts call for change echo the changes in the laws taking place in analogous areas in other countries and the equality framework that they champion is one based on the international women's rights agenda. The changes illustrated in this volume of papers are the result of a heightened activism on the part of China's women's groups and show case a comparative and cosmopolitan vision on their part. Fifteen years after the watershed international Women's Conference in Beijing, those efforts have now come of age although not fully realized. Most of the presentations reference the historic moment of the Beijing conference as the second wave of the feminist agenda in China. Catalyzed by the Beijing conference in 1995, the women's groups created alternative lawmaking models based on the Beijing Platform of Action and the CEDAW.

It is a very exciting turning point in the history of women's rights in China to reflect on the changes in the last 15 years. It is also a time of great social change in the areas of migration, in privatization of land, and in market place regulation. We also see that during this period the locus has shifted to provincial level lawmaking. The developments taking place at the provincial level are more exciting than the national law making efforts. These shifts generate new questions whose answers are poised to alter the shape of women's lives in China. Women lawyers have a heightened role to play in tackling those issues raised by these developments.

Another hallmark of the new development in law and policy is that since the Beijing Conference, Chinese women have developed new patterns of interaction with their counterparts in different countries. Chinese women's groups are now shaping the thinking of their peer groups around the world and have added a new dimension to international feminist discourse.

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<sup>1</sup> Katherine Zhao, former Fulbright scholar in China was the rapporteur for the strategy meeting. She was assisted by Maggie Tiernan.

At the same time, Chinese women at the local level do not always see themselves as subjects of rights nor does the state see it self always as the duty bearer to implement those rights. The gender and law experts whose papers appear in this volume have taken enormous strides to create a gender discourse and a rights based practice both in and outside courts.

The areas for examination in this volume of papers focus on new developments in: 1) domestic violence; 2) gender-based employment discrimination; and 3) rural women's access to land rights. The expert group selected these rapidly emerging areas of inquiry based on their potential to "have a breakthrough" in the Chinese legal system and effect broad ranging impact in China. The presentations map and critique the current status of laws and anticipated developments in China in the previously noted three areas. Chinese expert presentations were followed by comments from U.S.-based experts. The second part of the strategy meeting focused on the development of a Platform of Action as a call to action to address challenges and seize emerging opportunities in the Chinese gender and law landscape.

***Aims and Goals of the Consultation:***

- To provide a unique opportunity for reflection away from the everyday work of the China gender and law experts.
- To share strategies and deliberate with their peers in China, and international and comparative gender and law experts on urgent questions on new and emerging gender and law in China.
- To develop a repertoire of tools based on a cross-fertilization of different methodologies and approaches in order to bring new perspectives and insights into existing problems.
- To draft a platform of action to address existing and emerging challenges.

***Chinese Experts:***

1) Professor Guo Jianmei

***Professor Guo Jianmei:*** Professor Guo Jianmei is the founding head the Center for women's Law Studies and Legal Services- the first and leading public interest law firm in China. Guo Jianmei was chosen as one of the 1000 outstanding women in the world who were nominated for the 2005 Nobel Peace Prize.

2) Professor Guo Huimin

***Professor Guo Huimin:*** Professor Guo Huimin is a leading anti- discrimination scholar and practitioner specializing in employment discrimination. She is Professor of the

*Humanities at the Law School in Northwestern Polytechnical University and the Director of the Center for Women's Rights and Development in Northwestern Polytechnical University.*

3) Professor Zhu Xiaoqing

**Professor Zhu Xiaoqing:** *Professor Zhu Xiaoqing* is the Vice-Director of the Department of Public International Law, Center for International Law Studies of Chinese Academy of Social Sciences (CASS); Director, Center for Gender and Law Studies of Institute of Law, CASS.

4) Professor Xue Ninglan

**Professor Xue Ninglan** is Professor at Law Institute, Chinese Academy of Social Sciences (CASS) and an expert on family law.

5) Professor Li Ao

**Professor Li Ao:** *Professor Li Ao* is professor of Law at Wuhan University School of Law and the founder of pioneering courses on clinical legal education and gender and law.

6) Dean Lin Jianjun

**Professor Lin Jinjuan:** *Professor Lin Jinjuan* is the Dean of the Law College of China Women's University. She is a member of the Domestic Violence Task Force.

7) Professor Li Huiying

**Professor Li Huiying** is Professor of China Central Party School and member of the Working Committee of Women and Children, State Council of China.

8) Professor Liu Bohong

**Professor Liu Bohong** is a prominent gender scholar. She is a Senior Research Fellow and Deputy Director of the Women's Studies Institute of China and professor at Beijing Normal University and China Women's College.

9) Professor Xie Haiding

**Professor Xie Haiding** is Associate Professor of Institute of Law, Chinese Academy of Social Sciences (CASS) and the Center for Gender and Law Studies, CASS.

10) Ms. Li Ying

**Li Ying** is a senior lawyer with Center for women's Law Studies and Legal Services, the premier women's legal aid center in China. She has represented a large number of domestic violence victims in groundbreaking cases.

11) Professor Ye Jingyi

**Professor Ye Jingyi:** Professor Ye Jingyi is a highly regarded Labor Law scholar. She is a Professor of Law at Peking University Law School and Deputy Director and Research Fellow, Institute of Labor Law and Social Security Law, Peking University.

12) Professor Liu Xiaonan

**Professor Liu Xiaonan** is the China University of Political Science and Law.

#### ***U.S.-Based Commentators and Resource Persons:***

***Moderator: Hon. Nancy Gertner***

Ira Belkin Esq., Ford Foundation

Dr. Rangita de Silva de Alwis, Wellesley Centers for Women

Dr. Amy Gadsden, University of Pennsylvania Law School

Barbara S. Hamelburg Esq., Foley Hoag LLP

Professor Rosanna Hertz, Wellesley College

Professor Joan Kauffman, Harvard University and Brandeis University

Elizabeth Kristen Esq., Legal Aid Society - Employment Law Center

Titi Liu Esq., Asian Law Caucus

Professor Sally Merry, New York University

Professor Katharine Moon, Wellesley College

Robin L. Nielsen Esq., Rural Development Institute

Dr. Susan Roosevelt Weld, Georgetown University Law School

Diane Rosenfeld Esq., Harvard Law School

Dr. Nan Stein, Wellesley Centers for Women

Professor Lucie White, Harvard Law School

Professor Margaret Woo, Northeastern University School of Law

#### ***Format of the Report***

The first part of this report discusses the presentations made by the Chinese experts and the Platforms of Action they developed in three working groups. The second part includes the papers that were submitted by the experts to the Wellesley Centers for Women, some of which are in Chinese.



Since the main purpose of the report is to examine and compile the new gender and law developments in China and to view these changes through the prism of the Chinese experts scholarship and presentations, this report does not focus on the rich and analytical presentations made by the U.S. based commentators at the China Gender and Law Consultation.

## **PART ONE**

### **REPORT OF THE CONSULTATION AND INTRODUCTION TO THE PAPERS PRESENTED**

#### **Domestic Violence**

This panel consisted of:

**Professor Lin Jinjuan:** *Professor Lin Jinjuan is the Dean of the Law College of China Women's University. She is a member of the Domestic Violence Task Force.*

**Li Ying:** *Li Ying is a senior lawyer with Center for women's Law Studies and Legal Services, the premier women's legal aid center in China. She has represented a large number of domestic violence victims in groundbreaking cases.*

**Professor Xue Ninglan:** *Professor Xue Ninglan is Professor at the Law Institute of the Chinese Academy of Social Sciences (CASS) and she has been engaged in the experts draft law on domestic violence.*

*The following is a report of their presentations:*

#### ***The Evolution of Anti-Domestic Violence Advocacy and Practice in China***

The 1995 Fourth World Women's Conference was a watershed moment in China's women's rights protection and a catalyst for innovative thinking and practice. It not only marked the beginning of the journey for most women's rights advocates in China, thereby planting the seeds of a women's movement, but it also helped name otherwise unnamed offences with a universal vernacular that dotted the Chinese legal landscape.

The scholarship on domestic violence spans the 15 years since the Fourth World Conference on Women to the present. The first wave of legislation included general protections for women's

rights enshrined in the Chinese Constitution and other laws including the Criminal Law, the Law on the Protection of Women's Rights and Interests, the Law on the Protection of the Minors, and the Marriage Law. A flurry of legislative activity between 1995 and 2001 marked the second wave of women's rights protection, which was built on the values of CEDAW and the Beijing Platform of Action. In 1996 and 2001, Hunan province enacted the earliest municipal and provincial-level legislation on domestic violence in 1996 and 2001. This bottom-up approach heralded a call to action that included the gradual institution of a domestic violence hotline and a police reporting center. The year 2001 marked another turning point when the amended Marriage Law mentioned domestic violence as a legitimate ground for divorce, making it the first time domestic violence was recognized in national law. Although the law did not define domestic violence clearly, the law allowed victims to request compensation if divorce was a result of domestic violence. Issued at the end of 2001, the Supreme People's Court's judicial interpretation of the Marriage Law included a definition of domestic violence as acts of violence that limit women's freedom and cause bodily or mental damage. Yet many scholars felt this narrow definition of domestic violence unduly narrowed the scope of the issue. More recently the 2005 amendment to the Law on the Protection of Women's Rights and Interests acknowledged that the government has responsibility to stop violence against women.

One of the most important narratives in present-day China is the pivotal role that NGOs and civil society organizations play and continue to play in bringing domestic violence to the forefront. Organizations such as the Center for Women's Law Studies & Legal Services of Peking University (also known as the Beijing Women's Law Center), the Anti-Domestic Violence Network of China Law Society, and Beijing Maple Women's Psychological Counseling Center all had a critical role in outlawing domestic violence and creating a cause of action for it. In another development, for the first time in the four years that China has been reporting to CEDAW, the China Women's Research Institute invited 22 NGOs to appraise the government's efforts in five women's human rights areas before the Committee's review of China's 5<sup>th</sup> and 6<sup>th</sup> country report in 2006.

### ***New and Emerging Developments on Domestic Violence***

#### *The Supreme People's Court Guide on Handling Cases of Domestic Violence and Marriage Cases*

This Guide was drafted by the Applied Jurisprudence Institute of the Supreme People's Court, the Guide on Handling Cases of Domestic Violence in Marriage Cases ("Guide") and was released in March 2008. The Guide was originally piloted in nine basic courts.

#### *Breakthrough Elements in the Guide:*

The Guide not only establishes the principle of gender equality but also establishes it as the basis for combating domestic violence. Drawing on international standards, it defines domestic violence as physical, sexual, psychological, and economic control. In addition, one of the most important elements of this Guide is the civil protection order. Chen Min, a leading domestic violence advocate, described its introduction as "a small step in law theory, but a big step in judicial practice." The protection order is divided into an emergency or temporary order which

lasts for five days, and a longer term order that which lasts from three to six months and up to 12 months under certain circumstances.

New ground was also broken regarding the burden of proof. Under the Guide, the burden of proof shifts to the alleged perpetrator once the victim has made a prima facie case of domestic violence. Although China has yet to allow the admission of expert testimony, the Guide enables records from government agencies and social organizations to be introduced as evidence in domestic violence cases. This initiative helps to address the challenge of establishing evidence in domestic violence cases by expanding the scope of the admissibility of evidence.

#### *Equity in Property Allocation*

The Guide further addresses compensation for victims of violence and property allocation. If the victim is not working or is financially impoverished then the Guide stipulates the payment of alimony, child support, and medical expenses. Another noteworthy element is the recognition that the victim's behavior does not justify a lower punishment in cases of domestic violence. In terms of property, Article 55 mandates gender equality in its allocation and places value on domestic work in order to avoid the impoverishment of women after a divorce.

#### *Protecting the Child from Direct or Indirect Violence*

The Guide, in a breakthrough regarding the protection of minors, mandates that the court can rule the perpetrator unfit to raise children on the basis that the child might imitate his or her behavior or may be direct or indirect victims of violence.

#### *Progress and Challenges in the Application of the Guide*

As of August 2009, courts have issued 12 protection orders nationwide, with Hunan province Changsha city Yuelu district court issuing six of those orders. In August 2008, Wuxi city, Jiangsu province issued the first protection order prohibiting the perpetrator from beating or verbally abusing the victim. Since then, the scope of the protection order has increased. One protection orders prevents the perpetrator from entering within 200 meters of the victim and the victim's family. In another pioneering instance, Zhuhai city Xiaozhou district court issued a protection order in May 2009 prohibiting the disposal of joint marital property. This case marked the first properties-related protection order in China. In April 2009, Hunan Provincial People's Court issued new guidelines which expanded protection not just to victims seeking divorce but also to those in marital disputes. These guidelines also stipulated protection for women who resort to violence as a means of self defense.

In the year since the Guide's release, certain flaws and gaps have surfaced. First, certain judges have ruled that periodic instances of domestic violence do not constitute domestic violence. Second, the Guide only applies to couples who are in the process of getting a divorce, who plan to divorce, or have divorced within the past six months. Thus victims who do not wish to divorce cannot apply for protection orders. Third, though the attacker is barred from a 200 meter radius

from the litigant, policemen will likely not be able to monitor the attacker. Similarly, the Guide does not prohibit the perpetrator from entering within a 200 meter radius of the victim's hospital or place of work. Lastly, the Guide is operational only in a few courts in China, so that the current challenge is to expand its use to other courts.

***Several Opinions on Prevention and Prohibition from Domestic Violence formulated by Governmental Departments and Organizations, including the Women's Federation***

Various government agencies formulated and released *Several Opinions on Prevention and Prohibition from Domestic Violence* (hereinafter, the Opinions) in August 2008. The Opinions brings to the forefront the role to be played by a multi-agency initiative in addressing domestic violence. These agencies include the All China Women's Federation, the Ministry of CPC Publicity, the Supreme People's Court, the Ministry of Public Security, the Ministry of Civil Affairs, the Ministry of Justice, and the Ministry of Health.

Some provinces and cities have examined ways to concretely operationalize the Opinions. For instance, Heilongjiang Provincial Women's Federation and the Provincial Public Security Division initiated judicial intervention stations in Daqing city. This joint effort highlighted preemptive action and involved the mediation of domestic violence disputes.

***The Legislative Proposal of the Law on Prevention and Prohibition of Domestic Violence (drafted by the Anti-Domestic Violence Network of China Law Society).***

The Anti-Domestic Violence Network is one of the strongest networks of civil society advocates in China, spanning 28 provinces and autonomous regions. Supported by the Ford Foundation, it started in 2001 as a project-based initiative to examine possible intervention points with regards to domestic violence. The network conducted a survey which revealed that above 90 percent of law enforcement officials felt that there was a need for domestic violence legislation. In 2002, an expert group headed by Professor Chen Mingxia was established to raise public awareness and to draft a law to prevent and control domestic violence.

The network reviewed comparative law on domestic violence and asked Beijing area experts for input in all areas of the law. One of the debated issues was whether violence covers not just physical and sexual violence but also psychological violence. In a recently revised draft unveiled in 2007, the definition of domestic violence was expanded to cover physical, psychological, sexual, and economic violence in the spirit of CEDAW. The draft contains various breakthroughs including the issuance of protection orders, an expanded definition of what constitutes a family member, the revocation of a perpetrator's custody of children, and a multi-agency response to address domestic violence as an offense against the public. The protection order, for example, may also include the payment of maintenance, alimony, and education fees for underage children, medical treatment and psychological counseling fees for injuries caused by domestic violence, and compensation for property. It comes in two forms: an emergency order that extends up to 15 days and a long-term order for 3-6 months or 12 months under special circumstances. The draft law covers parties to a family, post-marriage, and in intimate partner relations. In fact, Dean Lin

believes that intervention programs for intimate partners before marriage can reduce the incidence of violence in the marriage.

## **Experts Draft on Domestic Violence:**

The work of the Anti-Domestic Violence Advocacy Network was first published in 2003, and has subsequently been modified several times. The draft law serves three legislative purposes:

- 1) to prevent and prohibit domestic violence so as to prevent discord in the family;
  - 2) to protect family members, especially victims of domestic violence, and underage children;
  - 3) to promote equality in family relations and keep harmony and peace in society. Harmony and peace in the family can be maintained not by ignoring the problem but by preventing the violence.
- The introduction of civil measures such as protective orders from outside has been introduced as a form of preventing domestic violence.
  - The protection to underage persons is an important cornerstone of this law because children are often directly or indirectly affected by domestic violence. The perpetrator is barred from custody of under age victim of domestic violence.
  - The draft law strengthens government authority to get involved in domestic violence. Domestic violence is not just a family matter, but a matter for government authorities both legal and administrative agencies.
  - This draft also emphasizes prevention of domestic violence through education, NGO networks and through prevention agencies set up by the local government.

## ***Challenges Concerning the Draft Law***

- The need to expand the coverage of the law to include more categories of people.
- The question remains regarding the definition of domestic violence. Should it be narrowly limited to a certain categories of offences?
- Relationships are becoming complicated and no longer straightforward and are not limited to marital arrangements. Therefore the coverage of the law must be expanded to former marital relationships, romantic relationships and or living together arrangements.
- The draft law includes all forms of domestic violence and provides examples of a wide range of violence. In particular, any behaviors that cause damage to victim will be covered under this law.
- Another provision that is being much debated is the concept of the protection order. The idea of the protection order is that victims get protection before violence takes place. However, public security personnel and court personnel oppose this idea as they think that this will increase police costs.

### ***The ACWF and Seven Ministries Guiding Opinions on Prohibiting Domestic Violence***

The Seven Ministries Guiding Opinions (“guiding opinions” or “opinions”) recognizes the importance of integrating the prevention and prohibition of domestic violence into the responsibilities of public security officials and establishes an office for domestic violence complaints. The guiding opinions also stipulate case filing and other procedures for the procuratorate. Additionally, the opinions charge health and civil affairs bureaus, and those areas with the appropriate conditions, to have batterer intervention and counseling programs. Such an initiative is important to help address the root causes of domestic violence.

The following questions were raised by the Chinese experts regarding the SPC Guide and guiding opinions:

- The definition of domestic violence has been disputed and not yet finalized. Should the definition be expanded? If so, how?
- In addition, what are the different types of domestic violence? According to international standards, there are four types: physical, psychological, sexual, and economic control. The latter has come under attack by scholars.
- Nature and extent of protection orders: comparative law studies show that protection orders are not just a measure used during divorce. As previously noted, the SPC Guide is limited to divorce.
- Domestic violence and sexual harassment lawmaking bifurcate the advocacy field, which results in tension in terms of resource allocation.

Some remaining challenges:

- The effectiveness of the Guide has been limited to a certain extent by misunderstandings and issues with implementation by select pilot courts.
- Women who do not wish to divorce but who face domestic violence do not have adequate protections.
- Public security bureaus only get involved if there is physical violence rather than problems with the distribution of property.
- After the release of the guiding opinions, Heilongjiang province initiated pilot sites regarding community intervention programs. Women’s federations are now able to conduct injury appraisals, which was once the exclusive domain of the public security bureau. Justice bureaus have also allowed domestic violence victims to access legal aid. While the guiding opinions are meaningful, they are still rather general and their operability is not that strong.
- One third of the cases handled at the Beijing Law Center involve intimate partner violence, which is not protected under current law. The hope is that future legislative efforts will cover various types of violence such as sexual harassment, rape, abduction, and human trafficking. While domestic violence has received a good amount of attention in China, other forms of violence have not obtained adequate levels of

awareness. When the public mentions gender violence, they tend to define it as domestic violence against women. For example, International Violence Against Women Day, which occurs annually on November 25, is observed as Anti-Domestic Violence Day. In addition, the human rights action plan issued by Chinese government includes measures on violence against women yet the language is to eliminate domestic violence against women. Unfortunately, the media fuels this misperception.

## **Gender Awareness in Lawmaking in China**

***Professor Liu Bohong:*** *Professor Liu Bohong is a prominent gender scholar. She is a Senior Research Fellow and Deputy Director of the Women's Studies Institute of China and professor at Beijing Normal University and China Women's College.*

Professor Liu Bohong began her remark by congratulating the Gender and Law expert group consultation in the choice of very relevant and urgent topics. In September 2009, the ACWF organized a conference on the protection of women which focused on similar topics including the enforcement of the 2008 to 2012 national plan against the trafficking of women and children.

Professor Liu Bohong debated the merits of focusing solely on a national law on domestic violence or widening the focus to draft a law on violence against women. Although the spotlight in China is clearly on domestic violence, this focus ignores some of the other pressing problems concerning violence against women. Prof. Liu wondered whether Chinese experts should put their weight behind a national law on domestic violence, which is feasible, or a violence against women law that may be more complicated. Her consultation with senior officials at State Council legislative affairs office impressed upon her that there may be opportunities for only one law related to Chinese women. Given this fact, she reflected on strategies to prioritize gender-based lawmaking.

Professor Liu Bohong categorized the most severe forms of violence women face in China thus:

1. human trafficking: especially with the development of a market economy, the nature of trafficking has changed from marriage trafficking to labor trafficking;
2. prostitution: violence against prostitutes has been overlooked because of its illegal nature;
3. sexual harassment in the workplace: sexual harassment is pervasive due to corruption and the lack of employment opportunities. Sexual harassment usually starts from the moment a woman looks for a job and spans her entire career;
4. community or society-based violence against women;
5. because of government corruption and other reasons, government officials take mistresses as a way to control women;
6. sexual harassment and sexual violation of those in the service industry;
7. severe violence against women perpetrated by the media;
8. *de facto* violence against women through government policies, such as compulsive measures against women in terms of population planning. Before 1995, involuntary



- sterilization led to rural women in particular to become disabled and unable to engage in work. However, no one discussed this phenomenon because it was a government policy;
9. historical violence faced by women such as Chinese comfort women during WWII; and domestic violence.

In Professor Liu Bohong's opinion, the most severe forms of violence are those against women in the service industry (sex for work) and violence against women by officials (sex for power), both of which significantly decreases the status of women.

The Anti-Domestic Violence Network is one of the strongest networks of civil society stakeholders in China, spanning 28 provinces and autonomous regions. Supported by the Ford Foundation, it started in 2001 as a project-based initiative to examine possible intervention points with regards to domestic violence. The network conducted a survey which revealed that above 90 percent of law enforcement officials felt that there was a need for domestic violence legislation. In 2002, an expert group headed by Prof. Chen Mingxia was established to raise public awareness and to draft a law to prevent and control domestic violence.

The Domestic Violence Network's expert group reviewed comparative law on domestic violence and asked Beijing area experts for input in all areas of the law. One of the debated issues was whether violence covers not just physical and sexual violence but also psychological violence. In a recently revised draft unveiled in 2007, the definition of domestic violence was expanded to cover physical, psychological, sexual, and economic violence in the spirit of CEDAW. The draft contains various breakthroughs including the issuance of protection orders, an expanded definition of what constitutes a family member, the revocation of a perpetrator's custody of children, and a multi-agency response to address domestic violence as an offense against the public. The protection order, for example, may also include the payment of maintenance, alimony, and education fees for underage children, medical treatment and psychological counseling fees for injuries caused by domestic violence, and compensation for property. It comes in two forms: an emergency order that extends up to 15 days and a long-term order for 3-6 months or 12 months under special circumstances. The draft law covers parties to a family, post-marriage, and in intimate partner relations. In fact, Dean Li believes that intervention programs for intimate partners before marriage can reduce the incidence of violence in the marriage.

## **PART TWO**

### **GENDER-BASED EMPLOYMENT DISCRIMINATION**

***Professor Guo Huimin:*** *Professor Guo Huimin is a leading anti-discrimination scholar and practitioner specializing in employment discrimination. She is Professor of the Humanities at the Law School in Northwestern Polytechnical University and the Director of the Center for Women's Rights and Development in Northwestern Polytechnical University.*

***Discrimination in advertisement and occupation segregation, focus on body image, discrimination in care-giving responsibilities and gender-based retirement discrimination***

In her paper and subsequent presentation, Professor Guo Huimin highlighted discrimination in recruitment and advertisement. An advertisement she cited aptly captures the heart of the problem: “The company plans to recruit 10 programmers. Requirements are as follows: no gender limitation; healthy resident with an ID card of this city; under 30; male should be of bachelor’s degree or above while female should be of master’s degree or above.” Women are clearly held to higher standards than men. As a result, only 6.4 percent of working females are in technology and administration positions around the nation while the number of men is 10.9 percent. Instead, over 79 percent of females are in blue collar work.

Professor Guo Huimin argued that gender-based occupation segregation forces a majority of women to engage in low-wage work in China. Women comprise 40 percent of the workforce but they mainly concentrate in the bottom tier. According to the program “Gender Differences among Workers from Rural Areas in City Labor Markets,” women’s human capital stock, including their work experience, educational level, and health condition, is comparatively significantly lower. Occupational segregation caused by gender discrimination is nearly 78 percent in labor markets. As a result, most women are engaged in low-income, low-skilled, low stability, and low-status jobs. Occupational segregation has an especially disproportionate impact on migrant women. In 2006, women accounted for approximately 36 percent or about 47.47 million people of the 132 million employed rural workers. However, female migrant workers face multiple employment barriers. First, as “rural people,” they experience urban social exclusion, and second, as women, they experience gender discrimination.

Other issues that particularly affect and disadvantage women include expectations regarding body image, family responsibility, and early retirement. Body image plays a major role in the hiring of female employees in certain sectors. To comply with gender bias in the workplace, many women applicants undergo plastic surgery in order to aspire to the expected ideals of beauty. Family responsibility discrimination is often a double-edged sword. Workplaces privilege male employees because they consider women to be the primary caregivers of children and the family, furthering limiting women from equal workplace responsibilities. Yet when women are absent from the workforce and also unable to inform public policies, it is not only women who are disadvantaged but society at large. Early retirement policies exemplify legal regulations that restrict female advancement and society’s access to needed expertise. The media has reported a series of early retirement cases in recent years. In July 2007, for example, approximately 200 female healthcare staff members who worked in professional or technical positions in Tangshan were forced to retire at 50. In Zhejiang province, a majority of the teachers, doctors, anesthetists, engineers, accountants, journalists and senior editors were also compelled to retire at 50. The women alleged that the employers completed their retirement procedures and illegally altered their professional titles in order to allocate them a reduced pension. In Northwest University at Xi’an, many female “contract cadres” whose jobs were teacher and doctors were forced to retire at 50 because their original status was workers. Healthcare professionals, mostly doctors, pharmacists, senior nurses, and accountants, working at a Shanghai district hospital were also forced to retire at 50. Although these cases have been taken to court, no petitioner has currently won a case in either arbitration commission or in the courtroom. Lastly, the disconnect between the plethora of

legislation that address gender-based workplace discrimination and the lack of effective implementation policies represents a particularly challenging issue.

### *Analysis of Legislation*

The Law on the Protection of Women's Rights and Interests enshrines the basic state policy of gender equality and the prohibition of gender discrimination but lacks a definition of gender-based employment discrimination and sexual harassment. However, local regulations from Shaanxi and Guangdong province, among other locales, have gone a long way in passing new implementing measures on gender discrimination and sexual harassment.

The recent Employment Promotion Law, which came into force in 2008, guarantees gender equality in recruitment and employment standards and provides, for the first time, a cause of action for gender discriminatory employment practices. Yet the law still considers certain categories of employment as unsuitable for women, which risks stereotyping and segregating women into low-paying career options.

Some new policies, though gender neutral and progressive, have had a disproportionately negative impact on women. For example, the All-China Trade Federation's recent issuance of "Specific Suggestions on the Collective Contract to Protect Female Workers' Rights and Interests" calls upon all trade unions in China to sign collective contracts with enterprises and/or employers. However, as a result, a large number of female temporary workers were dismissed.

### *Experts Draft of Anti-Discrimination in Employment Law*

The draft law sets forth the definition, applicable scope, anti-employment discrimination measures, and the enforcement agency. For example, all levels of people's governments and social organizations are responsible for supervising employment discrimination matters in the areas it exercises administrative power. In addition, discrimination against social status is prohibited, including discrimination against farm workers, regional discrimination, and household registration discrimination. The law prohibits discrimination based on sex, disability, health, nationality, appearance, and age. A cause of action and remedies are important cornerstones of this law as well as the establishment of an Equal Employment Opportunity Commission that will have quasi-judicial powers.

In her final analysis, Prof. Guo Huimin argued that there was no clear definition of gender-based employment discrimination in China or clarity in identifying such discrimination. She observed that discrimination against women comes in multiple forms and is not just based on gender but can also be tied to a disability or residential status along urban or rural lines. As such, some applicants suffer from multiple forms of discrimination. A remaining question is whether the U.S. standard of formal discrimination or the international standard of formal and substantive discrimination will take precedence in China.

Professor Guo Huimin highlighted some of the problems in contemporary China regarding gender discrimination:

- Many Chinese women obtain employment through their husbands, especially military officials or those in urban areas. This situation results in women following their husbands' employment, and is especially problematic when their husband loses his job or is transferred.
- Of the advertisements studied, over half are gender specific or elaborate different standards for male and female. In many cases there is no understanding of gender discrimination on the part of the employer. Neither does the advertising company show any sensitivity to gender.
- There is a correlation between a female applicant's physical appearance and her employment opportunities. The employer may also place implicit or explicit restrictions regarding marriage or pregnancy status. In response, women tend to expedite marriage and pregnancy before seeking employment.
- Gender segregation in employment results in women selecting majors in college that reinforce these stereotypes, which in turn results in ghettoizing women to certain low-status and low paying jobs.
- The glass ceiling: once women get to a certain level, it is hard for them to move up. On the other hand, there are cases where women tend to resort to sexual favors or a good family background to smash the glass ceiling.
- Marriage and pregnancy: Before the opening of the markets, the government bore the cost of pregnancy. The cost of pregnancy is often another reason why companies prefer to hire men.
- Childcare and family leave: Before China's advent to a market driven economy, the government took care of children. Women are now being disadvantaged because of their care-giving responsibilities. This makes it doubly important for both men and women to share care-giving responsibilities through workplace policies. A model policy that can be replicated is a pilot program in Xi'an that allows both female and male to access half a month of family leave.
- Temporary workers, or those whose employment is tied to their husband's employment, lack adequate protection. Of the latter, if the husband leaves or loses his job then the woman is left unprotected or their job is taken away as well. For example, when husbands who are laid off from state-owned enterprises, their wives have to become domestic workers in the informal sector.
- Retirement is a form of systematic discrimination because the law stipulates different retirement ages based on gender. However, some women and men are of the opinion that this difference is a special protection for women.
- Although sexual harassment is included in the LPWRI, it is not part of the Labor Contract Law so the employer avoids liability in cases of sexual harassment.
- There is no cause of action under the Labor Contract Law, which means that a person whose rights have been violated cannot sue under this law. Thus, a significant gap exists between the law on the books and the law in action.
- Professor Guo Jianmei and Professor Guo Huimin are working on promoting local government provisions on the management of domestic workers. But there is a disconnect between the aims of the government, which is to manage domestic workers, and the objective of the women's groups, which seeks to protect their rights.

- Gender issues can be more effectively addressed at the provincial level, as women's groups have been more successful in including strong anti-discrimination policies based on international standards into provincial legislation.

## **Employment in the Informal Sector and Female Workers in China**

***Professor Ye Jingyi:** Professor Ye Jingyi is a highly regarded Labor Law scholar. She is a Professor of Law at Peking University Law School and Deputy Director and Research Fellow, Institute of Labor Law and Social Security Law, Peking University.*

Professor Ye Jingyi discussed that China was yet to adopt a universally accepted definition of the informal sector and most researchers use the definition provided by ILO. There is some ambiguity in China as the official literature uses the term flexible employment. Small to medium enterprises, community-based centers, household-based production, small vendors, and those self-employed usually constitute those in the informal sector.

Professor Ye Jingyi questioned why there has been such growth in the informal sector since the start of reform in China in 1978. Due to globalization and competition, many China-based enterprises have adopted various measures to lower labor costs such as using seasonal laborers. In order to increase efficiency they have laid off many workers. These workers have had trouble finding employment so they may resort to temporary work or other types of informal sector work.

The informal sector continues to play a role in the development of China's economy. A 2007 Fudan University report noted that 130 million people constituted informal workers in China, accounting for 40 percent of the urban labor force and 35 percent of GDP. Migrant workers comprised the majority of informal workers, followed by laid-off workers. Many of those in the informal sector are in the service industry, although migrant workers are also highly concentrated in the construction and manufacturing industries. For example, migrant workers encompass over 80 percent of workers in the construction industry. Statistics from a study in Wuhan city shows that 86.3 percent of those jobless were laid off from state-owned enterprises. Only 20 percent of workers were able to find re-employment with large companies or state-owned enterprises.

Although in terms of numbers of students in higher education, China has surpassed Russia, India, and the United States, only 70 percent of graduates were able to find employment from 2005 to 2007. In order to improve employment figures, universities would sometimes create fake positions. In 2009, only 68 percent of the 6.5 million college graduates found jobs, including fake positions. Since graduates wish to work in major cities such as Beijing or Shanghai, they would rather accept informal jobs in these cities than move elsewhere.

### ***Women Informal Workers***

Among college graduates, women face more difficulty securing employment. More than 80 percent indicate experiencing discrimination during the recruiting process. In terms of total

numbers, there are more women than men in the informal sector and among those unemployed. The All China Women's Federation figures indicate that almost 63 percent of women overall and over 50 percent of female migrant workers are in some kind of informal employment, compared with 40 percent of men. Even within the informal sector, men and women assume very different jobs. Women are in service sectors such as retail, food service, and farming, whereas men are in the construction, transportation, and power plant industries. Within the same industry, such as the food services, men tend to be chefs, whereas women tend to be in assistant positions.

Gendered income gaps exist due to segregation within industries and among different types of employment. According to ACWF figures, the average annual salary of women is 63 percent of men's within the informal sector. Benefits such as social security is also less for women than for men, with migrant workers receiving limited insurance. For example, only eight percent of migrant workers have insurance for pregnancy and childcare. Women are thus the weakest of the weak among vulnerable groups in the informal sector. While the government has been issuing policies that have been effective to a certain extent, challenges remain. Current laws concerning wages, social security, and other issues, for instance, are not systematically enforced and do not apply to those in the informal sector, resulting in the lack of protection for those workers.

## **Sexual Harassment in the Workplace**

***Professor Xue Ninglan:** Professor Xue Ninglan is Professor of law at the Chinese Academy of Social Sciences and is an expert on family law.*

With regards to anti-sexual harassment lawmaking, Professor Xue Ninglan argues that the LPWRI for the first time prohibits sexual harassment yet contains unenforceable provisions. The law also does not provide a legal basis for judicial remedies. She calls for an understanding of sexual harassment as an abuse of power by the powerful against the powerless.

Two landmark cases in Beijing and Wuhan involved women bringing suits against their employers. Through these two cases, sexual harassment gained the spotlight in China and helped to push the inclusion of sexual harassment in the 2005 amendments to the LPWRI. Scholars commented that its inclusion was a small step for law making but a major step for society. Professor Xue observed it was a "small step" because the provisions relating to sexual harassment provide very little scope for judges to handle such cases in reality. Yet 28 different provinces have revised their LPWRI implementing measures since 2005 to prohibit sexual harassment.

The CASS Gender and Law Research Institute has been conducting research related to combating sexual harassment in the workplace. The first part of their research involves qualitative research on a national scale whereas the second part focuses on drafting a sexual harassment law. One of their findings concerns the role and identity of the victim and offender: deeply held views in China continue to place blame on the victim. Many third parties assume that for sexual harassment to take place, the victim has to at least implicitly give consent. Thus the conception is that for sexual harassment to stop, women have to clearly say no. In CASS's view women's reaction to

stand up and say no is important but isn't a sufficient resolution of the problem. Professor Xue argues that the unequal power relationship is often the main cause of sexual harassment.

***Some challenges in proving sexual harassment:***

- Employers largely lack preventive measures to deter sexual harassment. Many employers in handling sexual harassment lack awareness regarding protecting women's rights; instead they would either ignore or downplay the woman's complaint.
- A common attitude is that employers think it is something between two individual employees and not something pertaining to the company in general.
- Society applies a double standard to men and women. Since the LWPRI was amended in 2005, the official media outlets now frame sexual harassment as a violation of women's rights. However when women experience sexual harassment, they would endure the treatment rather than face the social stigma associated with publicly admitting sexual harassment. Some women even blame themselves.
- It is hard for the victim to have evidence of sexual harassment admitted in court. Thus many cases are decided against the plaintiff. Judges may also show bias in their rulings.
- The amount of legal relief that victims can receive is also limited and mainly restricted to civil measures such as apologizing or paying a small amount of compensation. Very few employers have been penalized for sexual harassment.

***The legal framework***

In 2007 and 2008, CASS submitted an experts' draft to the National People's Congress (NPC) regarding guidelines and measures that courts can adopt in sexual harassment cases. Although there is a need for a judicial interpretation on sexual harassment, it is also important to include preventative measures on sexual harassment into the tort law drafting process. Through ACWF, the Chinese Academy of Social Sciences (CASS) has submitted written suggestions to the NPC legislative office in August 2009. Their suggestions include compensation for psychological damage. With regard to the role of employers, if the sexual harassment occurs due to the employer's neglect of duty, the employer should be held liable.

In February 2009, the Maple Women's Psychological Center submitted draft legislation on anti-sexual harassment. Another major initiative was the Beijing University Center for Women's Legal Services and Research on Women to promote an internal guideline for companies on sexual harassment; this is a fundamental step. Prevention is more important than efforts after the fact.

***Litigation on Sexual Harassment***

***Professor Guo Jianmei: She is the founding head of the Beijing University Center for Legal Services and Research on Women. She is a pioneering women's legal services lawyer and a preeminent women's rights advocate.***

Sexual harassment has been a topic under discussion since the 1990s, yet it only started to capture

the public's attention in 2001. According to legal scholars, sexual harassment is one of the ten most debated legal topics in China today. In terms of cases, the first sexual harassment case was litigated in 2001 and 19 national cases have followed since. Of these 19, ten cases resulted in a victory and one case was withdrawn. These cases are grouped into two time periods from 2001 to 2004. The first sexual harassment case that won occurred in 2002; from 2001 to 2003, there have been about ten sexual harassment cases. After sexual harassment was added to the amended LPWRI in 2005, there have been approximately eight cases. *The Wen Jing* case in Chongqing had a significant impact on society even though it lost in court. Professor Guo Jianmei argued that this was unfortunate because there was clear evidence in the form of 19 text messages in this case. It also heard after the LWPRI and several local implementing measures on sexual harassment had been implemented.

Prof. Guo Jianmei noted that these suits face challenges in classifying sexual harassment and establishing evidence. The cases that won in courts used provisions regarding civil law violations of individual dignity or reputation instead of citing the sexual harassment clause in the LWPRI. However, it is important to seize the opportunity to use sexual harassment as the cause of action in order to develop a milestone case. In a case in Xi'an city, the province had just passed implementing measures so Prof. Guo relayed to the judge that this could be the first case in which LWPRI could be used as a legal basis. The judge did use LWPRI as the legal basis but did not acknowledge sexual harassment, which points to the lack of judicial awareness and sensitivity to this issue. In another development, Professor Guo has been working on developing Internal Sexual Harassment Guidelines for Companies. So far, three companies have agreed to draft internal guidelines to prevent sexual harassment.

## **The New Expert's Anti-Discrimination Law Draft**

**Professor Liu Xiaonan**

**Professor Liu Xiaonan represented Professor Cai at the conference**

### ***Some Elements of the Draft Law***

The China University of Political Science and Law drafted an anti-discrimination law in response to limitations in the current law. Although the Constitution and other current laws guarantee equal rights for all citizens, their scope is too narrow. Important categories have not been incorporated, including bias based on physical appearance or residence/*hukou* (household registration). Current Chinese law prohibits discrimination based on gender, physical disability, and other categories but its coverage remains narrow and does not follow the spirit of the regulations of the International Labour Organization (ILO). For example, it does not cover religious belief or age. Circumstances that are specific to China, such as household registration or physical appearance discrimination, also need the protection of the law. Professor Liu Xiaonan further argued that existing laws are principle-based and lack actionable measures. The law prohibits discrimination based on gender and disability but there is no system in place whereby victims can easily file complaints, bring criminal suits, or a suit against private



enterprises.

## **Mainstreaming Anti-Discrimination Law into the Law School Curriculum and Clinical Programs**

**Professor Li Ao: Professor Li Ao is Professor of Law at Wuhan University School of Law and the founder of pioneering courses on clinical legal education.**

### *Female vs. Male students*

Schools are often the incubators for gender-based discrimination in law school. Female undergraduate students are considered desirable whereas master's students are seen as lacking in suitors. When interviewing prospective students, some Ph.D. advisors require female students to be married or have a boyfriend. This is because many female graduate students generally spend their first summer vacation beautifying themselves and second summer husband- hunting. Male graduate students, on the other hand, use the first summer to complete an internship and the second summer job hunting.

### *How to incorporate gender-based discrimination awareness into the law school curriculum?*

Professor Li Ao discussed the four related courses that she has developed. They include: (1) gender and women's development: an elective that is open to all students and a joint class taught by faculty interested in gender issues. (2) gender and law, which is an elective open to all students and the first such class in China. (3) undergraduate law class as a clinical legal education--the first legal clinic focused on combating gender discrimination (raise awareness about this topic through handling cases) and the second is focused on mediation on gender equality. This involves collaborating with the local court to have students handle mediation, with the objective to incorporate gender equality into the mediation process. (4) anti-discrimination litigation classes in law school. This course utilizes moot courts as a way of analyzing gender discrimination by retrying actual cases handled in legal clinics and inviting judges that presided on the case to provide commentary. The moot court session is open to all students and psychologists and sociologists are asked to participate.

A way of retaining male students' interests in the class is to include topics on discrimination against men. Another methodology is to use games, videos, and other entertaining yet educational mediums to spread information. Prof. Li also at every opportunity related the cases to the student's own lives and experiences. Her teaching materials are now being distributed to other campuses in China.

### *Mainstreaming Gender and the Law into the Legal Curriculum*

Professor Li Ao, who introduced seminal courses on gender and the law in China in 2007, writes that "gender mainstreaming can only be realized by the incorporation of gender issues into policy and policymaking, and the incorporation of gender into education in turn helps ensure

its incorporation into policy and policymaking. Only by the achievement of gender mainstreaming in education can the next generation further develop conceptions of gender and a more acute awareness of questions of gender equality.”

Her course on “Gender and Women's Development” covered issues concerning women’s political participation, women's rights protection, women's employment, anti-gender discrimination and the women's movement. The course elicited a powerful response from the undergraduate student body drawn from different courses and was considered to be among the best-received open electives at Wuhan University.

Professor Li Ao's clinical courses have been merged with her “Gender and Law” class materials and strategies in order to develop a specialized clinic on anti-gender discrimination. Clinic students successfully handled cases involving the “socialization of housework, gender loopholes in administrative enforcement, residence rights for a married woman who lost her father; sexual harassment; domestic violence; and employment discrimination.” Through the clinics, students became deeply aware of the way gender informs legislation, law enforcement, the judicial system, and legal practice.

Moot courts served as incubators for discussions on gender discrimination in the workplace and training for litigation strategies. In this way, the moot courses, clinics, and courses provided the dialectical interplay between theory and practice on gender and law for students and participating judges and lawyers.

### **Part Three**

#### **Rural Women's Access to Land Tenure Rights**

***Professor Guo Jianmei:** Professor Guo Jianmei is the founding head the Center for women’s Law Studies and Legal Services- the first and leading public interest law firm in China. Guo Jianmei was chosen as one of the 1000 outstanding women in the world who were nominated for the 2005 Nobel Peace Prize.*

Her paper and discussion focus on the groundbreaking work done by the Peking University Women's Law Studies & Legal Aid Center on rural women’s access to land. Most of the new cases in this area have been spearheaded by Professor Guo Jian Mei.

Professor Guo Jianmei argues that the denial of land rights and interests had a “profound impact on rural women,” especially as the survival of women and their families often depend on their access to land. For her Center, this is one of the most important yet most difficult issues they have confronted in the last decade.

Since 2004, the Center has represented 61 cases selected from more than 2,300 applications for legal aid, involving 1,650 people in 19 provinces, municipalities, and autonomous regions.

Among the litigated cases, eight cases resulted in a favorable decision that helped rural women recover economic losses worth 13.2 million yuan. Twenty three of these cases have yet to be adjudicated. While representing legal cases, the Center also conducted investigations in four provinces, namely, Yunnan, Zhejiang, Hebei, and Hunan.

Problems related to rural women's land rights in part concern the right to contract land for married-out, divorced and widowed women; women's right to receive economic proceedings of rural collective economic organizations, and women's right to the compensations from land appropriations. Meanwhile, such restrictions and deprivation assume various complex characteristics which are discussed below.

### ***Patriarchal Norms***

Infringement of women's land rights can be categorized under five points:

- Women lose their land because of marriage.
- Women lose land because of changes in marital status, including widowhood, divorce, and remarriage.
- Women lose land during its appropriation, which is an especially serious issue in suburban areas surrounding cities.
- Unmarried women receive no land or less land.
- Men sometimes move their household registration to a wife's place after marriage. Although this appears to be an infringement on rights of men, but it has a significant impact on women as well.

When women move to a village or city for marriage, their contracted land is often forcefully seized by the village committee even when they do not receive land from their husband's village. Rural women also lose their land when they divorce, remarry, or become a widow. Village committees tend to revoke these women's household registrations through coercive measures, including under the guise of "village rules and customs," and ask them to transfer their household registration to their parents' residence. Women are also deprived of their right to compensation for land appropriation and their land contracting rights. Single women often have no access to land, and in anticipation of marriage, many village committees make them ineligible to receive land. Even when men move to their wives villages they are deprived of their land rights. This affects both men and women.

### ***Impediments to Women's Land Rights Protection***

Of the 61 cases on land rights, rights protection litigation has faced various impediments. The courts in most of these localities dismiss such cases because local governments privilege social harmony over women's rights. Secondly, traditional customs and mindsets at the grassroots take precedence over gender equity.

Professor Guo Jianmei also argues that the high degree of autonomy enjoyed by the villagers'

organizations allows for arbitrary decision making by village committees. While the Organic Law on Village Committees provides that “village rules and agreements” shall not run counter to state laws and policies, the village organizations often deprive women of their rights. In addition, farmers’ dependence on land, shortage of land due to population explosion, and traditional mindsets that conceptualize a married daughter as “used water” further exacerbate gender inequalities.

- Officials at the local level are passive about the infringement of women’s rights and either ignore violations or don’t take action.
- Gaps and flaws in the legislation affect women’s rights protection. The laws are vague and inoperable and therefore impossible to use. For example, although the Land Contract Law provides for equal access to land, there is no provision on procedures for redress when inequality occurs.
- The legal language is not gender specific and women’s status is unspecified.

#### *Gender Bias in Traditional Ways of Thinking:*

- Most villagers, including women, assume that when a woman marries she is no longer part of the village.
- At a particular court session, the courtroom was filled with many villagers with the men shouting “Land is for men only. It shouldn’t be for any woman.” Lawyers at Guo Jianmei’s center further recalled, “People were yelling, ‘we don’t care where you come from, if you come from Beijing, you don’t scare us.’ We had to be rescued and given a police escort.”
- The land is equivalent to their lifetime savings and earnings.
- Local officials accept unequal land distribution as the norm. Incompetence of local judges is another challenge to women’s rights protection.

#### *The Beijing University Women’s Center Action Plan*

- Litigation itself cannot solve issues with complex historical, cultural, and economic roots.
- Public interest litigation can help mobilize a social movement and address some of the land-related problems.

#### *Using Litigation*

Professor Guo Jianmei writes that: “land right protection for rural women is the best battlefield to practice public interest litigation, for it is of great significance and worth our effort to make experiment and breakthrough. Public interest litigation is not only about litigation itself, but also a systematic project integrating comprehensive methods and strategies.”

Legal reform through a bottom-up approach is a model that Professor Guo Jianmei recommends. Although the Article 4 of the Organic Law of Village’s Committees calls for township

governments to supervise “village rules and agreements,” the governments tend to ignore such duties. However, Article 63 (b) of Property Law issued in 2007 was adopted due to the advocacy of Guo Jianmei’s Center. It notes: “Where the legitimate rights and interests of any member of the collective are infringed upon by any decision made by a collective economic organization, villagers committee or the principle thereof, such member may require the people’s court to cancel the decision.” This article is the entry point for judicial review of “village rules and customs” and provides remedies for female victims. However, the supervisory functions of certain governmental departments have yet to be determined. A litigation project to initiate judicial review is being planned.

***Professor Li Huiying is Professor of China Central Party School and member of the Wording Committee of Women and Children, State Council of China.***

Professor Li Huiying brings an alternative and complementary perspective to bear on the process of women’s equal access to land addressed by Professor Guo Jianmei. She makes a call to action to revise the patriarchal culture that mandates that a woman traditionally join the husband’s village. Instead, she proposes that the man join his wife’s village after marriage and enjoy equal rights as a man. She cites examples of this practice in localities such as Yidu city in Hubei, Dingzhou County in Hebei, and Lueyang county in Shaanxi. This paradigm change represents a new equality between men and women. However, this new model has yet to capture the imagination of village communities and patriarchal customs still dominate. Yancheng city of Henan Province, for example, distributed land to men but not to women in 2005. Professor Li argues that many administrative officials do not question the traditional practice of a woman marrying into a husband’s village. As a result, over twenty thousand married women in Nanhai district, Foshan city, Guangdong province had their land rights and interests violated.

Women in Zhoushan village, on the other hand, have played a pivotal role in the revision of their village rules and village conventions. As a result, the revised village rules and village conventions of Zhoushan village have incorporated significant breakthroughs that include a greater role for women in participation in community affairs. These rules call for a 50 percent quota for women in the Chinese Communist Party, women elected as villager representatives to be not less than 50 percent, and women elected as members of the two village committees, villager team leader, and other villager organizations to be not less than one third of the representatives, and general support and encouragement of women’s participation in political affairs. Another major advancement in the law is the provision on promoting the reform of marriage and residence practices and breaking the traditional paradigm that a woman shall “live with her husband’s family” after marriage. Moreover, “children in a household purely with female members or with both sons and daughters enjoy marriage freedom, they may stay in their hometown village or join their wives’/husbands’ villages at their own discretion, in both situations they are entitled to treatment offered to local villagers.” The law also equalizes the treatment of women and men who are forced to move back to the village of their birth due to changes in their marital status. Moreover, the law calls for village committees to provide appropriate support to all marriages whether the husband joins the wife’s village or vice versa. Professor Li Huiying argues that “after revision of village rules and village conventions, various associations have been successively established in experimental

villages to promote the building of new civilized habits and customs, which have effectively dissolved the difficult problem of women's land rights."

Professor Li Huiying makes a powerful connection between son preference and women's unequal access to land. She argues that behind the preference for sons are "two ultimate causes, one being the thought that a son can support their parents when they are old, and the other being degrading a daughter's value while improving a son's value in the family through women's joining their husbands' families after marriage, keeping the father's name as a family name and following paternal lines, which is reflected in three ways, namely family culture, village culture including distribution of collective resources, and folk culture." The issue of land is connected to the selection of the gender of unborn babies and sex selective abortion. Currently, the sex imbalance among the newborn population has reached unacceptable proportions in China and is the highest imbalanced ratio in the world.

Preference for male infants and the correlative high imbalance between genders is shaped by the fact that once women get married a disproportionate number do not remain in the village and are thus unable to take care of elderly parents. In 2007 and 2008, major research was conducted in two provinces on people's marriage preference patterns. According to the research, most villages assumed that when women marry they have to leave and some villages even issue deadlines.

She therefore makes an urgent appeal for revision of village rules and conventions not only as an effective way to correct sex imbalance at birth, but also to solve problems concerning women's land rights and interests.

*Li Huiying makes the following creative recommendations to address women's unequal access to land:*

Some government agencies have started to take action, in part due to a small number of victimized married-out women who have aired their grievances in Beijing. For many women, land is their livelihood: it is the only thing they have. We see this in the suburbs of Nanjing, a city in Southwest China, where women have chosen to stay in their home villages after marriage. In another part of China, 200,000 women and children decided to remain in their original villages.

Last year, the Guangdong provincial government designated nine areas that were particularly troublesome and asked local governments to take action. In one district, the government resolved over 95 percent of claims and has promised that the remaining five percent will be completed this year. Local governments resolved these claims by dispatching over 30 small working groups to proactively prevent problems.

Li Huiying states: “In this complicated and high stakes game, women themselves have to become powerful interest groups.” In order to solve the problem of women’s lack of rights to the land, it is important to address the issue of patrilocal migration upon marriage and consider ways in which both genders can have an equal right to decide their residence.

In terms of villages governed by residents’ law or regulations, it is important to include a provision on gender equality. However, trying to add language into law is not easy because most people think women should leave the village upon marriage. Thus, training programs conducted for officials frame the issue as one concerned with caring for the elderly. Given that many sons don’t provide care for the elderly, daughters should have the opportunity to support their parents. When the issue is seen in this way, village officials are more willing to accept a change in the rules regarding women’s residence.

Li Huiying echoes the need for a social movement to support legal changes. Even when laws change, unless a social movement mobilizes new thinking and trends, those new laws will not have any effect. It is important to introduce new ideas in a way that resonates with the villagers, and they feel comfortable about adopting such ideas. One of the most effective ways was to organize a mock court performed by and for farmers and the elderly.

## **Conclusion**

The final two presentations of the Consultation examined cross cutting issues. The first brief comments by Professor Zhu Xiaoqing of CASS focused briefly on the

importance of gender mainstreaming in china and the steps taken to address gender bias in the legal profession. The second set of comments by Professor Xie Haiding once again from CASS examined an alternative point of view on gender studies: the need for greater male participation.

Professor Zhu Xiaoqing spoke very briefly about gender mainstreaming work developed at the gender and the law institute at CASS. Two important areas in which mainstreaming is taking place is in legislative drafting and in research on gender bias in the legal profession and the courts. She quoted Lenin to argue that practice without theory is blind and directionless. Therefore practice and theory must go hand in hand.

The Gender and Law Institute has conducted an extensive gender based analysis of all Chinese law. Since that historic watershed moment in 1995, there has been a greater awareness of gender. The most challenging and daunting aspect is the work on raising gender awareness among the judiciary in China. Working toward this goal, the institute has conducted a questionnaire to gauge the view and opinions of legal professionals on gender issues. The participants of the question and answer project include police, judges, lawyers, and legislative personnel at the local levels. This is also submitted to faculty and students of law schools. The Institute has also visited 14 courts and reviewed approximately 4000 cases which cover both civil and criminal issues. The results were sometimes alarming: the legal professionals lack a gender perspective and are biased against women. Thus even when Chinese laws may be gender neutral, the results are not gender neutral and have a disproportionately negative impact on women. This initial research provides the Institute with a baseline for future initiatives.

Professor Xie Haiding's comments were highly valued as an important male voice at the consultation. He argued that the legal research on gender in China was conducted disproportionately by women and was predominantly from a female point of view and lacked male participation. Without male participation this research and practice cannot thrive. He argued that gender like age, socio economic class, residential status is just one of many grounds of discrimination and research and practice had to examine how gender cross cuts and intersects these other grounds of discrimination. In order to do this, women's rights and gender studies groups must connect with other groups working on anti- discrimination issues. Thus rather than privilege one voice, way all voices can be amplified and can be mutually reinforcing.

Following three days of roundtable discussions, the Chinese experts separated into working groups to draft an action plan on the three areas that were discussed. These three action plans map the follow-up steps that need to be taken by the Chinese experts to further their agenda of advancing women's rights in China.



## DISCUSSION OF ACTION PLANS

### CHINA GENDER AND LAW STRATEGIC ACTION PLATFORM

#### WORKING GROUP ONE

##### Rural Women's Land Rights

Professor Guo Jianmei presented the Action Plan for the Land Rights Working Group, which consisted of Prof. Guo Jianmei, Prof. Liu Bohong, and Prof. Li Huiying.

**U.S. Commentator:** Dr. Amy Gadsden

##### Introduction

Land rights can be the most complicated of women's rights issues and is affected by many factors including culture, and economics, among others. Given that in three to five years from now, there may be a significant move toward privatization, the group focused on a three year plan of action.

##### Action plan:

In the **legislative front** there are several opportunities:

- 1) Land Management Law, currently being drafted.
- 2) Law on Village Self-Governance
- 3) Land Law

- Actions we can take to benefit from these opportunities: advertising campaigns, seminars, maybe even a comprehensive survey at national level. There are six or seven on-going survey projects, but the scope needs to be expanded. The survey must be representative and cover both developed and undeveloped areas, including areas with minority communities.
- **Litigation:** Keep focusing on individual cases. High profile cases resonate more with the public. We should carefully select our cases. The first type should be typical cases featuring rural women. The second type of case should focus on whether Article 63 of the Property Law can be deployed to challenge illegal local discriminatory rules, and especially corrupt officials' use of them. The third type involves suing local officials for inaction, such as not taking action to resolve problems or not interfering with village committees who act illegally. We did one case in the last category without getting much public awareness, but maybe in the future we will. Cases must be representative,

and have the potential of being very high-profile. We hope to handle ten cases in the first two categories, and five in the last one.

- **Administrative Action:** We also want to initiate projects that attack this problem using administrative solutions. We aim to set up four pilot programs, covering areas with different economic levels. In these projects, we want to: train and educate local officials; focus on the local level; draft a template for the right kind of village committee: civilized, fair, and gender neutral (once we have identified good practices with a survey project, we can incorporate them); establish a monitoring/evaluation mechanism for local and county officials; and use arbitration, which can be very effective.
- **Research:** At the conclusion of these three projects, we will come up with a very high-quality research report which can serve as a handbook for future efforts.
- **Publicity and media:** We want to publicize our cases, repeat pilot projects, and promote such projects among the media, State Council, and people's representatives; we want the government to adopt a pilot model into policy. This three-year plan will be very effective.

## WORKING GROUP TWO

### Gender-Based Employment Discrimination

Professor Ye Jingyi presented the Action Plan on behalf of the Gender-Based Employment Discrimination Working Group which consisted of Prof. Guo Huimin, Prof. Ye Jingyi, Prof. Xue Ninglan, Prof. Li Ao, and Prof. Liu Xiaonan.

**U.S. Commentator:** Ira Belkin Esq.

### Introduction

The group felt that compared to an issue such as domestic violence, the area of gender based employment discrimination is still emerging in China and therefore the research and action in this area is still in its nascent stages. The group envision a long road ahead in terms of advocacy in this area.

- **Challenges:**
  - **Need for a clear concept/definition:** There needs to be a clear definition of equality and discrimination. We need systematic studies on stereotypes in order to arrive at definitions.
  - **Cost should apply to both genders:** There are costs associated with litigation and enforcement. A hiring company would also have to carry cost. For example, we often hear from businesses that they don't feel safe about sending a woman on a business trip. Sending someone with her or someone else would be expensive. The cost also involves

welfare, i.e. maternity leave. This will cost the business money, whereas it used to cost the government money. We think it should also apply to men, or it will be too expensive to hire women.

- **Greater government responsibility/accountability:** The government should release new regulations and monitor implementation.
- **Equal pay for equal work:** Need more research on government-owned enterprises, which have different standards.
- **Sexual harassment in the workplace:** Need more research. Workplace sexual harassment policies are rare.
- **Improved research methodologies:** For example, research on college graduates focuses only on their first job. We need to strengthen our ability to collect data.
- **Review current labor law and relevant regulations.**
- **Conduct systematic studies on anti-discrimination and work.**
- **Goals**
  - To completely eradicate discrimination and create a harmonious society. This involves two things: equal opportunities and equal results. In the short term we hope for equal opportunities; in the long term we hope to improve the legal system as a whole.
- **Strategy**
  - Scale up our current work.
  - **Medium to long-term goals:**
    - Education and training: training for legal professionals (current legal professionals and also future legal professionals/students); training for the public, using media and college courses.
    - Research and study: focus on individual cases but also improve research methodologies, including systematic research in all categories; study anti-discrimination on a macro-basis but also concentrate on issues occurring at the micro-level such as vacation time and the retirement age; investigate employment discrimination and its linkage with sex preference at birth.
    - Reform in the legal system: clarify current legal reforms.
  - **Short-term goals:**
    - Set up a network for anti-employment discrimination.
    - Develop research on employment of college graduates.
    - Create training materials for different audiences.
    - Create committees to engage in the legislative drafting process: there are two important laws being drafted right now: the 1) Social Welfare Insurance Law and the 2) Revision on the Law Governing Female Worker's Rights. Given the government's current focus on social policy, it is critical that these laws include a gender perspective.

## **WORKING GROUP THREE**

### **Domestic Violence**

Dean Lin Jianjun presented the Action Plan on behalf of the Anti-Domestic Violence Working Group, which consisted of Dean Lin Jianjun, Li Ying, Prof. Zhu Xiaoqing, and Prof. Xie Haiding.

**U.S.-Based Commentators:** Dr. Joan Kaufman and Dr. Rangita de Silva de Alwis

The heightened action on domestic violence has resulted in many new developments in the area of domestic violence both in terms of networks, innovative programs, new policies, guidelines, and local level laws. There are many challenges in policy and practice that need to be addressed.

**Multi-level challenges that need to be addressed:**

- **Negative gender stereotypes/concepts**
  - Address the root causes of domestic violence by addressing the negative stereotypes against victims of domestic violence. These stereotypes affect the way people think and how a judge, police officer, or other parties involved in the case will respond to the crime of domestic violence.
  - Defects in the legal system affect domestic violence: The system of law enforcement does not provide a way to quickly terminate or prevent violence.
  - Some stereotypes present in daily life include the following:
    - Inequality between men and women, especially between wives and husbands. Society thinks that women deserve physical violence because of their unequal status.
    - Society considers family matters to be private matters—outsiders should not intrude, which makes it harder to intervene in cases of violence in the home.
    - Society assumes that if woman is beaten, she must have done something wrong and deserved the beating.
- **Challenges in the legal system**
  - China lacks national legislation on domestic violence.
  - The law is vague and inoperable.
  - Current legislation does not provide clear-cut definitions and guidelines.
  - Lack of an effective prevention and protection mechanism in place.
  - Remedy—resources like shelters and medical interventions are not sufficient.
  - Current legislation lacks a gender perspective and don't provide protection to minority groups and underage victims.
  - Among current legislation, the linkage among agencies and service providers is missing. This creates a lack of coherence in the system.
- **Enforcement**
  - Enforcement is ineffective and implementation remains difficult.
  - Law enforcement personnel and core staff don't have proper training.
  - The lack of coordination among different agencies exacerbates problems with enforcement and implementation.
- **Goals**
  - The ultimate goal is to end domestic violence so that men and women can live in harmony as equals.
  - Revise the law in different areas so as to combat gender stereotypes.
  - Mainstream gender equality.
- **Strategy**
  - Domestic violence is the product of many different factors, so when we address it we need to take various measures into consideration.

- Strategies we come up with are specific to the challenges we face, the system, and their implementation.
- **Changing people's mindsets**
  - Increase education on equality between the two genders and equip people with basic knowledge.
  - Public education must start in elementary school.
  - With that as a guideline, three strategies are recommended:
    - Incorporate domestic violence into the elementary and high school curriculum. In Beijing, a pilot program has already been initiated.
    - Promote “zero tolerance” movements in certain communities. Work with basic and grassroots levels to make people aware that violence is not tolerated.
    - Develop broad-based public awareness campaigns, and use media outlets to increase public awareness and the level of gender sensitivity.
    - Undertake different types of advocacy to change people's views on gender equality and domestic violence. Educate the community that domestic violence is a human rights violation.
- **Recommendations for institutional changes?**
  - The goal is to promote legal reform and make it more accommodating of gender issues
  - Three types of action are proposed:
    - First is to engage in the drafting process of the anti-domestic violence law.
    - Educate legal personnel such as prosecutors, judges, attorneys, and police officers. Raise awareness on the draft law, solicit their feedback, and garner their support.
    - To follow up, we have to start working on guidelines to accompany the eventual presentation of the anti-domestic violence law.
    - Make the law easy to implement.
    - Review and examine the current existing laws and identify places where there are inconsistencies and blind spots.
    - More importantly, after having reviewed and examined existing flaws, we should draft recommendations to resolve inconsistencies and submit them to the National People's Congress for their approval.
    - If the system is improved, it will eventually help to educate the public and change their mindsets on domestic violence.

- **Create an anti-discrimination network:**
  - The first action that we plan to take is to establish a anti-discrimination network that is modeled after the anti-domestic violence network.
  - Individual member organizations belonging to the network will have their own specialized tasks, depending on their area of expertise.
  - The network will help strengthen and promote interagency collaboration.
  - For future efforts, we must involve as many agencies as possible and encourage them to work together to be more effective in their joint fight against domestic violence.
  - Encourage and promote male participation in the network and the larger movement against domestic violence.
  - Recruit more male volunteers, and some rehabilitated former offenders of domestic violence to teach and educate the public.
  - Continue to enhance education and training of legal practitioners such as judges.
  - Be more strategic in utilizing existing legal resources.

## **Action Steps**

### **Gender-Based Employment Discrimination**

- Training:
  - Media Training
  - Training of government officials
- Website:
  - This would be a public relations tool
- Cases:
  - Conduct strategic litigation as a way of profiling gender- based employment discrimination
- Hotline for victims of gender-based employment discrimination
- Blacklist of bad practices
- Research:
  - Statistics on male/female employment
  - Multi-school survey of employment
- Coordination:
  - Anti-discrimination network
  - Equal employment opportunity network

### **Rural Women's Land Rights**

- **Short Term**
  - Make recommendations to the new land management law.
  - Make recommendations to the revisions to the Village Committee Organization Law.
  - Make appointments with the relevant agencies to understand the status of the laws.
- **Action Steps**
  - Convene small consultation to discuss recommendations.
  - Use the media, seminars, and research to lobby people's representatives.
  - Collect concrete data through research to present to legislators and administrators.
  - Employ litigation to compel enforcement.



- **Enforcement**

Use litigation as a way of enforcing laws:

- Use strategic litigation to illustrate the problems affecting rural women.
- Accept typical cases where women's rights are being violated.
- Use Article 69 of the Property Law, which calls for cases to be reviewed by the SPC, to assess and monitor current Village Laws.
- Conduct cause lawyering litigation for a class of plaintiffs.
- Use administrative litigation to prosecute administrative officials, with a goal of two to five cases. The litigation will cover different geographic areas.
- The cases will be used to mobilize attention around effective enforcement.

- **Pilots:**

Conduct four pilots in strategic areas, some examples:

- Hunan: a very traditional area
- Guangdong and Hebei: Both areas have very progressive shareholder systems. The idea would be to expand them.

## **Domestic Violence**

- Educate public elementary and middle schools.
- Education on domestic violence and gender equality. Pilot programs exist in Hunan, Hebei, and Beijing. Hope to expand relations with all schools in Beijing.
- Scale up the work of public interest law through outreach with the network of national public interest lawyers.
- Training for judges, police, lawyer, training, medical professionals, and court professionals.
- Broaden the participation of men, specifically targeting male volunteers and former offenders.
- Incorporate new ideas from this meeting to the draft law.
- Review the draft domestic violence law at the November seminar before submitting it to the National People's Congress.
- Familiarize legislators with the draft domestic violence law to facilitate its acceptance when it is introduced in November.

- Draft national guidelines for the implementation of the LPWRI. Possible strategy workshop to be held in March.
- Outline inconsistencies in the legal system and make recommendations for amendments, new interpretations, and the repeal of gaps in the laws. Identify blind spots in the law.
- Conduct seminars for different agency representatives.
- Continue to use the Supreme Peoples Court guidelines to educate lawyers and judges, and expand their coverage beyond the nine pilot areas.
- Expand the Domestic Violence Network cautiously and slowly over time to cover children of violence, persons with disabilities, senior citizens, and migrant workers.
- Invite members from different civil society networks for seminars and workshops.
- Create an anti-discrimination network to address the root causes of domestic violence.

### **Next Steps:**

#### **Develop an anti-discrimination network**

The Gender and Law expert Group proposed an anti-discrimination network that would emphasize the need for both women and men's engagement in the advancement of gender equality and address multiple and cross cutting forms of discrimination including gender, age, ethnicity, residency, disability, marital status, among others.

# VIOLENCE AGAINST WOMEN

Lin Jianjun

## ***Anti-Domestic Violence Law in China***

by LIN Jianjun<sup>2</sup>

### **I. Overview of the Anti-domestic Violence in China**

Domestic violence is not purely a family affair, but a worldwide social problem spanning time, space, countries and nationalities. Like any other kinds of violence, it is in essence a behavior that disregards human rights, which is against the ideal of human's pursuit of peace.

In China, anti-domestic violence has grown from uncovering domestic violence to furthering and deepening the fight against it. The Fourth World Conference on Women (Beijing, 1995) and the adoption of the *Marriage Law of the People's Republic of China* (Amendment, 28<sup>th</sup>, April, 2001) span the three stages of evolution of anti-domestic violence in China.

#### **Phase One- Before the Fourth World Conference on Women (Beijing, 1995):**

During this period, the *Constitution*, *Criminal Law*, the *Law on the Guarantee of the Rights and Interests of Women*, the *Law on the Protection of the Minors*, the *Marriage Law* and other relevant legislation all reflected the spirit of protecting the rights of family members and prohibiting domestic violence, but the legislation at all levels did not specifically use the term “domestic violence”. Domestic violence was not considered as a separate or independent social problem, and was not a general concern from the legislator, the judicial authority or the public.

**Phase Two- between 1995 to the adoption of the *Marriage Law of the People's Republic of China* (amendment, 2001):** The Fourth World Conference on Women was held successfully in Beijing in 1995, in which the *Beijing Declaration* and *Platform for Action* emphasized and reiterated the determination of the international community to combat against domestic violence. The issue of domestic violence was becoming an academic topic and even a hot issue because of the driving force of the Conference. The legislation on anti-domestic violence was carried out gradually with the development of social intervention and support. In 1996, the first local policy on anti-domestic violence, ‘*Several Rules on the Prevention and Prohibition of Domestic Violence*’, was adopted in Changsha city, Hunan Province. In March, 2001, the first local legislation on anti-domestic violence, ‘*Resolution on the Prevention and*

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*Prohibition of Domestic Violence* ', was promulgated by Standing Committee of the People's Congress in Hunan province. The concept of "domestic violence" appeared in the legislation for the first time. Moreover, some coordinating organizations, a police reporting center specifically for domestic violence (hotline number 110, like 999 in the United States, the center for identification of wound and disability from domestic violence and shelter for domestic violence were set up by the administrative department, the judicial department and women's federation, which represented the preliminary building up of social intervening systems. The call for the regulation on domestic violence in national legislation had increasingly risen.

**Phase Three,-After the adoption of the Amendment on the Marriage Law (2001):**

With the driving force from the theories and practices on domestic violence, the relatively major breakthrough was achieved in the legislation. The Standing Committee of the National People's Congress adopted *the Amendment on the Marriage Law* on 28<sup>th</sup>, April, 2001. It regulated domestic violence as one of the legal circumstances to grant divorce in courts, and stipulated the duties of relevant bodies, the salvage measures for victims and the legal liability of the offenders. This was the first time for China to specifically regulate domestic violence in the national legislation. This key breakthrough in the domestic violence legislation marked a milestone in the process. After that, more attention was paid towards anti-domestic violence. In 2005, the amendment on *the Law on the Guarantee of the Rights and Interests of Women* further stated that domestic violence against women was to be prohibited and provided related ways to seek remedies. At present, the specific legislation on preventing and prohibiting domestic violence has been advocated and more is expected by people through new legislature and amendment of related laws and rules and the raising of public awareness.

## **II. Current Legal Framework on Anti-domestic Violence**

In terms of law, domestic violence concerns tort, illegal acts against administrative law and even criminal behavior. Therefore, the prevention and prohibition of domestic violence are carried out by the multifarious legal measures through a combination of civil, administrative, and criminal approaches. The rules and regulations are scattered in the *Constitution*, *General Principles of Civil Law*, *Marriage Law*, and *Law on the Guarantee of the Rights and Interests of Women*, *Law on Punishment in Public Order and Security Administration*, *Criminal Law*, and other local legislation.

**Administrative Law Approach:** Where the victim of family violence or maltreatment makes a petition, the public security organ concerned shall give administrative punishment to the actor according to the provisions on the administration of public security. The punishment includes detention, fine and warning. Article 43 in *the Amendment of Marriage Law* stipulates, "The victim shall be entitled to make petitions concerning the family violence that is happening, and the

relevant urban residents' committee or villagers' committee shall make dissuasions, and the public security organs shall stop such acts." The provision means that domestic violence is not a family affair any longer, which will be stopped and punished by the public security organ as their vital duty. Article 58 of *the Amendment of the Law on the Guarantee of the Rights and Interests of Women* further states, "If anyone commits sexual harassment or family violence against a woman to violate this law, and if his act constitutes a violation of the public security administration, the victim may require the public security organ to give the violator an administrative punishment or may initiate a civil action in the people's court."

**Civil Law Approach:** As a law regulates the personal and property relations between civil subjects, the Civil Law embodies the protection for the personal rights of the civilian from the perspective of anti-domestic violence. The prevention of domestic violence is operationalized through the civil remedies, compensating and remedying the damage and injury to the victim, and then getting the legal protection needed for the stopping of the violence. For example, *the General Principles of the Civil Law* states, "Citizens shall enjoy the rights of life and health." (Art. 98), "the use of insults, libel or other means to damage the reputation of citizens or legal persons shall be prohibited." (Art. 101), "Citizens shall enjoy the right of marriage by choice. Mercenary marriages, marriages upon arbitrary decision by any third party and any other acts of interference in the freedom of marriage shall be prohibited." (Art. 103), "The main methods of bearing civil liability shall be: cessation of infringements; compensation for losses; extension of apology." (Art. 134). as for the compensation, article 119 of it regulates, "Anyone who infringes upon a citizen's person and causes him physical injury shall pay his medical expenses and his loss in income due to missed working time and shall pay him living subsidies if he is disabled; if the victim dies, the infringer shall also pay the funeral expenses, the necessary living expenses of the deceased's dependents and other such expenses." In addition, article 7 of *the Law of Succession* stipulates, "A successor shall be disinherited upon his commission of any one of the following acts: intentional killing of the deceased; killing any other successor in fighting over the estate; or a serious act of abandoning or maltreating the deceased." *The Law of Marriage* provides special remedies for the married victims of domestic violence, i.e. where domestic violence has led to the nonexistence of mutual affection as husband and wife, belong to the circumstances which divorce shall be granted if any mediation fails (Art. 32). Furthermore, the innocent party shall be entitled to claim damages where the domestic violence has led to the divorce (Art. 46). *the Amendment of the Law on the Guarantee of the Rights and Interests of Women* says, "If anyone commits sexual harassment or family violence against a woman to violate this Law, the victim may require the public security organ to give the violator an administrative punishment or may initiate a civil action in the people's court" (Art. 58)

**Criminal Law Approach:** Serious domestic violence is a criminal behavior against the individual and the society, which shall be controlled by the criminal jurisdiction. The offender will receive the same punishment as it gets where it is

committing a crime against the stranger. Under the Criminal Law, depending on the object of infringement, the offender commits the following crimes: crime of intentional injury, homicide, offense of rape, crime of insult, crime of illegal confinement, crime of abducting and trafficking in women and children, Interference with the freedom of marriage by violence, crime of abusing a member of one's family, crime of abandonment and so on.

**Community Approach:** Article 43 of *the Marriage Law* (Amendment) regulates, "In the case of family violence or maltreatment of any family member, the victim thereof shall be entitled to make petitions, and the villagers' committees, the relevant urban residents' committee, villagers' committee or the entity where the victim is a staff member shall make dissuasions or mediations. The victim shall be entitled to make petitions concerning the family violence that is happening, and the relevant urban residents' committee or villagers' committee shall make dissuasions..."

In brief, under the current law in China, the measures addressing domestic violence can be organized under four aspects: community approach where the relevant urban residents' committee or villagers' committee shall make dissuasions or mediation; civil law approach where the legal results as damages for personal injury, divorce and damages for its injury from violence in terms of civil liability; administrative law approach, domestic violence not reaching the conditions of constituting a crime shall be meted administrative punishment by the public security organ where the victim makes a petition; and the last one is the criminal law approach where the offender has to undertake criminal liability when serious behavior constituting a crime.

### **III. Introduction to the Legislative Proposal of *the Law on Prevention and Prohibition of Domestic Violence* (drafted by the Anti-Domestic Violence Network of China Law Society)**

#### **A. Brief Introduction to the Anti-Domestic Violence Network**

The Anti-Domestic Violence Network of the China law society was set up in 2000, in Beijing, as a non-governmental organization launched by the experts, scholars, women activists and NGO's concerning women's human rights in Beijing. It is the first interdisciplinary and trans-departmental network specifically focusing on the domestic violence against women in China. The network aims at eliminating gender-based violence, improving gender mainstreaming and gender equality and speeding up social progress. Up to date, the anti-domestic violence network has 112 individual members and 59 group members, which covers 28 provinces and autonomous regions across China (there are 31 altogether in China). After June, 2000, the network has carried out a series of activities, including: surveys of status quo of domestic violence, judicial intervention, case studies of domestic violence, oral accounts of women victims, and publicity of media, improving of legislation, legal aid and information communication.

After the establishment of the Anti-domestic Violence Network, the program actively promotes the introduction of national legislation “Law on the Prevention of Domestic Violence”. The program has made a questionnaire survey on the perception of domestic violence of one thousand legislators and judicial functionaries and four thousand people from the public, and explored the model of anti-domestic violence with the cooperation between different agencies in both urban and rural area. Based on the fundamental research, the legislative proposal of the Law on the Prevention of Anti-domestic Violence (program) was introduced. In 2007, the panel for amending the proposal was established, and the proposal amended by them will be submitted to the national legislative organ in the next year.

## **B. Major Contents of the Law on Prevention and Prohibition of Domestic Violence (a legislative proposal)**

### *1. Structure and Legislative Purpose of the proposal*

*The Law on Prevention and Prohibition of Domestic Violence* (hereinafter referred to as the proposal) has six chapters, including general principles, administrative intervention, judicial intervention, social intervention, legal liability and supplementary provisions.

Article one of the proposal firstly regulates the legislative goals: the law is enacted, according to the Constitution, aiming at the prevention and prohibition of domestic violence, protecting legal rights of family members, maintaining equal, harmonious and civilized marriage and family relations, promoting social harmony and stability. The regulation represents its purpose in three aspects. Firstly, it aims at the prevention and prohibition of domestic violence, fundamental goals to decreasing the family conflicts, stopping domestic violence and preventing the occurrence of domestic violence in the future. The second purpose is to protect legal rights of family members, especially to safeguard the victims and children. The last one is to maintain the equal and harmonious marriage and family relations and to promote social harmony and stability. The legislative goal of such law is to maintain a harmonious family and society. Yet it is worthwhile to note that the harmony in family or society can not be achieved by the sacrifice of the victim. Stopping of assaults of the offenders is the prerequisite of harmonious family. Therefore, the aim to protect the victims and their children from injury should be above the goal of a harmonious family.

### *2. The Spirit of the Legislative Proposal*

**Priority for the protection for the victim of domestic violence:** The proposal stipulates the following in the general provisions: the state protects the legal rights of family members, prohibit all kinds of domestic violence. Intervention shall be imposed promptly and prevention shall be conducted effectively, and the priority of protection for the victim shall be given. The proposal introduces the system of

civil protection order, through which the victim may ask the court to issue protection orders according to the seriousness of assaults. The orders require the offender to stop the violence, leave the home, and not contact the victim or get near to the victim; if not the offender will face criminal liability. It may effectively protect the victim from the violence without the need to leave home within the validity period of order, providing safe living surroundings.

**Special protection for the minors:** The minors are usually injured directly or indirectly from domestic violence, or are taken as the tool to control the victim by the offender. Therefore, the proposal emphasizes the basic spirit of special protection shall be imposed on the minor victims in the fundamental principle. It regulates that the guardian of the minor victim is her/his statutory agent *ad litem* in the case of civil action in which the victim is a juvenile, except the circumstance that the guardian is the offender. Meanwhile, if the law presumes that the custody of the children by the offender is harmful to the children he right of the offender to custody or visit the juvenile victim is restrained (Art. 47). The people's court can revoke the qualification of the offender as the guardian (Art. 23).

**Strengthening the duty of public power to intervene in domestic violence:** Domestic violence is not a family affair but is serious criminal behavior which has a far-reaching influence on family, society and state. Therefore, the law on anti-domestic violence stipulates the obligation of the relevant governmental departments that they shall intervene actively, through judicial and administrative departments, of civil administration organizations, of administrative organizations for education and of administrative organization for health care. The active intervention from the public authorities provides effective remedies for the victim from the assault.

**Putting prevention at the head and integrating prevention with control, building up the network of overall prevention and control:** The proposal sets the principle of putting prevention in the first place while combining the prevention and control methods together, and building up the comprehensive system to combat domestic violence. It pays particular attention on the prevention of domestic violence, and the problem of domestic violence can not be addressed in a way of "treating the symptoms but not the cause", which should be solved by understanding the root cause. The prevention and prohibition of domestic violence is enormous and complex, which can not be carried out by the undertaking of one department of government or some civil organizations, and then the proposal expands and increases the duties of government and requires them to meet the obligation within proper authorization on the one hand, emphasizing the building up of comprehensive system and service network by the related judicial, medical and educational bodies and the police and the community on the other hand. The system and network will provide all-around social service. In addition, in order to



avoid the overlapping of duties or the different departments meeting the obligation in their own way in disregard of overall situations, to coordinate the allocation of resources among the governmental bodies and civil organizations, to aid and supervise the task of governmental and civil organizations, the committee of prevention and prohibiting domestic violence shall be set up by the central and local government, so as to improve the effectiveness of anti-domestic violence.

**Comprehensive legislation spanning various fields:** The law on anti-domestic violence is a comprehensive law comprising of relevant regulations concerning civil law, criminal law, civil procedural law, criminal procedural law, family law and social service law. It aims at building up an overall aiding and service network combining with the judicial system, law-enforcement system, health-care system, education system and community, so as to provide the best way to protect the victim. The law is a special law spanning several fields in terms of aforesaid analysis.

### *3. Several Controversial Issues in the Proposal*

#### **a. Concept of Domestic Violence**

**Subjects of Domestic Violence:** The Interpretation on Several Issues on Application of Marriage Law of the Supreme People's Court (hereinafter referred as the Interpretation) specifically states that the family member is the subject of domestic violence. There is consensus as to the classification of the family member as the subject of domestic violence both in academia and practice. The controversial issue is if the partner who lives together or ex-spouse is the subject of domestic violence. Accordingly, two opposite views are argued: some hold that the partner shall not be treated as the subject of domestic violence to protect, as the inclusion will encourage living together instead of marriage, which will exercise a bad influence on the youth. Others argue that the subject of domestic violence shall include the partner, for the violence among them is similar to that among family members from the perspective of their emotional relations, which need same or similar measures to protect or prohibit. Moreover, the broad legislation will be good to expand the scope of protection, specifically be good to the couple before marriage, who are to be regulated by the law on anti-domestic violence after the occurrence of violence, and then homicide for love may be avoided. Furthermore, the treatment for the offender before the marriage may reduce the possibility of more tragedies.

**Forms of Domestic Violence:** It is greatly important to define the forms of domestic violence, which concerns which act shall be stooped and intervened, and the scope and level of the protection for the rights of the victim as well.

At present, the Interpretation defines domestic violence as, "a behavior whereby a

person causes certain physical or mental injuries to his family member(s) by beating, binding, forced restriction of personal freedom or by other means.” The domestic violence here refers to both physical violence and sexual violence, not covering the mental violence. To this view point, two opposite arguments are held as well. The supporter thinks that the narrow interpretation (i.e. domestic violence only covers physical and sexual violence, not the mental violence) is suitable for the status in China, because the subjective mental violence is difficult to demonstrate or to obtain evidence. It is hard for the public in China to accept such idea within a broad scope. The other believes that the mental violence shall be included as a form of domestic violence. The inclusion shall be done not only for the ratification of international treaties by China or the reality in China, but also for the protection for the rights of the victim. The judicial practices reveal that the narrow definition of domestic violence excludes some cases from the circumstances of domestic violence, which is harmful to the protection of the victim.

The proposal interprets the subject and the forms of domestic violence in a broad way, regulates that domestic of violence in the law here refers to behavior that results in physical, psychological, sexual or financial injury among family members. Furthermore, it states that the violence between the partners or ex-partners is covered by the law. Concerning the controversial issue of subjects and forms of domestic violence, the proposal provides broad definition. The proposal holds that the relation between partners is similar to the family relation and the same protection and prevention shall be given in view of the diversity of sexual relations, and then regulates that the violence between the persons with particular relations like love affair or cohabitation or ex-spouse shall be covered by this law. For the forms of violence, the proposal thinks that the scope of “violence” will extend with the development of society and the deepening of research, and the meaning of it will be enriched. This is not only concerning the scope of protection for the victim, but also the content and ways of remedies as value-based approach. Therefore, the proposal states, “the domestic violence this law refers to includes the behavior that causes physical , mental or financial injuries between family members.”

## **b. Civil Protective Order**

During the investigation and researching of the proposal, another controversial issue that came up was the adoption of the civil protective order as introduced in other countries.

The majority holds that the civil protective order shall be introduced to make up the deficiency of remedies as provided in the existing laws. There are mainly three kinds of ways to seek remedies, i.e. administrative, civil and criminal. These remedies share the shortcoming of indirect remedies with complex procedure after

the event. The efficient and urgent protection for the victim is not available when it is suffering from the domestic violence. The tort action is to be brought and the offender is to be prosecuted for the criminal liability only after the violence with actual injuries, which is not for the effective prevention of further domestic violence. The procedure is very complex with rather high cost. The civil protective order provides the direct and preventative and simple protection before the further violence, which may be got with relatively simple procedure and less time. China shall borrow the system for which is more powerful and direct measure for protecting the family members and providing the remedy.

The others believe that the law shall be accommodated to various factors of politics, economy and culture, and to the status quo of a nation. The implementation civil protective order needs corresponding economic conditions, such as the financial ability for the offender to find other living place, the burden of the police that the protective order adds and etc. therefore, the system of civil protective order is not suitable for China with relatively weak economical foundation.

In view of special value of the system of civil protective order comparing with other preventive measures, especially the feasibility and effectiveness, the proposal uses specific chapter to regulate the content of the order. It stipulates the application, jurisdiction, trial, categories, content, effect, withdrawal, modification, and extension, implementation of the protective order and the consequence of the breach of the order in great detail, strengthening the protection for the victim from domestic violence.

**Li Ying**

***New Development in Prevention and Prohibition of Domestic Violence in China***

*By Li Ying<sup>3</sup> from the Center for Women's Law Studies & Legal Services of Peking University*

Ever since the Fourth World Conference on Women held in 1995 in Beijing, China has made remarkable achievements in fighting against domestic violence targeted at women. Through media coverage, TV programs and films, the concept of domestic violence has drawn attention from the general public. Prohibition on domestic violence against women stipulated in the revised *Marriage Law* in 2001 first expounds on China's position on anti-domestic violence and clearly identifies the responsibility of competent departments in this regard. *The Law of the People's Republic of China on the Protection of Rights and Interests of Women* promulgated in 2005 makes further regulations; some provinces and municipalities have released special regulations on anti-domestic violence; some local public security authorities have set up the hotline 110; some courts have established anti-domestic violence tribunals. The campaign of anti-domestic violence has been unfolded at the legislative and governmental level. NGOs like the Center for Women's Law Studies & Legal Services of Peking University, anti-domestic violence network of China Law Society, Beijing Maple Women's Psychological Counseling Center, have played a major role in promoting anti-domestic violence through various approaches. Thus, they have grown to be an indispensable force in this undertaking.

However, compared with international development and what is required in the international conventions, prevention and prohibition of domestic violence, China still lags far behind in terms of legislation, enforcement and public awareness. It still needs the attention and action of the whole society. In such a context, judicial departments and other agencies, through proactive exploration, should make progress on judicial practices, government's responsibility and multi-departmental cooperation.

***I. Guidance on Trialing the Cases of Domestic Violence and Marriage formulated by the Application Law Institute of the Supreme People's Court***

**In March 2008, the Application Law Institute of Supreme People's Court**

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**formulated *Guide to Trialing the Cases of Domestic Violence and Marriage*** and designated nine grassroots courts nationwide as pilot courts. As the most striking highlights, this guide allows victims of domestic violence to apply for bodily protection order from people's courts. At present, effort has been paid off in the guide implementation. Arguably, the guide has by far represented the most systematic, comprehensive, operable, forward-looking and ground-breaking reference to judicial trial on prevention and prohibition of domestic violence in China. As pointed out by Chen Min, researcher of Application Law Institute of Supreme People's Court who drafted this document, the guide is of great significance in China's anti-domestic violence, for it is **a small step in law theory, but a big step in judicial practice**.

### *1. Breakthrough Elements of the Guide*

- 1) It establishes the principle of gender equality. As it evolves with the long history, gender has become the social standard shaped by men's values and experiences. Thus, men are able to gain much more competitive edge over women in politics and social life. Meanwhile, their domination in family and domestic violence reinforce men's control over women. The perspective of social gender highlights gender equality in a real sense, which serves as the foundation for domestic violence awareness and the philosophy interwoven in the Guide.
- 2) It makes breakthroughs in the definition and understanding of domestic violence. The guide introduces at length the concept and understanding of domestic violence recognized by the international community, and its influence on victims, violators and their children. It points out that the domestic violence aims for the control over victims (Article 2), which is a breakthrough in understanding the domestic violence which helps the judges better know the essence of such violence. In addition, the guide identifies the definition and types of domestic violence by drawing on the international standards. For example, sexual infringement on the victims is added to the misconducts which have four categories, namely, physical violence, sexual violence, mental violence and economic control (Article 3).
- 3) It establishes for the first time the measure of bodily safety protection for domestic violence victims, also called "protection order". Protection order is regarded as an effective means to prevent and prohibit domestic violence in overseas judicial practice. To the contrary, such a practice is yet to be applied due to legislative void and no legal foundation. Chapter Three in the guide is designed to stipulate the measure for bodily safety protection and clearly identify its main legal foundation as the Article 1 (11) of Clause 140 in *Civil Procedural Law*. This stipulation is the most striking breakthrough in the guide. Bodily safety protection measures leverage on the main content of overseas protection order, such as prohibition on beating the applicants,

disturbing and stalking applicants or their relatives and friends; applicant's moving from the shared domicile if necessary and possible; confinement of the accused to the place of 200 meters radius; no disposal of valuable property owned by the couple in private; forcing the accused to receive psychological treatment at their own expense. Meanwhile, it provides that the protection order may demand the accused to pay the applicant living expense, alimony and education fees for underage children, fees of medical treatment and psychological counseling for injuries caused by domestic violence; the protection of victims expanding from bodily right to the protection and compensation for properties. The bodily safety protection judgment can be categorized into two types: emergency protection judgment with an expiry of 15 days, and long-term protection judgment with an expiry of 3-6 months, or 12 months for special circumstances. Such highlight in the guide draws huge attention. Many people pay attention to how many protection orders have been issued by the pilot courts. To some extent, it reflects the needs of the general public for the effective prevention and prohibition of domestic violence.

- 4) For the first time, it identifies the transfer of evidence-producing responsibility under certain circumstances when it comes to domestic violence cases (Article 40), which shows the preferential protection over the victims. That is to say, the plaintiff produces evidence on the facts of violence and its consequence, and accuses the defendant of domestic violence. Then, the responsibility to produce evidence will be shifted to the defendant. Even if the defendant does not admit having committed the crime, he/she, if failing to produce evidence, will be convicted as the misconduct doer, and domestic violence is confirmed. Article 41 further prescribes that under the general circumstances the statement of the victim is more credible than the alleged perpetrator.
- 5) It first introduces the concept of assisting experts when it comes to evidence accreditation (Article 44), and provides that the comments from the assisting expert can be used as an important reference to the judgment. It is a forward-looking stipulation, for the guide takes into account the inadequate social and judicial understanding of specialized questions about domestic violence in the context of no assisting expert system available in China. Although there is no case where the comments from the assisting experts are applied, such a stipulation at least introduces the widely-used international system to the judicial practice in China.
- 6) It clearly prescribes that the records and certificates produced by the governmental agencies, social groups and organizations, and policing records from the public security authorities can be used as important evidences to accredit the existence of domestic violence. Such rules will expand the scope of evidence accreditation. To some extent, it addresses the bottleneck of difficulty in evidence producing. Meanwhile, it is a demanding task for the

authorities and organization to produce quality records. Otherwise, it will affect the validity of the evidence.

- 7) The guide emphasizes the concept of gender equality in the disposal of properties by considering the value of women in household management during marriage, so that divorced women can avoid impoverishment. The guide clearly defines some principles, such as compensation and preferential treatment for affected property interests (Article 55), which provides that in the case of confirmation of domestic violence, victims will get preferential treatment in property disposal if they need treatment, their jobs are lost or affected and their property is unfavorably disposed due to domestic violence; compensation and preferential treatment for what victims have sacrificed (Article 56); equal treatment of household labor (Article 57), which provides that women who are devoted a lot to household labor, children and care of elder can be compensated and preferentially treated when it comes to disposal of properties.
- 8) The guide also provides breakthrough regulations on protection of the minors. For instance, it provides that the perpetrator is not suitable for child-rearing directly, on the basis that children might tend to imbibe the violent way of communication through personal experience and imitation. It also establishes the superiority of minor's rights to the right of parental visit (Article 66), for the court can terminate the violator's right to visit the victim.
- 9) Chapter 7 is designed for mediation system. It establishes the principle of victim's freedom from error (Article 70). As stipulated in the guide, when handling the cases, the judge shall not blame victims under any circumstance, or shall not require the victim to adjust behavior for the exchange of not being physically abused, thus avoiding the false notion of "error-led abuse" inflicting on victims. This stipulation is of great relevance. Currently, some judges will lessen the responsibility of attackers due to the victim's errors when dealing with cases related to domestic violence. However, such a principle rectifies this misunderstanding and helps protect the victims.

## *2. Implementation of the Guide*

Since the inception of the guide in the pilot courts from May 2009, it has drawn the public attention to domestic violence, for good results have been achieved in the pilot programs. In August 2009, Jiangsu Wuxi Chong'an District Court issued the very first protection order. By far, 12 orders have been issued nationwide, including six from Hunan Changsha Yuelu District Court, one of the first pilot courts. The fourth one first demanded that the attacker was banned from the scope of 200 meter radius from the domicile of victim and the relatives. It went beyond other judgments which were confined to prohibition from hitting and stalking victims. In May 2009, Zhuhai Xiaozhou District Court issued to Ms Chen's

husband a protection order, which read, within the duration of protection order, any party shall not dispose valuable property shared by the couple in private. In fact, it represented the first properties-related protection order in China. Currently, the pilot courts have expanded to dozens of grassroots courts nationwide.

To our knowledge, the issuance of six protection orders in Hunan Province has effectively deterred the attackers, for the accused (the attackers) are no longer violent against their wives unexceptionally. Given the satisfactory results, the city of Changsha expanded the pilot area, that is to say, all the districts and town courts in Changsha participated in the pilot program except Kaifu District. Besides, Hunan Provincial Supreme People's Court formulated in April 2009 *the Guidance on Enhancing the Judicial Protection of Women Victims in Domestic Violence*, which has stepped forward on the basis of the Guide. For instance, the subjects for protection are well targeted towards women; the scope of protection covers not only women who file the divorce litigation, but also those who are still in the wedlock. What is more important, the guidance identifies the principle of punishment for women who "stop domestic violence by a violent method". As for those women, given their motivation and causes for the criminal acts, the less malicious and harmful nature, the more sincere repenting or the understanding of the victims and their kinship, they will be subject to light punishment or impunities may apply, especially for those who have underage children to look after in the family. It also prescribes the sentence reduction and parole for those "who stop domestic violence by a violent method": their sentences may be reduced and parole might be applied under a certain condition. It is the first time that China has clearly defined the protection for those women, indicating that the local courts begin to approach domestic violence and the practice of stopping violence by violence from the perspectives of gender and laws.

### 3. *Problems*

So far, the Guide has been implemented for more than a year. Despite some results achieved, the following problems also crop up:

- 1) Some pilot courts lack understanding and implementation. Some judges understood the guide mechanically without getting to know its essence. For instance, when dealing with a divorce case in which a husband hit his wife and caused her minor injuries, a judge did not convict the husband of domestic violence. The reasons provided by the main judge are as follows: First, the Guide stipulates that the domestic violence aims at the control over the other party. The husband hit his wife to get divorced rather than try to control her. Second, the Guide points out that the domestic violence occurs periodically. Since the husband beat his wife a few times, so it is not domestic violence due to the lack of periodical occurrence. We also know that some pilot courts have an uneven understanding of domestic violence or even ignored the domestic violence. Only designated judges were given copies of the Guide, whereas



other judges or off-court judges did not know nor had a clear idea about the Guide, let alone understood and applied it.

- 2) The Guide is only applied to the couple divorced or about to divorce. By contrast, those victims who do not want to get divorced cannot apply for protection orders. It means a number of victims are not covered by the bodily safety protection order, although such a number accounts for a large proportion. Furthermore, the Guide is not loophole-free in the procedural setting of the bodily protection order. For instance, if the litigants apply before the litigation, they shall file divorce litigation within 15 days after the court signs and delivers the protection order. Otherwise, if the application goes beyond 15-day limit, the order will expire automatically. If the litigant files the divorce litigation at the 20<sup>th</sup> day which indicates the expiry of the order, the litigant might be subject to domestic violence again. Then she has to re-apply for the order, and the judge would go through the investigation again. This process will waste the litigant's effort and judicial resources. It might put the litigant in an even more dangerous position.
- 3) Limited jurisdiction of assisting departments and authorities will affect the implementation results of the protection orders. For instance, the public security authorities can only limit the bodily freedom rather than something related to the properties in the orders; it is difficult to monitor the activity scope of the litigants. A case in point is that the attacker is required to be at a 200-meter radius away from the litigant. However, on one hand, the public security bureau has no policemen available to monitor the attacker; on the other hand, if the work unit where the attacker works and hospital to which the attacker go are within 200 meter radius area, the way to deal with such situations is yet to be regulated in the Guide.

There is room for improvement through the active exploration of grassroots pilot courts. What is valued in the Guide is that the practice comes first, considering no special law on prevention and prohibition of domestic violence in China. It calls for enormous progress in the judicial practice and lays a solid foundation for the juridical interpretation or even legislation in the future.

## **II. *Several Opinions on Prevention and Prohibition from Domestic Violence* formulated by Governmental Departments and Organizations, including Women's Federation**

In August 2008, *Several Opinions on Prevention and Prohibition from Domestic Violence* (hereinafter, the Opinions) was jointly formulated by the All China Women's Federation, the Ministry of CPC Publicity, the Supreme People's Court, the Ministry of Public Security, the Ministry of Civil Affairs, the Ministry of Justice, and the Ministry of Health. Although the Opinions are too general in principle, it highlights

the role played by the government in intervention of domestic violence. This document identifies the responsibility for seven departments respectively, and highlights their mutual coordination and collaboration. Its striking features are as follows:

1. Integrate the prevention and prohibition of domestic violence into the case-receiving scope of the public security authority. In Article 8, it prescribes that the public security bureau shall set up the spots for domestic violence reporting, integrate the hotline 110 report into the policing activities, and handle the complaints related to domestic violence in a timely manner in line with the *Rules on Policing by Hotline 110*. As for the cases of domestic violence, the public security authorities should handle the cases in line with the laws and the situations.
2. The document stipulates the case filing and supervisory responsibility for procuratorate authorities (Article 9). If the people's procuratorate believes the public security authorities to investigate unfiled cases related to the domestic violence, or if the victims believe the public security authorities shall investigate the unfiled cases related to the domestic violence and the people's procuratorate believes it is groundless for the public security not to file the case, the procurator shall notify the public security authorities to file the case in line with laws, and the latter shall file the case accordingly.
3. The document comes up with detailed requirements for the responsibility of medical department and its staff, the diagnosis evidence, relief and training from the Civil Affairs Departments. If the staff in the medical and civil affairs departments are sensitive to the anti-violence effort and participative in the effort, it will help assist the victims and provide the injury evidence.

The *Guidance on Trialing the Cases of Domestic Violence and Marriage* formulated by the Application Law Institute of the Supreme People's Court stipulates the policing records from the police station, the records from sheltering station, medical records from the hospitals, and documents from the women's federation can be used as the indirect evidence. The provisions in the Opinions and the anti-domestic violence measures in the court system are mutually reinforced.

Besides, the Opinions propose the localities, if conditions permit, shall provide psychological treatment for the attackers and counseling for the victims. Previously, the anti-domestic violence work in China was confined to assisting the victims. There was no community-based education system and measures available to the attackers. Luckily, education and physiological rectification for the attackers in the Opinions are innovative enough to address the root causes of domestic violence.

Since the issuance of the Opinions, some provinces and cities have explored many concrete ways to implement the Opinions. For instance, Heilongjiang Women's Federation and the Provincial Public Security Division initiated in Daqing judicial intervention stations in domestic violence communities, which highlighted the coordinated joint action, preemptive action, mediation and feedback visits, after-mediation service. In light of the severity, they adopt three-level intervention measures (namely, low, middle and high levels) and explore the long-term mechanism for domestic violence intervention.

Although the media makes the publicity of the Opinions, and various localities & departments concerned are learning and implementing the Opinions, they are yet to be tested in the process of practice. More attention must be paid to the over-general provisions and the gaps in the legal liability and administrative accountability.

# **GENDER MAINSTREAMING**

**Zhu Xiaoqing**

## ***Approaches for Gender Mainstreaming in Legal Field in China***

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### **Abstract**

No one can tell exactly when the expressions “gender “ and “gender mainstreaming” were introduced into China. But what we are certain is that since the U.N. Fourth World Conference was held in Beijing in 1995, these two expressions have been used quite frequently, and have been extended to a wide range of areas. They appear in 12 critical areas of concerns listed in Beijing Platform for Action.

However, “gender” and “gender mainstreaming” are not mere expressions. They also have a direct bearing on a series of theoretical issues. The concept of gender and gender mainstreaming should be given serious attention. The main reasons for emphasizing the theoretical studies in this respect lie in the following facts, that is, without theoretical guidance, one may take actions blindly; and without the support of action, theory may lose its ground. Theory and action, therefore, complement each other in reality.

Law-making is one of the approaches to promote gender mainstreaming in legal field. Since 1995, it is obvious that gender perspectives have been incorporated into relevant laws as compared with laws relating to equality between men and women before 1995. On one hand, such development is the direct result of the Fourth Women’s Conference; and on the other hand, more importantly, it proves that to some extent, gender concept has already been recognized and accepted in Chinese legal field.

Judiciary is another approach in promoting gender mainstreaming in legal field in China. Frankly speaking, as the understanding and acceptance of gender concept in China is still on a primary stage, it is inevitable that the incorporation of gender perspective in judicial practice takes time, and it is by no means an easy task. However, this does not mean that there is no active field survey in judicial activities. During the survey conducted by the Center for Gender and Law Studies, we found that there are close links between the gender awareness of the judicial staff and the outcomes of trials and arbitrations. If judicial staff is gender blind, parties concerned

cannot expect gender justice in the judgment and outcome of the arbitration given by the court. The incorporation of gender concept in judicial practice, therefore, is not only an important link in promoting gender mainstreaming in legal field, but also an effective approach to guaranteeing enforcement of law in a fair and proper way.

It is true that in the process of promoting gender mainstreaming in Chinese legal field, there exist both achievements and challenges. For challenges, they mainly include: gender blindness/bias in existing laws; and gender blindness/bias in judicial practice.

Based on the research and survey conducted, we put forward two suggestions. First is by submitting relevant legislative proposals, to encourage and promote the incorporation of gender perspective in law-making processes; and second is to conduct gender training among judicial workers.

# 中国法律领域社会性别主流化之入径

## Approaches for Gender Mainstreaming in Legal Field in China

朱晓青\*

很难准确地说“社会性别”、“社会性别主流化”这两个词语是何时进入中国的。但有一点是肯定的，那就是，1995 年联合国第四次世界妇女大会在北京举行后，这两个词语在中国的使用频率越来越高，并且使用领域渐广，迄今至少已在《北京行动纲领》所列的 12 个关注领域中使用。<sup>4</sup>也就是说，在这 12 个关注领域，或提出了社会性别平等的理念，或者已经或正在采取推动社会性别主流化的行动。从这个角度说，在多领域并通过多途径推动中国社会性别主流化似乎已成为一种趋势。但出于本文主旨的考虑，同时也鉴于法律对于推动中国社会性别主流化的重要意义，这里仅从立法和司法入手，讨论中国法律领域社会性别主流化的入径。

### 一、关涉社会性别及社会性别主流化理论的思考

“社会性别”和“社会性别主流化”不仅仅是一个词语，也有与此相关的一系列理论问题。因此，这里所说的关涉社会性别及社会性别主流化理论的思考，其实就是关于它们的理论问题的研究或探讨。之所以要从理论层面研究关涉社会性别及社会性别主流化的问题，主要理由在于，没有理论指导的行动是盲目的，而没有行动支撑的理论是虚无的。理论与行动二者相辅相成。具体来说，关于社会性别及其主流化理论的研究为推动社会性别主流化的行动提供了指导，而这种行动则充实或印证了社会性别及其主流化的理论。这也是我们在将近 7 年的关于“性别与法律理论与行动”研究项目中获得的深切体会。

关于社会性别及社会性别主流化理论的研究对推动中国法律领域社会性别主流化进程的作用是不可忽视的。这种作用主要体现在三方面：

1、行动的过程和深入需要理论依据。以反对对妇女家庭暴力的实践为例。我们于 2000 年在中国开始了反对针对妇女的家庭暴力的行动。但在进行反家暴的行动过程中，我们逐渐体会到需要社会性别理论的支持，才能探究出导致针对

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<sup>4</sup> 《北京行动纲领》的 12 个关注领域为：（1）妇女与贫穷；（2）妇女的教育和培训；（3）妇女与保健；（4）对妇女的暴力行为；（5）妇女与武装冲突；（6）妇女与经济；（7）妇女参与权力和决策；（8）提高妇女地位的机制；（9）妇女的人权；（10）妇女与媒体；（11）妇女与环境；（12）女童。

妇女的家庭暴力的成因或根源，并将这种行动继续深入下去。因而，我们开始了关于社会性别与法律关系的理论及行动的研究。

2、通过理论研究提升了我们对社会性别的认知和理解，为我们与国外有经验的学者和实践者开展社会性别问题的交流提供了契合点，或说交汇点。最终也使我们更容易就涉及社会性别的理论和实践问题与国外同仁产生互动及达成共识，并在推动中国法律领域社会性别主流化进程中展开有成效的合作。

3、理论假设成为实地调查研究的前提。这就是说，首先，理论上假设法律实践中存在着社会性别缺失或盲点。之后即进行相关的实地调查研究。通过这种实地调查研究，可探究和确认法律领域中社会性别缺失或盲点的表现及根源，同时也印证了我们的理论假设，从而可为我们采取相应的行动提供指导或依据。

## 二、中国法律领域社会性别主流化之入径：立法

这里将通过对 1995 年之前和之后制定的几部直接涉及男女平等的法律的比较，<sup>5</sup>阐述立法在推动中国法律领域性别主流化进程中的变化，同时也可从中看出立法的作用。

### （一）1995 年以前的立法状况

1949 年以后，中国政府采取了积极的立法措施，确立并实施男女平等原则。至 1995 年联合国第四次世界妇女大会召开时，中国已形成了以《宪法》为依据，并以《婚姻法》、《妇女权益保障法》等法律为主的保护男女平等的法律体系。

1、《宪法》。1949 年以后，中国共制定过四部宪法，即 1954 年、1975 年、1978 年、1982 年宪法。四部宪法均规定了公民的基本权利，并确定了男女平等原则。1982 年宪法即为现行宪法，它迄今经过 1988 年、1993 年、1999 及年 2004 年四次修正。从保护男女平等的角度来看，最有突破性的修正是 2004 年。对此，将在后文论及。

2、《婚姻法》。1950 年的《婚姻法》是中国共产党执政后的第一部婚姻法。这部法律摒弃了种种封建婚姻，规定在缔结婚姻和家庭生活中妇女与男子享有同等的权利。在这部婚姻法的基础上，1980 年 9 月 10 日第五届全国人民代表大会第三次会议通过了修订的《婚姻法》。该法明确规定：实行……男女平等的婚姻制度；并强调夫妻在家庭中地位平等。

3、《妇女权益保障法》。1992 年 4 月 3 日第 7 届全国人民代表大会第 5 次会议通过《妇女权益保障法》。这部法律是中国有史以来第一部全面保障妇女权益

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<sup>5</sup> 之所以以 1995 年为界限，主要是因为这一年联合国第四次世界妇女大会在北京举行。这次大会对于推动中国妇女权利保护的发展，进而推动中国的社会性别主流化进程具有深远的历史意义。

的法律。该法规定了其基本原则为：男女权利平等；对妇女实行特殊保护；禁止歧视、虐待、残害妇女。《妇女权益保障法》还将中国于 1980 年 11 月 4 日批准的、并于同年 12 月 4 日对我国生效的《消除对妇女一切形式歧视公约》所确认的有关权利融入其中。它规定保障妇女的政治权利、文化教育权益、劳动权益、财产权益、人身权利和婚姻家庭权益。

尽管上述法律中明确载有保护男女平等的条款，但从具体规定来看，不仅内容有所局限，而且也或多或少地存在社会性别的缺失或盲点。

## （二）1995 年以后相关法律的修改

鉴于 1995 年以后，中国在政治、经济、文化、社会及婚姻家庭等各个方面发生的巨大变化，加之，中国批准了诸多国际人权条约，并由此承担了条约义务，为了适应新的变化，更好地保障妇女权利，促进性别平等，中国立法机构进行了修改法律或制定新法的工作。而从法律的修改和制定的新法中可以明显看到社会性别视角的纳入。

**1、将人权写入《宪法》。**《宪法》具有最高的法律效力，是制定各项法律依据。《宪法》对于中国的人权保护起着至关重要的作用。经过较为曲折和漫长的过程，2004 年 3 月 14 日第 10 届全国人民代表大会第 2 次会议通过的《宪法修正案》，将人权写进了宪法。《宪法》第 33 条明确规定：“国家尊重和保障人权。”这是中国第一次将保护人权的条款写进宪法。这不仅对于作为人权组成部分的妇女人权的保护至关重要，而且也将有助于推动中国法律领域的社会性别主流化。

**2、修改《妇女权益保障法》。**为适应新的变化，根据 2005 年 8 月 28 日第 10 届全国人民代表大会常务委员会第 17 次会议《关于修改〈中华人民共和国妇女权益保障法〉的决议》，对该法进行了修正。经修正的《妇女权益保障法》较之原法律，有了一些突破性的变化。主要如：（1）将男女平等基本国策载入法律。（2）规定了反歧视原则。（3）将妇女发展纲要纳入国民经济和社会发展规划。（4）明确禁止性骚扰。

**3、修改《婚姻法》。**根据 2001 年 4 月 28 日第 9 届全国人民代表大会常务委员会第 21 次会议《关于修改〈中华人民共和国婚姻法〉的决定》修正的现行《婚姻法》重申并始终贯彻了男女平等原则。它明确规定“保护妇女、儿童和老人的合法权益”（第 2 条）。

此外，特别值得一提的是，经修正的《婚姻法》首次规定“禁止家庭暴力”（第 3 条），并将“实施家庭暴力”作为应准予离婚的一种理由（第 32 条）。经修正的《婚姻法》关于家庭暴力的规定，也表明了立法者认识上的改变，即：家庭暴力不再是一家一户内的“私人事务”，而是“公”领域中的事项。该法也体



现了一种社会性别视角，这就是，对妇女的歧视限制了妇女权利的实现。

4、制定《就业促进法》。2007年8月30日第10届全国人民代表大会常务委员会第29次会议通过了《就业促进法》。该法于2008年1月1日施行。该法第3条第1款规定：“劳动者依法享有平等就业和自主择业的权利。”第2款则强调：“劳动者就业，不因民族、种族、性别、宗教信仰等不同而受歧视。”此外，第27条明确规定：“国家保障妇女享有与男子平等的劳动权利”（第1款）；“用人单位招用人员，除国家规定的不适合妇女的工种或者岗位外，不得以性别为由拒绝录用妇女或者提高对妇女的录用标准”（第2款）；“用人单位录用女职工，不得在劳动合同中规定限制女职工结婚、生育的内容”（第3款）。这对妇女就业提供了法律保障。

除上述法律外，近期在《侵权责任法》（草案）制定过程中，法学研究所性别与法律研究中心与民法学界的专家就如何使该法为司法解决性骚扰纠纷提供基本法律依据进行了讨论，并已就有关条款提出了修改建议。

上述变化，不能不说有第四次世界妇女大会的推动。然而更为重要的是，这些变化表明，中国法律界在某种程度上已显现出对社会性别观点的认知和接受。

### 三、中国法律领域社会性别主流化之入径：司法

司法是推动中国法律领域社会性别主流化的另一条重要入径。但是，在对社会性别的认知还处于初始阶段的状况下，将社会性别观点纳入中国的司法审判当中尚需要一个过程，并且也有相当难度，但这并不意味着没有积极的行动。

为了解中国司法实践中性别观点纳入或缺失的初步状况，以便分析造成这些状况的大致原因，同时，也为以司法为入径推动中国法律领域社会性别主流化的目标提供依据和奠定基础，我们对中国中部、东部和西部的12个基层人民法院和人民检察院的相关案卷进行了阅卷调查工作。在阅卷调查中，我们调阅了相关刑事、民事案件及典型案件的三千余份资料。

在调查中发现，司法人员的社会性别意识与判决或调解结果之间有着紧密的联系，而司法人员社会性别意识的缺乏可能会导致判决或调解结果有失性别公正。正因为如此，将社会性别观点纳入司法实践即成为推动中国法律领域社会性别主流化的重要一环，或有效入径，并对公正执法具有重要意义。

## 四、中国法律领域社会性别主流化面临的挑战或问题

在推动中国法律领域社会性别主流化的进程中可说是成就与挑战或问题并存。

### （一）现行法律的性别盲点/缺失

我们曾从社会性别视角对中国的相关法律进行了初步检审，并发现了其中的社会性别盲点或缺失的问题。以《宪法》、《婚姻法》、《妇女权益保障法》和《刑法》为例。

《宪法》第33条第2款规定：“中华人民共和国公民在法律面前一律平等。”第48条第1款规定：“中华人民共和国妇女在政治的、经济的、文化的、社会的和家庭的生活等各方面享有与男子平等的权利。”但问题在于，在中国，宪法规范不能成为法官审理案件的法律依据。也就是说，这种不能司法化的宪法仅仅具有价值宣示功能，宪法权利也因此成为价值宣示的口号，一旦违背宪法的实际行为发生，如何遏制这种行为，如何补救实际损害，将成为难以解决的法律问题。

《婚姻法》第13条明确规定：“夫妻在家庭中地位平等。”这肯定了夫妻的平等地位，体现了社会性别意识。但主要问题是，在法律的实施中应该如何正确理解“地位”一词。

《妇女权益保障法》第2条规定：“妇女在政治的、经济的、文化的、社会的和家庭的生活等各方面享有同男子平等的权利。实行男女平等是国家的基本国策。国家采取必要措施，逐步完善保障妇女权益的各项制度，消除对妇女一切形式的歧视。”应该说，该规定体现了比较充分的社会性别意识，但由于《妇女权益保障法》具有不可诉性，故对违背该规定的行为难以进行法律处理。

《刑法》第4条规定：“对任何人犯罪，在适用法律上一律平等。不允许任何人有超越法律的特权。”该条规定存在性别盲点，即它并没有考虑到对受暴妇女杀夫案（即“以暴制暴”案）的处理不能等同于一般的杀人。

然而，我们所进行的法律文本的检审只是初步检审。换句话说，就是只列出了表现社会性别盲点或缺失的法律条文，没有进行进一步的分析。但这种初步检审无疑为我们未来的研究和行动奠定了基础。

### （二）司法实践中的性别盲点/缺失

我们在阅卷调查中发现，总体来看，中国法律文本中存在社会性别盲点或缺失，一些看似中立和对女性的保护性条款，由于未对其实施可能产生不利于女性的后果做出社会性别分析，这些条款在实际应用时往往成为女性享有法律权利

的障碍。此外，尽管司法人员依法办案，并在办案中贯彻男女平等原则，但普遍缺少社会性别意识。主要体现在：1、司法人员性别意识缺失造成有的案件审判结果有失公正；2、一些司法人员在审判实践中存在性别偏见。

### （三）未来的行动：一些建议

对于中国法律领域社会性别主流化面临的挑战或问题，我们需要采取应对措施或说行动。对此，这里提出两点建议：

1、提出相关的立法建议，推动立法中社会性别观点的纳入。

2、开展对司法人员的社会性别培训。对司法人员进行社会性别培训是将社会性别视角纳入司法实践的一个较为有效的方式。但需要强调的是，培训应是理性的升华，也就是说，要以理论研究作为基础；培训的价值在于告诉司法人员新的价值理念，同时，让司法人员发现自身及现在工作的价值，以及让司法人员发现自己的创造力。

综上所述，立法和司法无疑是推动中国法律领域社会性别主流化的两条重要路径。但这也是充满障碍或挑战的两条路径。然而，正是因为这些障碍或挑战，我们的研究和行动才更具有意义和价值。也正是因为这些障碍或挑战，才更需要我们进一步加强合作和整合力量，为推进中国法律领域社会性别主流化而携手努力。

## **Xie Haiding**

### ***Gender Mainstreaming in Legal Field: Achievements and Challenges in China***

Xie Haiding  
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The gender mainstreaming campaign has gained momentum in the past decade in China. Being a recently-enrolled participant in this campaign, I would like to share my own observations of the impact of this campaign on the Chinese legal field, the area I have been working for many years. My observations can be summarized as “three achievements, two gaps and one suggestion”.

#### **I. Three Achievements**

##### **A. Emerging Gender and Law Research and Trend of Forming a New Discipline**

1. The obvious distinction between the incorporation of gender perspective in legal research and concerns over gender issues in legal research lies in the following facts: no more empty talk on the abstract legal principle of “equality between men and women”, and no more mere concerns over legal rights prescribed on paper. Instead, much emphasis is given to women’s perspectives, by which concrete legal norms, some parts of the legal system and the rationality of the legal institution as a whole have been examined and challenged. In this process, gender concept originated in the west and its critical approaches have been introduced.
2. The direct representation of the emergence of gender and law research is reflected in the following ways. The number of academic work devoted to gender and law relations is increasing rapidly, the academic journals publishing this type of articles are gaining in authority, and the research is multiplying.
3. Most importantly, gender and law research has being promoted to become a branch of learning. A branch of learning not only implies the recognition as a type of knowledge, but also involves the establishment of a series of systems in

relation to teaching materials, teaching staff, students and classification of publication of books. And behind all these systems, it is power and interests that relate to knowledge and manifested in the form of knowledge. Consequently, developing into a branch of learning and gender mainstreaming are closely related to each other, in which the gender and law research may enable the research contingent and areas to expand rapidly, thus integrating the established accumulation of knowledge, and improving social effect of the dissemination of knowledge. Ultimately, the gender and law research can move from the edge of knowledge to the center.

### **B. The Impact of Gender and Law Research upon Legal Practice**

1. With democratization of Chinese law-making, more and more legislative responses have been made owing to challenges and criticism on the rationality of certain legal norms and legal system and constructive legislative proposals raised from gender perspectives.
2. More gender trainings have been conducted for law enforcement officers and judicial personnel, and the results of the trainings shall be reflected in individual cases.
3. The trend of establishing a new branch of learning in terms of gender and law research can provide guarantees for the role played by gender perspective in legal practice.

### **C. The Coming of Age of Gender and Law Organizations**

1. Talking about gender and law organizations in China, they mainly include those specializing in teaching, training, survey and studies and research, those providing legal services and those with functions covering both the former and the latter.
2. A more important aspect of the development of gender and law organizations is the trend of networking, which enhances the efficiency of the integration of resources and the influence of the dissemination of conceptions.
3. What is most important is that some gender and law organizations start to air their voices in relation to specific legal cases.

## **II. Two Gaps**

### **A. Gender Mainstreaming seems to be a Women's Campaign in China**

1. Though people engaged in gender and law research often claim that gender mainstreaming will emancipate both women and men, yet the actual effect does not seem ideal. For example, I am the only male participant among the Chinese experts to this conference.
2. The very reason to regard this feature as a “lack” lies in the following understanding, that is, being an important mission, gender mainstreaming aims to change traditional stereotypes upheld by men. Accordingly, if it lacks men’s participation, the significance of the campaign shall be negatively affected.
3. The reasons leading to the above-mentioned phenomenon may be analyzed in the following way. Firstly, the patriarchal system and gender stereotypes criticized are indeed representing men’s interests and privileges, and therefore, to men, at first glance, the claim that “gender mainstreaming emancipates both women and men” really sounds deceptive; secondly, as gender and law research still in its preliminary stage, some scholars in this field are unable to use gender perspective as the starting point to examine and study problems; and thirdly, lack of gender analysis leads to defects of narrative strategy.

#### **B. Gender Mainstreaming Lacks Basis Originated within China**

1. The theoretical preparation for the launching of gender mainstreaming campaign simply relies on the introduction of western feminist thoughts. Nevertheless, it is by no means easy to translate gender analysis from its abstract concept into a practically operational tool.
2. To me, the conclusion that “gender is socially constructed” as western feminists emphasized lacks new ideas. Whether “sex” or “gender”, they are all constructed by human culture. Therefore, what’s important is to reveal gender concept covered under certain arrangements of gender system and the problems they caused, instead of debating whether gender is constructed socially in an abstract way.
3. What gender viewpoint does Chinese legal system as a whole reflect? What gender logic do certain systematic arrangements adopt? And in the operation of the law, what gender understanding is dominating among law enforcement officers and judicial personnel when they handle legal cases? All these are rarely dealt with in gender and law research today in China. But they are issues requiring detailed and in-depth studies.
4. For law enforcement officers and judicial workers, they do not need abstract gender concepts, nor the ways in which western feminists attack patriarchal systems. What they need is to help them find out the gender concept ingrained in their minds and influence them deeply in their legal practices. Only thus,

may they form a more rational gender concept that is more close to justice and fairness. And only thus, may they be able to master the way to translate gender concept into practical activities. In this sense, more efforts should be given to knowledge-dissemination-oriented gender training.

### **III. One Suggestion**

Simply from a male perspective, I would like to bring forward one suggestion.

As equity, justice, freedom and harmony are common goals we pursue together, please help me----a male from Chinese legal community, recognize gender bias inherent in my mind, and form a gender concept embracing values of equity, justice, freedom and harmony. On this basis, please allow me, together with you----inevitably constituting we----to accomplish this mission of gender mainstreaming in legal field together!

# 中国法律领域的性别主流化：成就与缺失

## Gender Mainstreaming in Legal Field: Achievements and Challenges in China

谢海定\*

1995 年北京世界妇女大会召开以后，社会性别、性别主流化等词语逐渐成为中国社会的热门关键词。中国的性别主流化运动也由此拉开帷幕。时至今日，这场运动已经历时十数年，并且波及到中国社会的各个领域。作为这一运动的新近的参与者，我想尝试着主要从自己相对熟悉的法律领域谈谈对这一运动的看法，粗陋之见，敬请诸位专家不吝批评指正。

我的基本看法可以概括为“三项成就、两个缺失、一点建议”。

### 一、三项成就

#### 1. 性别与法律研究兴起并日益走向学科化。

(1) 将性别纳入法律研究，主要是从“95 世妇会”之后兴起的。其与此前法律研究领域对性别问题关注的最大区别是，不再仅仅空谈“男女平等”的抽象法律原则，不再单纯关注立法上赋予妇女的纸上权利，而是更注重从女性的立场审视、质疑、反思具体法律规范、某方面制度乃至整个法律机制的合理性，特别是对西方社会性别概念及其批判工具的引用。

(2) 性别与法律研究兴起的直接表现是：该类文献数量快速增长，文献发表的刊物级别越来越高，从事研究的人员逐年增加，并呈现出一定的年轻化趋势。早期文献以翻译作品为主，目前则以著述为主。中国法学刊物在实践中存在级别特征，像本人担任编辑的《法学研究》过去几乎不考虑这类主题的文章，但是最近几年总计发表过三篇作品。

(3) 最为重要的是，性别与法律研究正在逐步走向学科化。学科首先意味着作为一个知识门类的受认，同时还外在地表现为教科书、师资、学生以及图书出版分类系统等一系列制度，而在这些制度背后，或者随着这些制度而来的，是与知识相关的、以知识形式体现的权力和利益，或者说，学科可以被视为一种具有内在排斥结构的知识生产、传播、承继的体制。因而，学科化与主

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流化具有密切的联系，通过学科化，性别与法律研究可以迅速扩大研究队伍和研究规模，整合已有的知识积累，提高知识传播的社会效果，逐渐从知识世界的边缘向中心挺进。

性别与法律研究学科化的表现，包括高等教育中与此相关课程的开设、师资的配置、教材的编写、研究生教育招生方向的设计等等。

## **2. 性别与法律研究正逐步扩大对法律实践的影响力。**

(1) 伴随着中国立法的民主化，从性别视角对特定法律规范、法律制度合理性的质疑、批判，提出的建设性立法建议，在立法方面获得了越来越多的回应。例如，婚姻法修改过程中关于离婚问题的处理，妇女法修改中关于家庭暴力的问题，最近侵权法制定过程中关于性骚扰问题的讨论等等。

(2) 对执法人员、司法人员的性别培训越来越频繁，培训效果也将会在法律个案中日益得到体现。能够开展类似的培训，首先就说明性别视角的重要性日益得到法律实务界的广泛认同。至于培训效果的量化评估现在还难以有明确的结果，但是部分法律实务中的统计数据库明显增加了与性别相关的统计项目。

(3) 性别与法律研究的学科化发展将为性别视角在法律实践中发挥作用提供保障。系统接受过性别教育的法科学生，其中一部分是未来的执法者、司法者，除了他们自身会将性别视角带入自己的法律实践中之外，他们的做法还将形成一定范围的示范效应、辐射效应。

## **3. 性别与法律社团正在发展壮大。**

(1) 中国的性别与法律社团主要包括：以教学、培训、调研和研究为主的社团，以提供法律服务为主的社团，以及两者兼而为之的社团。此外，也有一些社团虽然不是以性别与法律为主要关注点，但是其所开展的部分活动会涉及性别与法律问题，尤其是一些公益法律组织，如北京东方公益律师事务所、北京青少年法律援助中心。

(2) 性别与法律社团的发展壮大，一方面表现为数量的增多，更重要的方面表现为其网络化发展趋势。如中国反家庭暴力研究中心、中国性别与法律研究网络。网络化发展提高了资源的整合效率、观念传播的影响力，不仅自身是性别主流化的重要表现，而且对于进一步推动性别主流化发挥着极为重要的作用。

(3) 最为重要的是，部分性别与法律社团开始针对具体法律案件发出声明。

从性别主流化运动来看，上述三个方面都是极为基础的方面：观念与知识的更新及其制度化传播，是性别主流化的前提，缺了这个前提，性别主流化无从谈起；观念、知识对实践的影响是性别主流化的实现过程，仅仅停留在观念、知识主流化的层面，不仅是无意义的，而且在逻辑上也是不可能的——观念、知识必然要带来实践的革新；而现代社会中，前述两个方面的实际推进都离不开社团（或者说公民社会组织）的发展，公民社会组织是现代社会任何一种运动的中坚力量。正是在这样的意义上，我认为，至少从法律领域来说，性别主流化运动已经在中国取得了实质性的进步。

## 二、两个缺失

### 1. 性别主流化在中国看上去是女人的运动。

（1）尽管性别与法律研究的人经常声称，性别主流化并不是女人要对付男人，不仅仅要解放女人还要同时解放男人，但是这样声明的效果却很不理想。作为一个例子，这次来参会的中国成员只有我一个是男性。在中国，从事性别与法律研究的学者，男性只占极少数；作为性别主流化成就的学科化发展，学生中也是女性占多数。

（2）之所以将这个特征视为一个缺失，主要是因为，性别主流化在中国的一个重要任务，恰恰是要使男性改变传统的已经固化的性别陈见，如果男性不参与，这场运动终究会悄无声息。

（3）我个人认为，出现这种现象的主要原因在于：第一，性别主流化批判的父权制、性别陈见确实代表了中国男性的利益，因而“解放女人同时解放男人”至少在乍听上去时让男人觉得具有欺骗性，这是根基；第二，中国的性别与法律研究整体上还处于初级阶段，部分从事性别与法律研究的学者自身，也并没有将性别视角内化为自己思考问题的方式，而是从一样的性别陈见出发来谈论法律的性别问题；第三，由性别分析能力不足所传导的叙事策略欠缺。其中有两种极端的表现：一种表现是泛性别化，所有问题都联系性别批判一番，张口就是“性别”；另一种表现是非逻辑，对一个制度、一个事件的评论或者建议自相矛盾，以至于曾听人问：中国的女性主义到底要什么？

### 2. 性别主流化缺乏来自中国自身的基础。

（1）人权没有国别，但是人权运动必须有本国的基础。性别主流化运动在中国的开展发端于 95 世妇会，其理论准备则主要是西方女权主义思潮的引介。然而，将社会性别分析从抽象的概念转化为实际操作的工具，并不是一件

很容易的事情。

(2) 不少中国性别与法律研究者在引介西方女权主义思潮的时候，紧抓住“性别是社会的建构”之类的只言片语不放。其实，在我看来，谈论性别是社会的建构并没有多少新颖性，而且对中国的性别主流化运动也没有多少实际意义。无论“性别”还是“社会性别”，都是人类所使用的语词，都是人类文化的产物，都是被建构出来的，因而，关键的不是抽象地指出它是不是被建构的，而是要揭示特定性别制度安排背后的性别观念以及这种性别观念的问题所在。而这就需要深入考察具体的制度规范及其运作机制。

(3) 中国的法律制度整体上反映了一种什么样的性别观？特定方面的制度安排背后的性别逻辑是什么？法律运作过程中，执法人员、司法人员对案件的处理过程，受到了什么样的性别意识的支配？中国的法律制度需要什么样的性别观念？这些需要具体探讨的问题，在目前的性别与法律研究中，尚属稀有珍品。

(4) 对于法律实践来说，具体的执法者、司法者需要的其实不是抽象的社会性别观念，也不是西方女权主义如何批判父权制的知识。他们需要的是，帮助他们认识到潜藏在他们意识深处的、对他们的法律实务工作发挥着作用的性别观念是什么，帮助他们形成更为合理的、更贴近公平的性别观念，帮助他们掌握将性别观念转化为实际活动的技术。在这个意义上，目前以知识传播为主的性别培训还存在着很大的提升潜力。

### 三、一点建议

鉴于时间关系，最后仅仅从一个中国男性的角度，说一点建议：

由于公平、正义、自由、和谐是我们共同的追求，请帮助我——一个中国法律领域的男性，认识到我自己在性别认识方面的偏见，帮助我形成符合公平、正义、自由与和谐价值的性别观念，在此基础上，请允许我与你们——我们——一起完成法律领域性别主流化的使命！

**Liu Bohong**

***Incorporating Gender Equality Into The Legislation-Making Process***

将性别平等纳入立法过程

全国妇联妇女研究所 刘伯红

2009. 3

**一、背景和历史契机**

2006 年 8 月，联合国消歧委员会第 36 次会议准备审查中国政府提交的《执行〈消除对妇女一切形式歧视公约〉第五六次联合报告》。按照《消歧公约》审议过程促进公民社会和妇女非政府组织参与的要求，中国妇女研究会联合在京的 22 个妇女非政府组织，从妇女的经济权利、妇女的政治权利、妇女的教育权利、妇女的健康权利和农村妇女的权利五个方面，重点评估和回顾了中国政府执行《消歧公约》的情况，形成了评估会议《纪要》，并派代表参加了联合国消歧委员会对中国政府执行报告的审查。中国妇女研究会向参会的 22 多个非政府妇女组织承诺，联合国消歧委员会审议后专门向各妇女组织的代表汇报审查的情况。

2007 年 2 月 15 日，中国妇女研究会在京召开“推动《消歧公约》在中国执行的后续行动研讨会”，邀请了在京的多位非政府妇女组织代表和妇女活动家参加。一方面，中国的消歧委员会委员、参加审议的非政府组织代表向大家介绍了这次会议的审查情况；另一方面，在讨论执行《消歧公约》后续行动的时候，与会代表们一致认为，应该紧紧抓住即将召开“两会”的历史机遇，促进立法决策中的性别平等。对于后者，大家提出两项建议：第一，促进《就业促进法》写入性别平等问题；第二，增强《物权法》中的性别敏感。此时，距离即将召开的两会只有半个多月的时间了，这样，执行《消歧公约》在中国的

后续行动就变得很实在，很紧迫了。

2007 年，十届全国人大或全国人大常委会计划在两会期间完成《物权法》、《就业促进法》和《劳动合同法》三部法律的最后的修改和制定。其中的《物权法》经过了 12 年的起草修改，尽管存在相当大的分歧，党中央还是做了很多说服工作，希望 2007 年的两会能通过该法。《就业促进法》是 2004 年开始起草，经过三年时间的广泛调研，八易其稿，也要提交两会讨论。《劳动合同法》也经历了长时间的酝酿，虽然存在劳资双方的分歧和争论，但发生在山西的黑砖窑事件，促使这部法律尽快出台。也就是说，参与这些法律的修改已经时不我待，迫在眉睫了。

2007 年的春节是 2 月 18 日，来得比较晚。中国妇女研究会、全国妇联妇女研究所在正月初八（2 月 25 日）上班的第一天，就召开了“《物权法》修改研讨会”。很多法律专家、法律工作者和性别研究者纷纷赶来参加了会议，主要围绕三个重点开展修改讨论：1）男女怎样平等地成为物权享有的主体；2）男女怎样平等地享有家庭物权；3）男女怎样平等地享有集体物权。在我的记录中，杨大文先生法理法条的功底十分深厚专业，郭建梅的司法实践丰富多样并执着坚持法律改革为实践服务的诉求，李明顺对法理法条的阐述比较严谨，刘海荣代表参政和立法的经验和视角不断给大家启发和导向，大家在上述三个重点方面提出了具有说服力的修改建议，这些法律专业表达的策略和能力给我留下十分深刻和强烈的印象。

2007 年 3 月 9 日，中国妇女研究会和全国妇联妇女研究所继续努力，接着召开了“《就业促进法》修改研讨会”，来自三方机制（劳动和社会保障部、全国总工会、中国企业联合会）的代表、法律研究者和工作者、以及有关专家学者参加了会议。由于参会的很多专家一直跟踪了《就业促进法》的起草工作，也由于专家们对我国劳动力市场存在就业歧视的看法比较一致，因此，《就业促进法》的修改重点始终聚焦在反对就业歧视、促进公平就业的要求上。专家们引证了国际社会的经验和立法主张，分析了国内的调查数据和案例，形成了翔实的修改建议。

2007年4月6日，在中华女子学院刘明辉教授的反复呼吁下，中国妇女研究会和全国妇联妇女研究所又举办了“促进和谐稳定的劳动关系——在《劳动合同法》中纳入性别平等”专题讨论会。来自全国总工会、中国企业家联合会、北京大学妇女法律研究与服务中心、中华女子学院、北方交通大学、北京警官学院、全国妇联妇女研究所的专家学者和全国妇联权益部的工作人员参加了讨论会，共同探讨如何在即将出台的《劳动合同法》中充分保护广大劳动者，尤其是女性劳动者的权益，促进各行业、各工种劳动关系的和谐稳定。

## 二、三个立法建议的主要内容

### （一）关于《物权法（草案）》的修改建议

研讨会从社会性别视角出发，力图从三个层面保障妇女与男子平等享有物权：1）明确并强调妇女作为“权利人（自然人）”平等地享有个人物权；2）明确并强调妇女作为家庭成员平等地享有家庭物权；3）明确并强调妇女等（包括上门女婿）作为集体成员平等地享有集体物权。

《物权法（草案）》的具体修改建议如下：

《物权法（草案）》是规范财产关系，维护广大人民群众切身利益，完善社会主义市场经济体制，构建社会主义和谐社会的民事基本法律。作为一项保障基本人权的民事法律，它应当遵循《宪法》的基本原则，具体体现相关法律的规定，并与相关国际公约的要求基本一致。

但是，在界定物权的个人主体资格时，往往没有将妇女作为一个独立的主体，而是将她们依附于家庭中的男性。同样，由于没有明确界定集体成员资格，在讨论集体成员的物权时，妇女往往以家庭成员的身份而不是以独立的个体被考虑，因而忽视了妇女作为个人的主体权利，特别是在婚姻变故时，她们的权利易于受到侵害。

根据我国国情，物权法应当体现《宪法》和《妇女权益保障法》（以下简称《妇女法》）都强调的原则，切实保障男女享有平等的财产权利，以改变现实中大量存在的侵害妇女财产权利的现象。然而，

在现行法律中缺乏有效维权依据，已有的保障平等的法律规定在执行中缺乏可操作性。在一些地方，传统的习俗和偏见影响妇女享受与男子平等的物权，有的地方甚至以乡规民约的形式剥夺妇女应有的权利。因此，我们对六审稿（2006年10月26日）提出以下建议。

### 1、进一步明确“权利人”的定义

“权利人”是物权的基本概念，关系到物权享有的主体资格。只有清晰和明确地界定“权利人”概念，才能广泛地维护广大人民的切身利益。通常来说，“权利人”概念由《民法典》界定。但是，由于我国的《民法典》还没有出台，因此我们建议在目前制订的《物权法》中做如下规定：

在第一章（基本原则）第2条第3款后增加一款：

“本法所称的权利人是指：自然人、法人和其他组织”。

### 2、进一步明确家庭成员平等地享有物权（不动产和动产）

为了使家庭成员平等地享有物权，必须明晰家庭内部个体成员的财产归属。只有这样才能充分地保障家庭内部所有成员的财产权利。大量个案显示，以往属于夫妻或家庭成员共有的财产，一般是以男性户主的名义登记的，当出现婚姻变故时，财产的分割往往不利于保护妇女的权益。因此我们建议在目前制订的《物权法》中做如下规定：

（1）在第二章（物权的设立、变更、转让和消灭）第一节（不动产登记）第14条第1款下面增加一款：

“不动产属于夫妻共同所有或者家庭成员共同所有的，应该在登记簿中注明。”

（2）在第八章（共有）第94条增加一款：

“夫妻依法共有的动产和不动产属于共同共有。”

### 3、进一步加强对集体成员合法权益保护的问题

近年来，在土地资源紧缺、人地矛盾突出的地方，或者在征地补偿过程中，一些地方的村委会采取村民大会或村民委员会表决形式，借村规民约侵害部分村民的合法权益。特别是出嫁女、离婚妇女以及上门女婿，由于这些集体成员的合法利益受损而引发的上访事件大幅上升。

目前，我国现行法律，如《农村土地承包法》、《村委会组织法》和相关土地承包政策，在实践中均难以成为家庭承包经营权共有人之间权属纠纷的有效依据。此次《物权法》已将土地承包经营权明确作为一项物权，理应就家庭承包权的归属和行使问题做出规范，为解决有关土地承包经营权纠纷提供切实可行的法律依据。因此我们建议：

（1）在第五章（国家所有权、集体所有权和私人所有权）第 60 条中，应该明确集体成员的资格。

（2）第五章（国家所有权、集体所有权和私人所有权）第 63 条第 1 款建议改为：

“集体经济组织或者村民委员会做出的决定侵害集体成员合法权益的，该集体成员可以请求人民法院予以撤销。”

并增加第 2 款：

“以村规民约的形式侵害集体成员合法权益的有关决议，该集体成员可以请求当地行政主管部门予以撤销。”

（3）在第十一章（土地承包经营权）第 127 条中增加第 2 款：

“土地承包经营权不受承包人的婚姻状况变化的影响。”

（4）在第十三章（宅基地使用权）第 153 条中增加第 2 款：

“宅基地使用权不受使用权人的婚姻状况变化的影响。”

以上修改建议通过全国妇联的报告和全国妇联的人大代表，反映到人大会上。

## （二）关于《就业促进法（草案）》的修改建议

研讨会听取了与会专家的意见后形成下列修改要点：1）强调就业领域公平公正的原则，在增加就业数量的同时提高就业的质量；2）界定就业歧视的定义，增设就业公平的专门章节；3）增强该法反对就业歧视的可操作性和对就业歧视的约束性；4）要求建立反对就业歧视的执行机制，明确政府责任。

《就业促进法（草案）》具体修改建议如下：

1、对《就业促进法（草案）》（简称“草案”）的总体意见与建议

（1）建议增加可操作性和约束性



从总体上说,《目前的就业促进法(草案)》仍然比较原则、可操作性和约束性不强。具有较浓的政策性文件色彩,法律应有的约束力和强制力不够。

## (2) 建议明确公平公正的原则,增加就业公平章节

此“草案”没有将公平就业放到应有的高度。“草案”在增加就业机会方面做出了很大努力,但是,在如何消除就业中存在的歧视现象、提高就业的质量、促进公平就业方面需要进一步强调。公平正义是社会主义社会的本质要求,也是和谐社会的重要内容,立法指导思想上应该体现这个原则。建立公平公正的劳动力市场秩序,保障劳动者的平等就业权利,有利于更好促进就业,有利于社会的和谐稳定。因此在就业促进法中体现公平公正的原则十分必要。

基于以上考虑,专家提出总则中首先需要明确提出公平公正的原则,草案的相关章节都应该体现平等公正的原则,同时,有必要单设“就业公平”一章。

## (3) 建议明确提出就业歧视的概念

此“草案”已经提出反对就业歧视,但是目前还明确就业歧视的定义。在实际操作过程中,势必会影响对歧视的认识和消除,使许多遭受歧视的劳动者的权益无法得到维护。因此,建议参照国际劳工组织第 111 号《反对就业和职业歧视公约》,基于我国国情,明确就业歧视的定义。

此“草案”中有关歧视形式的规定比以往《劳动法》有所扩展,歧视的形式拓展到年龄和身体残疾,但范围还是太窄,无法囊括现实中多种多样的歧视形式。据劳动与社会保障部组织的调查,中国劳动力市场中目前存在的歧视至少有 16 种,如社会出身或身份、婚育状况、地域等,建议本法把一些主要的歧视形式规定进去。

## (4) 建议明确执行机制和政府责任

(a) 执行机制需要进一步明确,实体化。“草案”中只规定“建立全国促进就业工作协调机制”,而没有规定机制的名称、职能等,而且后面的条款中也没有提及此机制,使该法律的执行缺少机制保障。

(b) 政府应当明确自身的职责，率先垂范，并建立有效的监督和评估制度。应强调工会、共青团、妇联、残联及其他社会组织的参与和监督作用。

(c) 在规范市场秩序一章中，对规范招聘程序规定不够。应就岗位公开、招聘条件公开、禁止招聘中的各种歧视等方面做出规定。

(d) 司法救济和救助的内容缺乏。应增加有效的、可操作的司法救济的内容，以使当事人能够通过司法渠道维护自己的权益。包括针对政府不作为的行政诉讼，针对企业歧视行为的诉讼和针对中介机构欺诈欺骗行为的诉讼等。同时诉讼程序应当简便、低成本，使普通劳动者真正通过司法救济维护自身的权利。

(e) 法律责任一章，过多涉及犯罪，行政措施不足。而作为一部行政法规，应当以行政处罚措施为主。因此建议将本章中的刑事处罚措施归为一条，进一步充实行政处罚措施的内容。

## 2、具体条款修改意见

我们将具体条款的修改意见用表格列出，包括三方面内容：一是“草案”内容，二是修改意见，三是修改理由。因篇幅限制，略去具体条款修改意见。

## 3、“公平就业”专章的内容

在《就业促进法》中设立“公平就业”专章，促进就业公平，反对就业歧视。具体条款如下：

### 第 章 公平就业

第一条 本法第五条所指的歧视为：基于民族、种族、性别、宗教信仰、社会出身或身份、地域、年龄、身体状况、婚育状况等因素，对劳动者采取的具有取消或者损害就业或职业机会均等或待遇平等作用的任何区别、排斥或优惠。

因工种或工作岗位特点需要、依法给予特殊照顾保护需要以及为消除现存不平等、推进社会公正的需要而采取的差别对待、限制或积极措施，不属于歧视。

第二条 劳动者享有平等的就业权利。用人单位招用人员时，除法律另有规定外，不得以民族、种族、性别、宗教信仰、社会出身或

身份、地域、年龄等为由拒绝录用或者提高录用标准。

第三条 各级政府要制定相应的政策措施,完善职业介绍、职业培训、就业服务、职业安全与卫生,消除歧视,创造公平就业环境。

第四条 用人单位应创造机会均等、待遇平等的就业环境。

用人单位、职业中介机构、传媒发布招聘信息,不得违反第一、第二条规定。

第五条 国家成立专门机构,如平等机会委员会,解决和受理就业歧视的问题。

第六条 有关违反法律的罚责应有力度,并要有防止对劳动者实施报复的措施。

### (三) 关于《劳动合同法(草案)》的修改建议

研讨会对《劳动合同法(草案)》的修改要点集中在三方面:1)建议将“女职工”的权利扩展到“女性劳动者”;2)建议将正规部门劳动者的权利扩展到非正规部门的劳动者;3)在劳动合同的内容中强调女性劳动者的特殊权利保护和友好的就业环境,反对工作场所的性骚扰。

#### 《劳动合同法(草案)》具体修改建议

##### 1、总的建议

《劳动合同法》(草案,以下简称草案)应与《宪法》、《妇女权益保障法》、《劳动法》等上位法的原则和规定相呼应。这些法律中有关维护妇女合法劳动权益、妇女特殊劳动保护、生育保障及防止对妇女人身权利的伤害,如防止工作场所的性骚扰等的规定,应当在《劳动合同法》中以适当的形式体现出来。同时,建议针对现阶段劳动关系中涌现出的新问题进行规制,以丰富和完善有关的劳动法规。

例如,本草案中的“职工”应包括农民工、非正规就业者等劳动人群,或直接称为“劳动者”(如将“女职工”改为“女性劳动者”)。

再如,建议对一些新兴产业和行业的劳动者权益作出更为明确的规定。《劳动法》中没有对非正规就业的劳动关系进行规范,本草案中以“劳务派遣合同”和“其他用工形式”两节对劳务派遣和非全日

制工作的劳动合同关系有所规范，这是一个进步，但是调整对象的范围偏窄，建议以适当的形式，更好地保障非正规就业的部分家政服务业和家政服务劳动者的权益。

针对《劳动合同法（草案）》（第二次审议稿）的有关条款，我们提出以下具体建议：

## 2、对具体法条的修改建议

条款原文	修改意见	备注
<p><b>第四条</b> 用人单位应当依法建立和完善劳动规章制度，保障劳动者享有劳动权利、履行劳动义务。</p> <p>用人单位在制定、修改或者决定直接涉及劳动者切身利益的劳动报酬、工作时间、休息休假、劳动安全卫生、保险福利、职工培训、劳动纪律以及劳动定额管理等规章制度或者重大事项时，应当经职工代表大会或者全体职工讨论，提出方案和意见，与工会或者职工代表平等协商确定。</p>	<p><b>第四条</b> 用人单位应当依法建立和完善劳动规章制度，保障劳动者享有劳动权利、履行劳动义务。</p> <p>用人单位在制定、修改或者决定直接涉及劳动者切身利益的劳动报酬、工作时间、休息休假、劳动安全卫生、<b>女性劳动者特殊保护</b>、保险福利、职工培训、劳动纪律以及劳动定额管理等规章制度或者重大事项时，应当经职工代表大会或者全体职工讨论，提出方案和意见，与工会或者职工代表平等协商确定。</p>	<p>此处与《妇女权益保障法》、《劳动法》等上位法的有关女职工特殊劳动保护的规定相呼应。</p>
<p><b>第五十条</b> 企业职工一方与用人单位通过平等协商，就劳动报酬、工作时间、休息休假、劳动安全卫生、保险福利等事项，签订集体合同。集体合同草案应当提交职工代表大会或者全体职工讨论通过。</p>	<p><b>第五十条</b> 企业职工一方与用人单位通过平等协商，就劳动报酬、工作时间、休息休假、劳动安全卫生、<b>女性劳动者特殊保护</b>、保险福利等事项，签订集体合同。集体合同草案应当提交职工代表大会或者全体职工讨论通过。</p>	<p>女性劳动者的特殊保护也应是集体合同中的一项必备内容。</p>
<p><b>第五十二条</b> 在县级以上区域内，建筑业、采</p>	<p><b>第五十二条</b> 在县级以上区域内，建筑业、采矿业、</p>	<p>此处将家政服务纳入</p>

矿业、餐饮服务业等行业可以由工会组织与企业方面代表订立行业性集体合同。行业性集体合同对当地全行业的用人单位和劳动者具有约束力。	餐饮服务业、 <b>家政服务业</b> 等行业可以由工会组织与企业方面代表订立行业性集体合同。行业性集体合同对当地全行业的用人单位和劳动者具有约束力。	《劳动合同法》的调整范围内，有利于家政服务业纠纷的解决，为今后家政行业的立法留下空间。
<b>第五十三条</b> 企业职工一方与用人单位可以订立劳动安全卫生、工资调整机制等专项集体合同。	<b>第五十三条</b> 企业职工一方与用人单位可以订立劳动安全卫生、 <b>女性劳动者权益保护</b> 、工资调整机制等专项集体合同。	大量现实要求通过订立专项集体合同来保护女性劳动者权益；工会近年来一直在推动签订女职工权益保护专项集体合同的行动
<b>第七十四条</b> 县级以上地方人民政府劳动行政部门依法对下列实施劳动合同制度的情况进行监督检查： （一）用人单位制定劳动规章制度的情况； （二）用人单位招用劳动者办理用工手续的情况；	<b>第七十四条</b> 县级以上地方人民政府劳动行政部门依法对下列实施劳动合同制度的情况进行监督检查： （一）用人单位制定劳动规章制度的情况； （二）用人单位招用劳动者办理用工手续的情况； （三）用人单位提供劳	用人单位与劳动者变更劳动合同的情况也应该是劳动行政部门监督检查的重要内容之一。

<p>（三）用人单位提供劳动合同文本的情况；</p> <p>（四）用人单位与劳动者订立和解除劳动合同的情况；</p> <p>（五）劳务派遣单位和用工单位遵守劳务派遣有关规定的情况；</p> <p>（六）用人单位遵守工作时间和休息休假规定的情况；</p> <p>（七）用人单位支付劳动合同约定的劳动报酬和执行最低工资标准的情况；</p> <p>（八）用人单位参加各项社会保险和缴纳社会保险费的情况；</p> <p>（九）法律、法规规定的其他劳动监察事项。</p>	<p>劳动合同文本的情况；</p> <p>（四）用人单位与劳动者订立、<b>变更和</b>解除劳动合同的情况；</p> <p>（五）劳务派遣单位和用工单位遵守劳务派遣有关规定的情况；</p> <p>（六）用人单位遵守工作时间和休息休假规定的情况；</p> <p>（七）用人单位支付劳动合同约定的劳动报酬和执行最低工资标准的情况；</p> <p>（八）<b>用人单位履行劳动安全卫生义务和创建防止性骚扰的工作环境的情况；</b></p> <p>（九）用人单位参加各项社会保险和缴纳社会保险费的情况；</p> <p>（十）法律、法规规定的其他劳动监察事项。</p>	<p>增加第八款可体现对劳动者心理健康、免受性骚扰等权利的保护。尤其是建立没有性骚扰的工作环境，有以下依据：《妇女权益保障法》的规定；可体现劳动法和有关国际公约对相关立法的要求；规定雇主防止职场性骚扰责任也是世界趋势和一些国家的成功经验。</p>
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### 三、三部法律草案的修改效果

三部法律草案都在 2007 年获得全国人民代表大会或人大常委会的通过，对于我们提出的修改意见，三部法律接受和采纳的情况有所不同。

#### 1、《物权法》修改的效果

在最后颁布的《物权法》第六十三条第二款，吸收了我们的建议，法条为“集体经济组织、村民委员会或者其负责人做出的决定，侵害集体成员合法权益的，受侵害的集体成员，可以请求人民法院予以撤销。”这样，就为土地权益或集体经济权益受到侵害的妇女或上门女婿，提供了保护自身集体物权的法律依据。

对我们希望强调的三个层面的“妇女物权”的要求，接受和采纳了保障妇女“集体物权”的要求。

## 2、《就业促进法》修改的效果

据全国人大网站(www.npc.gov.cn)和前劳动和社会保障部有关部门领导介绍，在2007年3月25日至4月25日《就业促进法(草案)》向全国人民公布，公开征求意见的一个月时间里，共收到修改建议11000条，其中7000多条建议提出“反对就业歧视，促进就业公平”的要求。据此，最后制订的《就业促进法》增加了专门章节第三章“公平就业”，共7款(第二十五至三十一条)，规定了政府促进就业公平的责任(第二十五条)，用人单位、职业中介机构促进就业公平的责任(第二十六条)，促进妇女劳动者(第二十七条)、各民族劳动者(第二十八条)、残疾人(第二十九条)、传染病病原携带者(第三十条)、农村劳动者(第三十一条)平等而公平享有就业权利。因篇幅所限，具体条款略。

设立“就业公平”专章，是我们“原则修改”、“具体条文增加”和“设立专章”三个层面要求的最理想要求。虽然专章的内容仍然没有界定“就业歧视”的定义，没有设立反对就业歧视的专门机构，距离我们提出的专章内容还有较大的距离，但却是三部法律修改中最多体现我们要求的一部法律。

## 3、《劳动合同法》修改的效果

《劳动合同法》对用人单位做了说明，包括了个体经济组织、民办非企业单位等非正规就业的部门，但仍没有包括我们希望加入的家务劳动者，反对工作场所性骚扰的要求也没有在劳动合同的内容中被提及，或者说，我们的建议基本上没有被吸纳。



#### 四、体会

通过 2007 年将性别平等的诉求纳入三部法律的实践，我们既得到成功的经验也得到失败的教训，主要体会如下：

第一，利用现有体制，多种渠道推进我们的诉求。首先，全国妇联是拥有人大政协席位的群众团体，全国妇联的人大代表和政协委员有代表妇女参与立法决策的强烈愿望和丰富经验，邀请她们参与修改法律草案的过程，发挥她们的积极作用，有利于将性别平等的声音反映到决策的过程中，也有利于修改方案更符合立法的要求。其次，充分发挥专家的作用，用法律的专门语言和技术语言表达性别平等的要求。实践证明，妇女研究和妇女工作的习惯话语，不一定能被主流法学家、立法决策者和人大代表听懂和接受，因此，必须创造性的使用专业术语，《物权法》的修改经验就反映了法学家这方面的智慧和专业能力。第三，充分发动中国妇女研究会 100 多为团体会员的作用，她/他们分别来自高校、社科院、妇联、党校等不同系统，又可以发动她/他们的团体会员，扩大参与的队伍。

第二，利用“二读”机会，采取联合倡导的策略。《就业促进法》加入“就业公平”专章的经验表明，利用人大常委会“二读”（公开征求意见）的机会，发动有关机构和人员提出建议，是一个行之有效的好办法。在人大常委会办公厅发出“关于公布《中华人民共和国就业促进法（草案）》征求意见的通知”后，中国妇女研究会及时出版了《研究信息简报》第 75 期，将人大常委会办公厅的通知、《就业促进法（草案）》原文、“关于《就业促进法（草案）》的说明”，以及中国妇女研究会的修改方案（三个方案）编入其中，放给中国妇女研究会会员，供大家参与建议时参考使用。同时，我们也运用了联合各不利群体（如农民工、残疾人、少数民族、传染病病原携带者等）的策略，广泛提出反对就业歧视，而不仅仅“就女说女”，争取更多的同盟军，有利于反歧视的要求被采纳。从另一个角度看，我们没有抓住《物权法》和《劳动合同法》公开征求意见的时机，组织大家广泛参与建议，就没有或较少取得相应的积极效果。

第三，深入的调查研究，是将性别平等纳入立法决策的重要基础。

《就业促进法》之所以在修改中取得突破性的进展，重要的原因之一是，参加修改建议的专家都有在这个领域长期深入调查研究的经验。例如，中国就业促进会申请了专门项目，促进将性别平等纳入《就业促进法（草案）》中，该会副会长张幼云女士就把他们的研究成果贡献了出来；国务院发展研究中心岳颂东研究员和我本人参加了劳动和社会保障部国际劳工研究所“公平就业研究课题”的基线调查，也将我们反歧视的建议提交出来；北京大学妇女法律研究与服务中心的工作重点之一是维护妇女的劳动权利，她们也贡献出典型的个案经验……这些，都丰富了《就业促进法》性别平等的立法建议。从另一个角度讲，对《劳动合同法》的关注和研究不够，急急忙忙匆匆开会，效果就不太好。

## 五、我们仍面临的挑战

2007 年将性别平等纳入立法过程的实践，是一个良好的开始，有益的尝试。我们面临的立法任务仍很艰巨，继续将性别平等贯彻到“立法细则”和“部颁条例（标准）”中去仍面临巨大的挑战，在这些实施细则的指导思想、实施方案、难点突破、配套措施等讨论中，我们还面临着分歧和挑战。此外，2007 年的尝试也有其偶然性，怎样将这次偶然的运作转变成一种持续参与立法的机制，使与性别平等关系重大法律的立法过程中融入性别平等的声音，也是我们应该继续努力的方向。

我们的结论是：雄关漫道真如铁，而今迈步从头越。

# **GENDER-BASED EMPLOYMENT DISCRIMINATION**

**Guo Huimin**

## ***Gender Discrimination in Employment in China***

### **I. Overall Situation of Gender Discrimination in Employment**

In China, gender-based employment being common and complicated has its own characters.

#### **A. Recruitment Discrimination**

Discrimination in recruitment impacts equal opportunity of women employees. Except those with special expertise and work skills and those with social resources and better family background, ordinary women usually suffer from direct or indirect gender discrimination at the beginning of their careers. Fifty five point eight percent women consider that they have encountered gender discrimination during their job hunting. Sixty three point seven percent of females and 47.6 percent males argue that employment discrimination against women is “greatest” or “greater”. The details are as follows:

#### **Discrimination in Employment Advertisement:**

One survey on employment advertisement in Shanghai and Chengdu in 1995 and 2005 presented that among the total 242520 and 57799 job positions separately given by 10 companies from newspaper advertisement of these two places, the number of positions recruiting only male were 72782 and 19486, which were 30 percent and 33.7 percent of the total (Zhou Wei, 2008). Let's have a look at the following recruitment announcement. “The company plans to recruit 10 programmers. Requirements are as follows: no gender limitation; healthy resident with an ID card of this city; under 30; male should be of bachelor degree or above while female should be of masters degree or above.” Clearly, the requirement of women in education is higher than that of men. As a result, only 6.4 percent of working females are working in technology and administration positions through the whole country while the number of men is 10.9 percent. 79.8 percent females are blue collars. Of them, 60.1 percent are working in the field of agriculture that with lower skills and income. That is 9.8 percent higher than male. Moreover, the income gap between male and female are enlarged. In 2003 the average income of working female in town was 81.9 percent of male, while in 1978 it was 83 percent.

Secondly, gender discrimination in job offering is always connected with the looks

and features. Some positions only need “ladies with fine appearance and temperament”; what’s more, they just choose beautiful saleswomen. Thus, some girls try to turn in their pictures with little clothes to attract interviewers’ interest. One survey has indicated that almost 60 percent college students do some medical operations of face lifting to promote their qualities in job hunting, this phenomenon bring up body politics to ladies’ professions.

Thirdly, with the underlying restriction of procreation and marriage of women, some women tend to promise their company that they will not engage in love affairs or marry someone during the next three to five years on their own initiative. Some women even promise that they will not have a baby during their graduate study period.

Finally, since it is hard for a female to find a job, some females turn to their boyfriends. In this regard, their employment starts to be attached to males, becoming a dependent subject. In a report titled “16 thousand graduates after thousands of job opportunities” by Chongqing Youth Newspaper, to solve the job problem of talented girlfriends became a useful experience. In order to recruit a suitable talent, one company even agreed to arrange a male’s girlfriend to work as long as she had studied relative majors.

## **B. Occupational Segregation and the Glass Ceiling**

Firstly, gender segregation forces about 80 percent of women to engage in non-administrative work. In 2006, the employment of the rural work force reached nearly 132 million. Of which, women account for about 36 percent reaching 47.47 million people. However, this large group of female migrant workers is facing double barriers in career. First, as “rural people”, they are facing urban social exclusion, and the other, as women, they are facing gender discrimination. According to the program the Gender Differences of the Workers From Rural Areas in Labor Market of Cities“, women's human capital stock (including work experience, educational level and health condition, etc.) was significantly lower than men; while in the performance of labor market, occupational segregation caused by gender discrimination is nearly 78 percent. Most women are engaged in low-income, low-skilled, low stability, and low-status jobs.

Then it is the glass ceiling phenomenon, embodying the promotion of female civil servants and professional and technical personnel, and the selection of female executives. The surveys undertaken by accounting firm Grant Thornton in Hong Kong show that the rate of female executives in companies of mainland and Hong Kong has been maintained at a high level. But, the mainland cities’ orientation on female employment varies. The survey shows that, 77 percent private enterprises in Beijing employ female executives, while 83 percent in Shanghai and Guangzhou. Ratio of woman in the senior management is also differences among cities. The ratio in Beijing and Guangzhou is just 35 percent, while 26 percent in Shanghai. It is difficult

for female civil servants to rise to break through the glass ceiling pole after being raised to the head of department. Generally speaking, the proportion of women cadres is not too low, it is about 40 percent, but the proportion of high-ranking female officials is too small. Even in Beijing, where the proportion of women cadres in Beijing high ranks is the largest, bureau-level female cadres is also only accounted for 16.7 percent and division level 24.4 percent.

Third, the discrimination of the occupation process is also reflected in the inequality of the professional training opportunities. Household chores are a drag on their career, which resulted in women getting fewer opportunities, and the discriminations including discrimination against fertility and against family responsibilities.

### **C. Discrimination on the Grounds of Pregnancy and Family Responsibility**

In China, the discriminations against fertility show differently according to the occupational identity. The problems blue-collar workers face were relatively less than white-collar workers, but most for the migrant workers. A survey showed that 51 percent of female migrant workers were discriminated by their employers because of child-bearing, of which 30 percent women's basic salary has been deducted or lower in the period of maternity leave, and 21 percent was dismissed by the company due to pregnancy or childbirth. In urban areas, the discriminations brought about by fertility are as follows: birth dismissal or constructive dismissal, loss of the original post, birth expenses not fully reimbursed and so on.

The other is family responsibility discrimination. Family responsibilities are often associated with fertility. Despite Chinese women workers entering the work force, they are still not free from the nature of caring others. After work outside of home, it is mainly women who are engaged in domestic work, while women get no wages, which caused tension and also become a reason for employers to discriminate against women.

### **D. "Follow-husband workers", household workers, temporary workers and influences from husbands:**

"Follow-husband workers spouse-workers" is a special status between "families" and "workers" which is gender politics caused by "worker depending on husband". It is an informal employment system arrangement in China's planned economy era in order to make up for shortage of formal employment. At the same time, Arrangements for the families of restrictions on employment can help the economically disadvantaged families of the formal staff. Follow-husband workers refer to the women, who left her original workplace to join the work units of their husbands and be employed by work units of their husbands. At that time, the government implemented the policy towards intellectuals and resolved problems of husband and wife living separate and apart. So all circles set up a series of organizations of production, composed of intellectual families, worker families and army families. Patrilocal family members responded to the call and walked out of

the home. They been engaged in the production of economic activities for a long time and has become an important component of China's labor force. "Follow husband-workers (spouse-workers)" originated in the 1950's, developed in the 1960's and 1970's and declined in the 1980's and 1990's. By the beginning of this century, it has gradually evolved again. Worker tied to the husband's employment is an unusual situation, some of the wives are entirely innocent, and some are asked to leave by the units of their husbands because the wife's work is given along with the husband's. So some units ask the wife to leave when the husband is asked to leave. The independence of professional qualifications of the wife is severely affected. This is the influence of china's peculiar patriarchal culture.

The housework has become a new industry composed of laid-off workers, and immigrant workers. And household workers are mostly rural landless peasants who work in the family. There are no specific legal protection for the rights of informal workers. In addition, temporary workers are also in the same situation, women are disproportionately concentrated in informal employment and are thus without protection of the law or employment contract.

## **F. Retirement Discrimination**

Retirement discrimination is a kind of institutional discrimination. The law expressly provided that men and women are different. What's more, women and women are different because of their different work. The focus on the differential retirement policies for men and women is one of the most critical debates taking place in China today. Female laborers must retire at 50 while male laborers can work until 60 (senior female cadres and professionals retire at 55 while their male counterparts retire at 65). These provisions make the issue complicated, and diminish the consistency of women's voice. The current policy is to encourage blue-collar workers to retire early. For example, people who retire early may get more benefits from government than they can get from the company. It affects women's expression on legislative change and restricts differences of opinion in the workplace. No consensus has been reached in the issues concerning women for over ten years.

## **II. NGO and legal countermeasures of women's organizations in China**

### **A. Legislation**

The amendment and implementation methods in various regions on "*The Law on the Protection of Women's Rights and Interests* ": Included in the basic state policy of gender equality and the prohibition of gender discrimination (the 27th amendment) prohibits the different retirement policy that women should retire

earlier than men. But there is no definition of gender-based employment discrimination. In particular, there is no definition of sexual harassment and general performance of gender-based employment. Article 40 prohibits sexual harassment against women. But there is still a lack of clear definition of sexual harassment in the law. This provision is included the chapter of personal rights rather than labor rights. It is equivalent to exemptions of employer's liability. Many victims don't know how to collect evidence of sexual harassment, and they don't know their rights and remedies when they are subject to violations in the workplace.

**In the Implementation Measures of the Law on the Protection of Women's Rights and Interests in Shaanxi**, the definition in international law on gender discrimination and sexual harassment are included in local regulations, it provide that people's governments at and above the county level should include the bearing fees for the rural women during their pregnancy, maternity, and lactation periods into the reimbursed range of rural cooperative medical systems, and reimburse the expenditures in accordance to provided criteria. It also provides for employers to sign a contract when hiring women employees.

**Article 18 of the Ways for the Implementation in Guangdong Province establishes that, "An employer unit shall not due to marriage, pregnancy, maternity leave, lactation and other cases, decrease the wages or other welfare of a woman worker, or unilaterally cancel the contact with the woman worker, and when alter the occupation of a woman worker, it should ask for the agreement of the woman worker ex ante."** Local legislation has made greater progress than the Women's Rights and Interests Protection Law.

The Law of Employment Promotion of 2007 (went into effect in 2008). There are a total of seven words of "woman", while six are in Article 27:

"The State guarantees that women enjoy the rights of labor equal with men. Except the types of work of the occupations that the state has provided as unsuitable to women the employer unit shall not take gender as an excuse so as to refuse the employment of women or increase its recruitment standards for women. As a work unit recruits a woman worker, it shall not regulate or constrain a woman workers marriage or child bearing functions in its labor contract." However, Article 27 still maintains that the State can establish certain occupations as unsuitable for women. This categorizations risk stereotyping and segregating women into low paying career options.

Article 62 for the first time provides a cause of action for gender discriminatory employment practices. But there are not any influential proceedings on the grounds of this.

The Labor Contract Law of 2007 has two words of "woman".

The law states that no employer should rescind its labor contracts with a woman

worker during a period of pregnancy, delivery and lactation period (Article 42).

As for collective contracts, the law requires, “the labor party in an enterprise may sign with the employing unit some specific collective contracts concerning labor security and sanitation, protection for women workers’ rights and interests, adjustment mechanism for wages, and so forth.”(Article 52) **The All China Trade Federation’s recent issuance of “Specific Suggestion on the Collective Contract to Protect Female Workers’ Rights and Interests “** is mainly a response to article 52. This Suggestion calls on all trade unions in China to sign collective contract with enterprises and/or employers. A bad result is that a large number of female temporary workers were dismissed.

In addition, the administrative law also has promotions: such as legislation on domestic workers. The Household Service Regulations in Beijing which includes a collective contract came into force in January 2007. The Ministry of Commerce asked Beijing University Women's Legal Research and Services Center to write a draft municipal legislation related to domestic workers. Shaanxi Province is trying to launch a domestic workers union, and also attempt to establish a local "Home Economics Management Regulations". Some of the issues still to be clarified deal with the lack of clear objectives in the law, what’s the relationship between the LPWRI and the municipal legislation, should there be a separate legislation related to domestic workers; Should it be gender neutral?

## **B. Legal aid**

Some of issues raised through litigation by centers such as the Women's Legal Research and Services Center of Beijing University, The Center for the Disadvantaged at Wuhan University, The Center for Women’s Rights and Development of Northwestern Polytechnical University have done some advocacy on public interest litigation. Some of these litigation efforts include, sexual harassment lawsuits by Beijing University Women's Legal Research and Services Center, and a milestone law suit involving injury to the fetus of a female employee by The Center for Women Rights and Development of Northwestern Polytechnical University.

## **III Present problems**

Despite so much efforts, many problems still remain.

### **A. How to balance, equality advocacy, prohibitions against discrimination and Special Protection in the guiding ideology of legislation promotion?**

China has always attached much importance to positive advocacy. But in the implementation report to CEDAW, we have being questioned on how to implement



the Convention without a definition of gender discrimination. To provide for specific legislation of prohibiting discrimination ought to be our task in the future. And we should reconsider the side effects of women's employment special protection on the basis of National Welfare in planned economy. Otherwise it will become the obstacles of competitions in new market economics. We also need to solve the problem of internal conflicts of law.

### **B. Excessive competition in market economics and discriminatory preferences of employers need a correction of laws and policies**

The major reason why employment discrimination occurs widely in China is due to the oversupply of labor in labor market. It is difficult to get a job, but it is a large range of employee selection to employers. Another reason is the abuse of the right of "choosing the best one" in people's mind and the insensitivity to discrimination. Discrimination in recruitment happens mostly in indirect ways.

### **C. How to avoid the ignorance of gender discrimination in the fight against employment discrimination?**

Combined with household registration, appearance, disability and other factors, gender discrimination will seem to be hidden in employment. Legislation is too principled, and there is no definition of gender discrimination.

### **D. The awkward law and gender discrimination in employment**

#### **Case 1 Pregnancy Discrimination**

In 2005, Ms Tang was dismissed by Ministry of Commerce because of some nominal reasons. The real reason was her marriage and pregnancy. So she brought a civil action in Beijing Dongcheng District People's Court after her complaint failed with the Department of Personnel. The employer said they dismissed Ms Tang because she has not filed out the marital status information truthfully. The First Instance judgment of Dongcheng District People's Court said, Ms Tang is a civil servant of the Ministry of Commerce, this case is out of the range of admissibility, the plaintiff should file a complaint to the government personnel department as same level as defendant, and the Court rejected Ms Tang's prosecution.

#### **Case 2 Retirement Discrimination**

Series of early retirement cases have been reported by domestic media. In July 2007, approximately 200 female health care staff members in Tangshan who worked in professional or technical positions were forced to retire at the age of 50. In fact some of the hospitals in Tangshan had completed the retirement procedures without these women's consent or signature. The women were given no intimation that they were to

leave their jobs within a few days. Similarly, in Zhejiang province, a majority of the teachers, doctors, anesthetists, engineers, accountants, journalists and senior editors who were forced to retire at 50 refused to retire in such arbitrary fashion. The women alleged that the employers completed all the retirement procedures and even illegally changed employees' professional titles in order to provide them with a reduced pension. In North West University at Xian, many female "contract cadres" whose jobs were teacher and doctors were forced to retire at 50 just because their original identities were workers. Many health care professionals working in a particular district in Shanghai were also forced to retire at 50. Most of them were doctors, pharmacists, senior nurses or accountants who worked in the hospital. The health department explained that these women were workers in their personnel file. Although some of these cases have been taken to court, currently, no one has won a case in either arbitration commission or in court.

### Case 3

In 2005, Zhou Xianghua, a cadre of the Pingdingshan Branch of China Construction Bank, affirmed that the Bank's requirement of her retiring at 55 violated the Constitutional articles about gender equality, not suitable for the actual situation of social development. She initiated labor arbitration and was rejected, and then she went to the local People's Court and sued the Bank. The First Instance judgment regarded that the Bank's requirement met the national policy and law. Her claim was rejected as well.

### ENDNOTES

<sup>1</sup> <http://www.nongjianv.org/old/club/publishing/lunwen/31.htm>

<sup>2</sup> Xue Shaoyun (2004) 'Observation and Reflection on Informal Employment in China: A Survey on Informal Employment in Six Urban Communities'. Wuhan Family Service Centre.

<sup>3</sup> The statistics refer to 'the Second Survey on Chinese Women's Social Status' and 'The Yearly Book of Labour Statistics in China' which can also be found in the following articles: Jiang Yongping: 'Informal Employment and Gender Analysis of Chinese Labour Market' and Tan Lin and Li Junfeng: 'Gender Analysis on Informal Employment in China'.

<sup>4</sup> For example: 'Notice on Preferential Policies For Laid-Off Workers Engaging in Self-Employed Business' and 'Notice on Further Improvement of Small-Amount Loans for Laid-Off Workers'

## **Ye Jingyi**

### ***Informal Employment in China and Female Workers in Informal Employment***

#### **I. Contemporary Snapshot**

##### **New Updates and Trend of the Labor Laws and Policies in China**

In 1994, the Labor Law of the PRC was approved by the Standing Committee of the National People's Congress (NPC), the top legislature of China. After this, the Ministry of Labor and Social Security released 17 implementation guidelines and supplementary regulations.

In 2003, the State Council enacted the Occupational Injury Insurance Regulation to improve arrangements and management on occupational injury insurance, while in 2004, the State Council enacted the Labor Protection Inspection Regulation, which is a higher-level legislation regulating the enforcement and inspection of the fulfillment of employees' labor rights and interests. Other new laws including the Labor Contract Law and the Employment Promotion Law were enacted on 29 June 2007 and 30 August 2007 respectively, both taking effect on 1 January 2008. The Labor Contract Law requires employers to provide written contracts to their workers, restricts the use of temporary laborers and helps give more employees long-term job security. Under the Employment Promotion Law an employer may find itself in court if it discriminates against a job applicant on the basis of sex, age, religion, race or physical disability. The Labor Dispute Conciliation and Arbitration Law and the Social Insurance Law have been approved by the Standing Committee of NPC on 29 December 2007. A series of related laws and regulations will be released in the coming years which, together with the existing laws on labor and security issues based on the Labor Law (1994), will provide a comprehensive and sound labor and security legal system.

Besides related laws and regulations, the State Council also released a series of policies covering some key issues regarding employment and social security such as:

- Notice on further improvement of employment and re-employment (2005),
- Decision on streamlining the arrangement of the basic social insurance associated with old age (2005),
- Opinions of solving issues related to migrant workers (2006),
- Guidelines on pilot basic healthy insurance for urban inhabitants (2007).

China signed the International Covenant on Economic, Social and Cultural Rights in October 1997, International Covenant on Civil and Political Rights in October 1998. Until now, China has signed or ratified 25 international human rights conventions or treaties.

Table 1. Major Laws and Regulations Since 2003

Year	Major Laws and Regulations since 2003
2003	Occupational Injury Insurance Regulation
2004	Regulations on Collective Bargaining Labor Protection Inspection Regulation
2005	Women's Rights and Interests Protection Law
2007	Employment Promotion Law Labor Contract Law Workers Paid Annual Leave Regulation Labor Dispute Conciliation and Arbitration Law
2008	Labor Contract Law Implementation Regulations

*Note: Regulations are issued by authority of the State Council or Ministry of Human Resources and Social Security; Laws are issued by authority of the National People's Congress.*

## II. Informal Employment in China and Female Workers Engaging in Informal Employment

China was established as a socialist country, and under the leadership of Mao Tse-Tung, sectors of the economy were strictly delineated. Workers were employed by the state, which provided workers with lasting job security and guaranteed livelihood—‘the iron rice bowl.’ However as China took the path towards opening its economy, the employment situation changed dramatically. Millions of jobs were dropped from the state-owned enterprises, and created in manufacturing and services in the private sector, but the new private sector jobs were without the old guarantees of wages and benefits.

Fulfilling the promise of the neoliberal export-oriented model, China has truly been reaping the economic rewards. GDP growth has exceeded 10% every year since 2003. (See Table 2).

Table 2. GDP Growth in 2003-2007

2003	10.00%
2004	10.10%

2005	10.40%
2006	11.10%
2007	11.40%

*Note: GDP per capita = around US\$2,010 in 2006 (Cf. US\$50 in 1978)*

A significant characteristic of employment in China now is the massive use of migrant workers. There are estimated to be 150 to 200 million migrant workers- out of a working population of 770 million in 2007.

Another major phenomenon is the level of labor unrest and disputes that has accompanied the rapid economic development before sufficient safeguards had been built to ensure sufficient protection for the working and living conditions of workers. In 2007, there were more than 450,000 cases of labor disputes, according to the Ministry of Human Resources and Social Security. Most of the cases dealt with wage issues, and Guangdong had the highest number of cases. The desperation and discontent of workers has often been expressed through direct actions such as work stoppages or public blockades (such as of highways), with participation of workers at times reaching thousands.

The rapidly increasing number and scale of labor disputes have been a major reason for the enactment of a major revision to the labor law, in spite of the strong opposition of foreign business associations in China, such as the US Chamber of Commerce.

### **A. Definitions of ‘Informal Employment’ in China**

Informal employment in China is usually officially referred to as ‘flexible employment’ (*linghuo jiuye*). Common views by researchers have been arrived at that informal employment should comprise employment in informal sectors as well as non-standard employment in formal sectors, which is also shared in this article.

Employment in informal sectors: Informal sectors, according to the definition by the ILO, refers to those micro or small productive units which are always isolated, unstable and vulnerable engaging in production and distribution of goods and services. Lacking capital, managerial skills and preferential supports from authorities, the managers of those units in informal sectors always suffer from disadvantages regarding market access, fair competition and public services, while they also provide their workers with highly unstable employment with low and unstable wages only for subsistence, not to speak of decent jobs. The informal sectors in China are mainly composed of small-scale business units outside of the legally registered and separate bodies including companies, public institutions government agencies and civil societies: (1) micro business units set up by individuals, families or partnerships such as self-employed workers, family-based handicraft operations and sole proprietorships with less than seven employees (*ge ti hu*); (2) public labor organizations based on communities, enterprises or NGOs aiming at creating jobs and wages; (3) casual

workers, vendors and other workers working at all other labor organizations not covered by the existing legal system.

Non-standard employment in formal sectors: Non-standard employment in formal sectors refers to all the kinds of special employment that differ from standard employment in working arrangements, ways of working and employer-employee relationships, including flexible employment, temporary employment, non-fulltime employment, contractual employment and seasonal employment. The formal sector is composed of independent legal bodies which are legally registered, have much more capital, advanced managerial skills and preferential support from government agencies, and are able to provide their employees with more stable positions and higher wages. In China, non-standard employment includes: (1) the informal workers in formal enterprises, public institutions, government agencies and civil societies such as temporary workers, seasonal workers and hourly-paid workers; (2) workers working in flexible ways in formal enterprises, public institutions, government agencies and civil societies such as flexible workers and non-fulltime workers; (3) freelancers with high skills such as writers and interpreters. It should be mentioned that the non-standard employment can also exist in the employment in the informal sectors.

## **B. The Background and Development of Informal Employment in China**

Before the introduction of reform and opening up policy in 1978, there had been distinct separation between the urban and rural areas. Rural peasants mainly made their living on the land while urban workers formed life-long and fixed labor relations with the state-owned enterprises (SOEs) under the central planned economy, so both informal sectors and non-standard employment rarely existed.

The opening up of the economy accelerated and deepened in the 1980s and 1990s, bringing to workers a wrenching change as the economy changed from one where most workers had guaranteed jobs with full state-provided benefits upon completing their education, to one where one's job and the terms of one's jobs depended on market demand. With the rise of the private sector, millions of industrial workers were laid off from unprofitable state-owned enterprises or enterprises that could not withstand foreign competition, and thus lost their 'iron rice bowls'. The informal employment in China arose and gradually developed together with the development of competitive labor market and diversification of flexible working relations after China set up the socialist market economy.

1. *Great employment pressure arising from the reform of SOEs, urbanization of rural areas and the huge amount of newly added working population*

The reform of SOEs is an important part of the whole market-oriented reform of economic institution in China, during which many SOEs went bankrupt or underwent reconstruction and a large number of workers were laid off. According to the estimation of the Asian Development Bank, about 37 million workers were laid off or redirected from 1995 to 2001 while, during the same period, only 17.5 million jobs were provided by private and foreign enterprises. In 2006, there were still 8.4 million registered unemployed workers in urban areas. Besides the existing employment pressure mentioned above, there is also the huge number of newly added working population. Take the situation of 2006 labor market, for example: the whole newly added productive population in urban areas over the country rose up to nine million and the number of the whole labor population in urban areas waiting to work was more than 25 million, while the newly added positions provided was estimated to be only 11 million, so the deficit of jobs was as high as 14 million. During the process of urbanization, about 150 million rural migrant workers in total rushed to urban areas to find jobs. The statistics mentioned above all demonstrate the tremendous employment pressure facing the Chinese government which is no longer able to provide enough formal job positions in the formal sectors and naturally turns to the new approach of informal employment, which features easy access and large capacities to absorb productive populations to alleviate the great employment pressure.

## *2. The influence of global trend of informal employment*

A lot of workers engaging in simple and manual jobs were squeezed out by the advanced technologies applied in the enterprises and transnational corporations, which, in order to reduce company costs as well as keep their competitive advantage, always contract their non-core businesses to developing countries with cheaper laborers. Workers are dispatched from traditionally formal working places to various small and flexibilized production units. The working time, methods of wage calculation and management of workers also vary dramatically. China, with its abundant and cheap labor resources, has been considered one of the best investment destinations and has naturally been influenced by the related trend of informal employment.

## **C. The Scale and Composition of Informal Employment in China**

There is a lack of official statistics specifically related to informal employment in China. Concrete statistics supporting the present overview of informal employment such as the whole scale of it and gender ratios, etc. are rare. This article is mainly based on other related official statistics and some regional surveys which are also shared in the main existing research.

According to official statistics, it is estimated that the working population in urban areas engaged in informal employment was about 80 to 100 million in 2002, while some scholars consider the ratio of working population engaged in informal

employment to the whole working population in urban areas to have risen from 13% in 1998 up to around 30%. Among this number, the number of workers in the informal sector overall is 27.07 million, accounting for 42% in proportion while the number of workers in traditionally formal sectors accounts for 58% in proportion. A newly released research report in 2007 by the Shanghai-based Fudan University (FDU) claimed that the whole number of the working population engaged in informal employment in urban areas is up to 130 million, accounting for more than 40% out of the total urban population, whose contribution to GDP is more than 35% of the whole population.

The whole of the working population engaged in informal employment may fall into categories as follows: 1) the migrant workers, 2) the urban laid-off workers (*xiagang*) and 3) the newly added productive populations in urban areas, among which migrant workers account for the majority. One distinct trait of the working population engaged in informal employment is that the average educational level is very low. According to the FDU report: half of the population ended in junior high schools (46.4%) while only 8.5% of them received tertiary or university education; for the rest of the population, 26.6% went to senior high school, 11.6% elementary school and 7% below primary school or illiterate.

With the deregulation of the labor market since 1978, those entering wage labor have been much more likely to enter informal work.

From the perspective of professions and employers involved, informal workers include informal employees such as temporary workers (*linshi gong*), hourly wage workers (*xiaoshi gong*) and dispatched workers (*laowu paiqian gong*) in traditionally formal sectors and units; workers in urban working units offering household services without profit or creating more positions for the unemployed; owners and employees of sole proprietorship or micro and small-sized enterprises; street vendors; and those professions requiring special skills including writers, interpreters and actors which is totally a very small amount, covering from the tertiary industry, especially the wholesale and retail trade and catering, to labor-intensive construction, manufacturing and mining of the secondary industry, to some services requiring special skills.

Those statistics mentioned above fully demonstrate the important role in enhancing the economic development and solving the employment issues for the huge capacity to absorb the unemployed and broad coverage of industries and professions of the informal employment.

Below are further descriptions of the main groups of workers composing informal laborers in China.

#### 1. *Migrant workers from rural areas*

It is estimated that now in China there are totally 150-200 million migrant workers, the majority of whom are engaged in informal jobs. Among all the laborers participating in the secondary industry, migrant workers from rural areas account



for 57.6% in number, even with a higher proportion especially in the processing and manufacturing industry (68%) and construction industry (80%); and among all the laborers in the tertiary industry, migrant workers from rural areas account for 52% in number. In 2005, migrant workers are mainly engaged in the following sectors: construction (19%), manufacturing of electronic parts and appliances (17%), manufacturing of clothing and footwear (15%), hotels and restaurants (11%) and business services (9%), which in total comprise more than 70% of all migrant workers.

## 2. *Urban laid-off workers (xiagang)*

According to domestic surveys, 70% workers laid off by SOEs turned to informal employment especially in local communities. A regional survey<sup>i</sup> launched in Wuhan city, the capital city of the Hubei province in central China, shows that only 20% of the workers laid off by SOEs and collectively-owned enterprises could find other jobs in SOEs and collectively-owned enterprises while the majority of them realize their re-employment through self-employment or working at private enterprises. The laid-off workers got re-employed mainly in the tertiary industry such as community services for public interests by ways of setting up own micro-businesses (45.1%), short-term temporary workers (25.5%) and others (23.2%), covering from household care (38.5%), management of community services (24.2%) to public service in communities and others (22.8%).

Another survey launched in six communities of six different cities in 2002<sup>ii</sup> reveals that among the 918 laid-off workers engaged in informal employment involved in this survey, only 28.9% of them had signed labor contracts. The survey in Wuhan also demonstrates that only 25.1% of laid-off workers realizing re-employment through informal employment never changed their jobs while 67% of them had changed jobs twice to four times. Such instability and vulnerability of informal labor relations is partly attributed to flexible arrangement of informal employment in terms of working time, workplaces, way of paying wages and administration, which, without effective laws and regulations related in place, probably are conducive to the infringement of labor rights and interests.

## 3. *Newly added labor force in cities (university graduates and the informal workers engaged in high-end industries)*

The number of university graduates in 2006 was 4.13 million, was 4.95 million in 2007 and will hit 7.1 million in 2010. Employment pressure facing more and more university graduates rose not only from the huge volume reflected in the statistics above but also from some structural issues. Given the traditional obsession with and preference for jobs in formal sectors in developed cities, a majority of university graduates prefer doing casual jobs such as software designer, translator and or artist in big cities such as Beijing and Shanghai, rather than having a stable and formal position in less developed regions in central and west China. But the

group of university students who voluntarily choose to take informal and highly unstable jobs, with their greater competitiveness of education and professional training, on average are able to earn much more while being less exposed to occupational risks than the other two groups mentioned above. There are also some freelancers or part-time professionals with special skills such as interpreters, tourist guides, writers and actors who voluntarily engage in paid non-standard work, having strong bargaining power in the labor market. Some researchers think that it is a trend of future ways of employment in China. The total number and the proportion of this kind of high-end informal employment is very small compared to the migrant workers and laid-off workers engaging in informal employment.

#### **D. Features of Informal Employment in China**

1. Labor relations in informal employment is always unstable and vulnerable. Workers engaging in informal jobs, whether high-end or low-end positions, are no longer fully protected by nor do they abide by laws and regulations. A major reason for this is the small number of signed labor contracts.
2. Those in informal employment have weak bargaining power and the employment quality of most informal workers is very poor.
3. Workers are strongly polarized into low skill and low-paid, vs. high-skilled and highly paid. Except for those freelancers or professionals with special skills, most informal workers, lacking knowledge and skills, are engaged in the informal sectors or non-standard positions of formal sectors. This non-standard employment helps to relieve the problem of subsistence and the poverty of the workers but is far from providing decent work conditions.
4. Hard work with low compensation. Workers face discrimination compared to formal workers for equal work done, and wages are subject to delay or deduction. It was reported that in 2004, the average annual income of migrant workers was around 8,000 RMB compared to 15,000 RMB for their urban counterparts. The 2007 Fudan report (referred to earlier) claims that there are huge income gaps between informal workers in different industries and regions. According to the data of the report, totally 44.8% of them earn 401-800 RMB per month and only 3.5% of them can earn more than 2,000 RMB per month.

Wages of informal workers are mainly calculated on the basis of working hours, and partly on the basis of pieces they have finished. A survey in Zhejiang Province in eastern China also reveals that among all the migrant workers in this province, 7.5% of them earn less than 600 RMB per month, which is even lower than the monthly minimum wage of this province. In industries which absorb a lot of migrant workers, such as the construction industry, the problem of wage deduction and back wages is serious. Those migrant workers working in formal sectors or

units as temporary employees are always discriminated against relative to the formal employees in terms of wages and welfare. The laid-off workers who manage to get re-employed by means of informal employment earn much less than before. According to a spot check, 30.2% and 34.9% workers could earn 300-500 and 500-1,000 RMB per month respectively before they were laid off, while up to 87.7% laid-off workers only got 300-500 RMB per month when they found other informal jobs in the communities.

5. Work having long hours and requiring great physical strength. It was reported that there was a macro-sized private enterprise in Zhejiang province (a coastal province in China) hiring more than 5,000 migrant workers who worked for ten hours a day with only one day for rest every month. As their wages were paid according to the pieces they finished, migrant workers had to extend working hours to get more wages. A survey published by the All-Sichuan Province Federation of Trade Unions (Sichuan is an inland province) shows that a garment limited company in that province worked continuously 13-17 hours a day for five days. To our particular concern, it was reported that more and more migrant workers organized collective work strikes against the heavy workload and wage delay or deduction. In other words similar conditions of informal work are being found in all regions of China.
6. Poor conditions at workplaces, lack of proper occupational safety and health (OSH) arrangements and frequent workplace accidents. A survey from Sichuan province revealed that 62.2% migrant workers had not been provided with labor protection items, 57.75% had not been trained on safe working, and 9.3% had experienced occupational injuries once while 4.23% twice. Because some small enterprises or workshops put the workplaces, the dormitories and the warehouses together with disorderly management of chemical substances, migrant workers working at such enterprises or workshops, directly exposed to dangerous even exotic substances or gases, were subject to various occupational diseases. Such illegal employment practices as forced labor and child labor were frequently observed in small coal mines and workshops. Even those migrant workers offering simple services in urban communities are mainly involved in such dirty and tiring work.
7. Workers involved in informal employment are mainly excluded from existing social security arrangements. According to related research of the Ministry of Labor and Social Security (now renamed the Ministry of Human Resources and Social Security), by 2004, only less than 30% informal workers had been found to have the basic old age insurance scheme and less than 10% in the basic medical insurance scheme, while the national average coverage of these two basic social insurances were 46% and 31% respectively. Regional statistics revealed more serious situations: Only 3.41% migrant workers working at enterprises of county level and above in Sichuan province took part in the industrial injury insurance while 0.84% of unemployment insurance and 2.99% of old age insurance. Apart

from employers' intent to evade responsibility to insure their workers, reasons for such low coverage of migrants in social security schemes include: low awareness of workers regarding such schemes; low monitoring of companies and enforcement of relevant laws; and the tendency of migrant workers to frequently change jobs and workplaces.

8. Informal workers, with their unset and flexible ways of working and some new and more complicated forms of employment such as sub-contracted labor, are difficult to organize to join trade unions. The legal and government-sanctioned All-China Federation of Trade Unions functions in a top-down manner, rather than grassroots-upward, and has been focusing on formal rather than informal workers. Most informal workers would rather turn to their local relatives or hometown fellows when their rights and interests get infringed upon.
9. Migrant workers engaging in informal employment also face some institutional obstacles such as the *hukou* (household registration) system which administratively and economically obstruct migrant workers from fair market access, competition and social protection. These migrant workers are discriminated against in their children's education, housing, and subjected to abusive practices of the urban management forces (*cheng guan*).

## **E. Females Engaging in Informal Employment in China**

In spite of lack of official gender statistics on informal employment in China, some features can still be discerned as follows, according to present research:<sup>iii</sup>

The total number of female workers engaging in informal employment is slightly greater than that of male workers. Of those in informal employment, female workers are more than male workers among laid-off workers, while among migrant male workers are more in number than their female counterparts. Of female workers as a whole, 63.7% of them are in informal employment while only 49.5% of the male workers are in informal employment.

From the perspective of industries and occupations involved, female informal workers distinctly differ from male informal workers. Female informal workers are mainly engaged in the agriculture, forest, herd and fishing industries, the retail and wholesale trade industry, the restaurant and hotel industry, as well as the social services industry. On the other hand, male informal workers are mainly employed in the construction, transportation, warehousing, post and telecommunications industries. From this we can find that female workers are generally engaged in domestic and household-related work, especially in homemaking services in which the workers involved are mostly female. Even in those industries and units without distinct gender segregation, female and male workers still differ in the details of the jobs they do. For example, male workers in restaurants can easily access such positions requiring certain special skills

such as chefs, while female workers are mainly involved in supplementary jobs like the waitresses.

At the same time, within the manufacturing industry, which is composed of formal workplaces, women tend to be concentrated in assembly line work of light industries such as toys, garments and shoes, and are also found in large numbers in the information and technology industry. These industries are characterized also by outsourcing, thus contributing to the process of informalizing labor in China.

Gender segregation in industries and occupations in the end cause the gaps in terms of income and social benefits between female and male informal workers. According to estimates based on the Second National Survey On Chinese Women's Status (2001), the annual average income of female informal workers only accounts for 70.1% of that of the male workers in 1999—a gap that increased by 7.4% from 1990. The annual average wages of female workers in such industries with mostly female workers is generally lower than that of the industries with mostly male workers while in the manufacturing industry featuring no distinct gender disparity, the average annual income of female workers only accounted for 48.47% that of the male informal workers. Even in such industries where female workers are concentrated, such as the industry of wholesale and retail trade, restaurant and hotel and the industry of social services, the average annual income of female workers only respectively accounted for 74.02% and 60.39% that of the male informal workers. Female informal workers also enjoy less social security and benefits than male informal workers. Yet at one time, the average income of Chinese women was about 80 per cent that of men.

Besides the general problems facing informal workers mentioned above, the rights and interests to work, as well as the rights to the body and wealth of female informal workers are subject to be more severely infringed. Take the housekeeping industry with highest rate of female participation, for example; the Labor Law fails to apply to the relations between the individuals and families, and housekeepers are subject to physical injury and sexual harassment from the hosts of the families they serve.

Informal employment to some extent helps female workers to balance work and raising children as well as housekeeping. But in all only a very small number of female workers voluntarily choose to engage in informal employment and the majority of them are forced to engage in informal employment of low quality.

We may conclude that the female informal workers are the disadvantaged in the whole group of informal workers, who themselves are the disadvantaged of the whole labor market. Given the different physical features of their gender, shortage of knowledge and skills, traditional views of women's role and responsibilities as well as gender related discrimination, female informal workers are generally unfairly treated in terms of compensation, social security and benefits and protection of legitimate rights and interests, causing them to suffer from poverty.

### **III. Official Responses to Informal Employment and An Overview Of Present Related Laws and Policies**

Given the huge employment pressure both in volume and structure, the Chinese government tends to encourage the development of flexible employment by devising regulations and policies to take advantages of the functions of informal employment in improving employment, alleviating poverty as well as keeping social stability. The policies below are intended to provide positive and institutional support to the development of informal employment:

1. Provide the laid-off workers with a series of preferential policies in the fields of finance, taxes and business administration to encourage them to get re-employed or self-employed, including offers of preferential treatment regarding tax and loans for laid-off workers engaging in sole proprietorship and partnership, provision of wage subsidies, and tax reduction or exemption to the small enterprises employing those laid-off workers.<sup>iv</sup>
2. Intensify the protection of migrants' basic rights and interests to work including the right to wages and right to OSH. Government at all levels specifically issued administrative measures regarding wage payment and industrial injury insurance of migrant workers and nationally launched special checks on their enforcement.
3. Encourage the development of the informal working sector in communities to create more jobs for public interests. At the national level, nine ministries including MOLSS and eight other ministries in 2001 jointly published 'Several Opinions On Improving Employment In Communities' in order to, by offering a series of preferential policies and training programmes, encourage and support the laid-off and the unemployed to organize themselves to set up some small units to provide simple services in communities. At the regional level, since the mid-1990s, Shanghai has been issuing comprehensive preferential policies to encourage the development of 'informal labor organizations' which absorbed urban laid-off workers and rural redundant laborers to get them employed or self-employed in communities and family-based workshops, providing socialized services for formal and big enterprises as well as engaging in works for the public such as public services, to get basic income and social security. The Shanghai municipal government provides the 'informal labor organizations' with a package of preferential policies within the first three years after the organization was set up, ranging from exemption from local taxes, preferential payment of social insurance, and free training for owners and employees on necessary skills, to securities for setting up loans. By the end of 2005, there were a total of 34,000 informal labor organizations in Shanghai, involving up to 355,000 laborers. The development model of informal labor organization in Shanghai was crowned as the 'Shanghai model' by ILO.

In reality, however, the success of ‘Shanghai Model’ is a rare case. Most of the preferential policies are still far from effective and fall short of expectations.

4. A series of laws and regulations were promulgated to regulate non-standard employment including Some Opinions on Issues of Non-fulltime Employment by MOLSS in 2003 and the newly published Labor Contract Law in which special chapters are included which set out rules regarding non-fulltime employment and contract laborers. However the Opinions issued by MOLSS are not enforceable.

On the other hand, the new Labor Contract Law made effective in January 2008 has given much hope to workers – in spite of various employers’ maneuvers to evade it. The new Labor Contract Law stipulates that every employee should have a contract which lays out all the workers’ rights and entitlements, and any employer who fails to do so must pay two times more compensation to the workers. It also introduces more job security, regulates and limits part-time and dispatch labor, and reduces use of short-term contracting which had been widely used by employers to avoid accident pay, health insurance and so on. Now, after two short-term contracts, a permanent open-term contract must be signed.

5. The coverage and levels of policies and laws regarding social security were improved. The MOLSS issued a series of circulars to regulate issues such as how to take part in the basic old-age and medical insurance for such flexible laborers as urban self-employed and freelancers, including some new arrangements on the responsible for paying premiums, the base and rate of payable premiums as well as the payment procedures.

Present laws and policies mainly focus on key groups involving informal employment such as migrant workers and laid-off workers, and lack whole and comprehensive regulations and supervision. Moreover, in spite of good government policies and incentives to encourage the development of informal employment, laws and regulations for the protection of labor rights and social security on informal employment remain inadequate and problematic. The major problems are:

1. The present labor law, with a limited coverage, applies to the labor relations between employees and their unit employers only and not to the labor relations between individuals, especially housekeepers and the families they serve, who are explicitly excluded from the labor law.
2. Labor standards regarding wages, work hours, rest and leave in the present Labor Law are mainly defined on the basis of formal employment, failing to meet the requirements and needs of flexibilized and informal employment.
3. The present social security arrangements can not match the development of informal employment. The existing social insurance system involving old-age and medical insurance etc., featuring high rates and payments, designed based on sole and formal employment relations between employees and their unit employers.

Those social insurances are registered, declared and paid for by the employers. But informal workers, which usually have no employer (or are self-employed) or who have more than one employer (i.e. if they have part-time jobs) with unstable positions and low income, are actually excluded from the present social insurance system.

4. Existing laws and policies are far from fully implemented and enforced. Informal workers applying for preferential treatments in tax and finance are always frustrated by the complicated formalities and long period of waiting while related authorities award treatments without clear standards for doing so.

#### **IV. Conclusions and Suggestions**

Given the severe employment situation in China as well as the role of informal employment in improving employment and alleviating poverty, absorbing a large number of laborers, informal employment will not be a temporary model but a long-lasting form of employment. We think that laws and policies should focus both on encouraging the development of informal employment and the protection of related rights and interests of informal workers:

1. To make different policies and regulations regarding employment in informal sectors and the non-standard employment respectively according to different key features and issues in two fields. For informal workers in informal sectors, more preferential policies, such as tax and financial policies for small enterprises as well as sole proprietors should be issued and more efforts should be made to simplify the administrative registration formalities, to reduce chargeable items and low market access. Governmental agencies should provide public services in the form of information, consultation and training to micro and small enterprises in informal sectors and design a package of social insurance arrangements suitable to informal laborers based on voluntary participation, while creating more preferential policies to guarantee that more and more informal workers are likely to benefit from social assistance and the social welfare system. For workers with non-standard employment (in the formal sector), great efforts should be made to standardize enterprises' employment practices towards equal pay, social welfare and security among informal workers and formal workers doing equal work.
2. To improve laws and regulations regarding protection of rights and interests of informal workers.
  - (1) To expand the coverage of the Labour Law
  - (2) To get informal workers involved while efforts should be made to regulate non-standard labor standards so that they guarantee informal workers' rights and interests. Government of all levels should strictly implement



related laws and regulations, especially cracking down on such illegal practices as employing child labor and forced labor and lower economical and administrative restrictions against migrant workers while providing them with securities on housing and education of their offspring.

3. Government of all levels should create an educational and training system suitable to informal employment to offer more opportunities for informal workers' upward mobility, fostering more technical talents to contribute to upgrading of industrial skills.

**Cai Dingjian Liu Xiaonan**

***Experts Draft of Anti-discrimination in Employment Law***

**Introduction to the Experts Draft on Anti-Discrimination  
in Employment Law**

**A. The Necessity of Enacting an Antidiscrimination Law in Employment in China**

The idea of equality is considered an important value in China. The Chinese Constitution stipulates that, “All citizens of the People's Republic of China are equal before the law.” “The State respects and safeguards human rights.” After the establishment of the People’s Republic of China, China has made great efforts to build an equal society, especially in eliminating the inequality caused by social economic status and gender.

After the implementing of the market economic reform, along with the rapid economic growth, the gap between the rich and the poor has widened rapidly in China, and various social problems such as unemployment has also emerged. With all these new social issues, among other things, China’s employment related discrimination has become so serious that it has even affected social harmony and stability. In recent years, we have seen some very serious cases and anti-discrimination lawsuits, which shows the seriousness of wide spreading discrimination phenomenon in China. However, the entire society lacks the idea of equality on employment and equal opportunity. The legal system is flawed, and judicial remedy for victims of discrimination is far from being established.

There is an urgent need in the current Chinese society for an anti-employment discrimination law for the following primary reasons:

First, employment discrimination is against a person's dignity and the right of personality, and anti-discrimination is to guard such rights. The so-called personal dignity is that each person shall have the right to receive other people's respect, free from being despised, being insulted and being treated unfairly. The most important aspect in personal dignity is the equal treatment. The unreasonable limitations set in employment process regarding gender, age, height, or appearance will cause the feeling of being insulted, which will violate the personal dignity. If such limitations are in the fields of higher school entrance, employment or promotion, a talent may be wasted because of such discrimination. Also, employment discrimination is not only

against one individual, it is against a wide range of population, and the harms it may cause is universal.

Second, the employment discrimination concerns the social justice, and the anti employment discrimination is to maintain the social justice. The social justice can only be achieved based on equal opportunity. The employment discrimination normally denies a person's equal participation, the equal entrance and equal treatment, which will lead to injustice in a society. In a society where discrimination is prevalent, it is impossible to have the true social justice.

Third, the employment discrimination can result in great waste of social resources. The unreasonable limitation and differentiation may prevent excellent talents from being employed or promoted. We have seen many bad examples. People were rejected to work for the government because of certain discriminative employment conditions, although they scored the best in the examinations; Sexual discrimination may cause many females not to be able to contribute their talent to the society; Discrimination against the carriers of the hepatitis B virus may prevent more than 100,000,000 people from working in the best suitable positions for the good for the society; the discrimination resulting from household registration hinder farmers and the relevant groups from fairly competing with those who have the right household registration. Therefore, employment discrimination is a great obstacle for building a society based on fair competition.

Fourth, the employment discrimination may damage social harmony and social stability. We have seen a case where a student from Zhejiang University stabbed the official after receiving discriminative treatments in a government job interview, which fully explained the serious social consequence discrimination can bring to the society. There have been more and more cases in China where social unrest was caused by discriminative treatments. For those who lost opportunity because of discriminative conditions, it is likely that they may be angry or even hate the society, and become the hidden unrest factors affecting the social stability.

Although there are some anti-employment-discrimination laws in China, such as the Labor Law, Laws on Protecting Women's Rights, Laws on Protecting Handicapped, which all contain certain provisions against employment discrimination, the current laws are not suitable for the need of the social development.

First, the scope of anti-employment-discrimination in the current laws is very narrow, so that many discriminative practices can still be free to be used. E.g., in the Labor Law, only four types of discriminative acts are prohibited, i.e., nationality, race, gender and religious belief. Other laws slightly extended the scope of protection, but some serious employment discrimination practices are not forbidden by any law, e.g., discrimination relating to household registration, appearance etc.

Second, the existing laws regarding anti-employment-discrimination are mostly some right announcement, which lack the safeguard and the implementation mechanism. For example, the laws are comprehensive with respect to protecting women and handicapped equal rights. However, discrimination against women and handicapped are everywhere, which shows the failure of law implementation and enforcement. When a woman is discriminated due to her gender, the primary recourse she has is to report to the Women's Association, which can rarely provide any comfort to the complaint. Although the newly revised the Law on the Protection of the Rights and Interests of Women provides that "if a woman's legitimate rights and interests receive is violated, the victim shall have the right to request either arbitration or litigation". However, such provision is rarely enforced by arbitration organizations or PRC courts. Also, if a governmental agency violates the relevant provisions in the law, it is free from being punished because PRC courts generally do not accept suits against government based on gender discrimination. Further, in case the violator is a private entity, the Labor Law or Civil Law of Principles also fails to grant rights to victims to sue the violators. The only recourse seems to be to sue the employer claiming there are breaches of employment contracts. Therefore, although there exist many protective provisions, there is no single effective way to protect victims of employment discrimination.

Therefore, we must make a law on anti-employment-discrimination, which should (i) provide the pertinent regulations in accordance with the current employment discrimination issues, (ii) provide clear definition regarding employment discrimination, (iii) establish special government institution in charge of law enforcement and (iv) provide effective remedies to the victims of employment discrimination.

## **B. The Feasibility of Making a New Law**

Although many people approve that China's employment discrimination to be quite common and serious, and it is necessary to formulate an anti-employment-discrimination law, there are also some people believe that it is not feasible to have such a law in China because the time for such a law has not come. Their primary reasons include: (i) China is still a developing country and anti-employment-discrimination is the business of developed countries. In China, economic development is the most important thing. If attention is given too much to equality, we may lose our competitiveness in efficiency; (ii) there is a huge population in China, and we are in a stage of over supply of labors. An anti-employment-discrimination law does not help on increase on employment; and (iii) it is employers' freedom to hire whatever employees they like and we should respect their rights.

China is a developing country and it should emphasize on the efficiency, and respects the employers' independent right. However, a long-term and sustainable development

should have a humanitarian foundation, and human's dignity and rights should be respected during economic development. If economic development becomes the only pursuit, human rights and dignity are constantly ignored, there will be serious social problems causing widening gap between rich and poor, increased criminal violations and social unrest. The 96th session of the International Laborer Conference held in 2007 issued a report "Equality at work: Tackling the challenges" which pointed out that the high economic, social and political costs of tolerating discrimination at work, and the benefits stemming from more inclusive workplaces surpassed the cost of dealing with discrimination. Discrimination bars people from some occupations, denies them a job altogether or does not reward them according to their merit because of the color of their skin or their sex or social background. This generates social and economic disadvantages that, in turn, lead into inefficiency and unequal outcomes. At the same time, significant and persistent inequalities in income, assets and opportunities dilute the effectiveness of any action aimed at combating discrimination. This may lead to political instability and social upheaval, which upset investment and economic growth.

Another aspect of anti-employment-discrimination is to take provocative actions against employment discrimination, and government should take more responsibility and employers are in the secondary role. In countries where anti-employment-discrimination is well implemented, there is no evidence that economic development is hindered by such implementation.

As for the relations between unemployment pressures with anti-employment-discrimination, the employment discrimination does not solve the employment problem, but is the solution for fair employment. Historically, employment discrimination does not result from over supply of labors, but from shortage of labors. Employment discrimination is created by the employers, not by the oversupply of labors with deeply imbedded in social and cultural systems. Anti-employment-discrimination does not reject selecting employees based on professional qualifications, but opposes those based on unreasonable employment conditions. Therefore, the employment discrimination has nothing to do with the size of the labor force.

**Anti-employment-discrimination is an employer' social responsibility.** There could have side effects on an enterprise which hires employees based on equal standards (e.g., a female worker cannot work during childbirth and the breast-feeding period). However, from a higher level, this is the enterprise's social responsibility. At the same time, the government must take measures to encourage the enterprise to undertake the anti-employment-discrimination responsibility, without which the good enterprises undertaking such responsibility may be disadvantaged.

Looking from the overseas aspects, particularly the developed countries, the legal regime of anti-discrimination in employment has already been relatively well

established, where there are not only anti-discrimination laws, and the detailed implementation regulations. The scope of anti-discrimination in employment is also very broad, including: sex, race (or nationality), religious belief, political viewpoint, marital status, nationality, age, disability and chronic illness, short-time duty, sex orientation, sexual harassment etc. **These countries' anti-employment-discrimination laws have not only been clear about the discrimination concept, but have also established special anti-discrimination organizations, and has provided effective solutions to implement the relevant laws.**

From the above analysis, China has already arrived at a stage that it must make an anti-employment-discrimination law, and it is currently a good time to make a law based on our own practice and the experiences we learned from foreign countries.

### **C. Our Thoughts on the Draft of this Law**

We have been focused on the following three issues when making the draft law:

1. This law should be the basic law on anti-discrimination in employment, and should cover the basic issues in field of employment discrimination.

According to the overseas experience on the legislation of anti-discrimination in employment, the anti-employment-discrimination legal framework normally consists of three levels: (i) anti-employment-discrimination fundamental law, e.g., Holland "Equal Treatment Law", the US "Civil Rights Law" (the seventh amendment). The anti-discrimination fundamental law mainly sets forth the discrimination concept and the applicable scope, enforcement agency and the mechanism for disputes; (ii) special laws aiming to resolve specific type of discriminations, such as the U.S. Employment Age Discrimination Law, Equal Wages Law, American Handicapped Law etc.; and (iii) in addition to the above, there are relevant anti-employment-discrimination related provisions in other laws, such as labor law, the civil law, criminal law, etc.

**Our draft law is a fundamental law in anti-employment-discrimination, which has set forth the definition, the applicable scope, the anti-employment-discrimination measures, the enforcement agency etc.**

2. This law should provide for the types of employment discrimination.

Presently, China's employment discrimination is quite common and serious. China's Labor law and Employment Promotion Law had only prohibits discrimination against nationality, race, gender, religious belief, handicap and infectious disease. This scope is very narrow, and fails to cover the scope recommended by the International Labor Organization, such as political views, social origin, age etc. In addition, the employment discrimination in China also

has certain Chinese characteristics, **such as discrimination against household registration, health discrimination, appearance, etc.** With a reference to the international experience and also based on the Chinese practice, this law should have a separate chapter dealing with each of above discriminative actions.

3. In order to make this law an enforceable and meaningful document, this law should establish an **independent equal employment opportunity commission, and the relevant remedial mechanism.**

As mentioned above, although there are some laws regarding anti-employment-discrimination in China, the effectiveness of such laws is weak. The main reason is that in such existing laws, there lacks effective implementation or remedial mechanism. There are no ways for an employee to take actions against employers for employment discrimination, and the violating employers will not be subject to punishment.

**One important experience we learned from those countries with good anti-employment-discrimination practice is that such countries have set up the anti-employment-discrimination enforcement agencies.** E.g., Holland has an equal treatment committee, whose responsibility is to take individual claims regarding employment discriminations. Parallel with the courts, the equal treatment committee plays important role in resolving employment discrimination related disputes.

Comparing with the judicial institutions, the special anti-employment-discrimination organization has the obvious advantage: (i) it is closer to the people. Comparing with the complex judicial process, a specialized agency can pay attention to resolve the issue amicably under a harmonious atmosphere. Bearing in mind in the employment discrimination cases, the conflicting sides are employer and employees (or potential), and normally the employee does not want to lose its job. Only as a last resort, the disputes may be resolved through court; (ii) the process with a special agency is free of charge, which lowered the victims' costs of dispute resolution; (iii) the special agency can initiate actions against employment discrimination, but a court generally can only act passively; and (iv) the special commission can have the expertise that a court does not have because the commission always has the freedom to invite experts in the areas which it requires the relevant special knowledge. As a result, from the overseas experience, victims of employment discrimination are likely to submit their disputes to the special commission rather than to the court.

**In addition to the quasi-judicial power, special agencies can provide consultation to the people in general and provide comments to the relevant government authorities, which may be important to further improvement of the practice of anti-employment discrimination.**

**Based upon the above, this law has provided for a specialized agency called the equality employment opportunity committee, and provided for in detail the establishment, authority, composition, procedures etc. Also, Chapter Four of this law provides for the remedial mechanism, in which we have set forth in detail the procedures for resolving a dispute with the committee. If an applicant is not satisfied with the results, she can further sue in court.**

#### **D. The Applicable Scope of the Law**

As the basic law of anti-employment-discrimination, this law is specific on the definition of the employment discrimination, i.e., an employer provides different treatment, reject employment or provide preferential treatment based on factors unrelated to an employee's professional capacity or working scope, which leads to the cancellation of employment or employment opportunity or affects equal treatments. **The law exempted the following seven types of actions from employment discrimination:** (i) the employer sets up certain reasonable standards based on the need of work, legal requirements etc.; (ii) the employer provides different treatments based on employees' qualifications and records of service as well as working achievements; (iii) the employer provides different treatments based on employee's working merits and ability; (iv) different treatments based on pregnancy or breast-feeding employees; (v) to provide special treatments to certain disadvantaged groups (for example to minority ethnics or handicapped); (vi) different treatments based on national security's consideration; and (vii) the religious organizations' certain employment matters.

In addition, this law applies to all the entities in China, and applies to the entire process of employment (covering pre-employment and retirement period).

#### **E. Measures of Anti-employment-discrimination**

In view of the current widely spreading employment discrimination, the Second Chapter of this law stipulates in detail the measures for each kind of employment discrimination:

First, the people's government and social organization's duty of anti-employment discrimination. All levels of people's governments and social organization must be responsible for supervising the employment discrimination matters in the areas it exercise administrative power.

Second, discrimination against social status is prohibited, including discrimination against farmer workers, regional discrimination, household registration discrimination etc.



**Third, sexual discrimination is prohibited.**

**Fourth, discrimination against handicapped is prohibited.**

**Fifth, discrimination against health conditions is prohibited.**

**Sixth, other forms of discriminations are prohibited, such as nationality, appearance, age etc.**

#### **F. Equality Employment Opportunity Committee**

Chapter Three of this law provides for an Equal Employment Opportunity Committee:

First, the levels of such committee. The committee shall be set up at both the central government and local government levels.

Second, composition and term of the committee. There should be one director, two deputy directors and certain number of committee members. Director shall be nominated by the chief of the government where the committee is set up. The term of office shall be 5 years. Members of the committee may include representatives of employers and employees, labor experts etc.

#### **G. Remedial Mechanism**

Chapter Four of the draft law stipulates specially the remedial measures for the victims of employment discrimination, which primarily include:

1. Conditions for submitting a claim to the committee: (i) applicant is the direct victim of discrimination or has direct interests thereto, (ii) there should be specific violator, (iii) there should be specific requests and facts and (iv) the claim is within the scope of acceptance for the committee.
2. There are reconciliation and the mediation system. The parties to the dispute may settle the dispute and sign settlement agreement. The settlement agreement, once signed, shall be binding.
3. **Burden of proof is shifted to the employer.** Under this system, an applicant is only required to provide to the committee with certain preliminary evidence of employment discrimination when it brings a claim to the committee, and it will be the employer's responsibility to prove that it does not exercise discriminatory acts.
4. Where parties to the dispute are not satisfied with the decision of the committee, they can further bring the dispute to courts. Also, if no appeal to the courts is

made, the winning party can apply to the courts for enforcement of the decision made by the committee.

In addition, this law also provided the punishments for violations, and there will be no fee for rendering a ruling by the committee.

**ANTI-DISCRIMINATION IN EMPLOYMENT LAW OF  
THE PEOPLE'S REPUBLIC OF CHINA  
(PROPOSAL DRAFT BY EXPERTS)**

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**Chapter 1 General Provisions**

**Article 1 (Aim of Legislation)**

In accordance with the Constitution, *International Convention on Economical, Social and Cultural Rights* approved by the Standing Committee of National Congress of the People's Republic of China, and relevant provisions of *Convention on Elimination of Discriminations in Employment and Profession 1958*, this Law is formulated to eliminate discriminations in employment, protect equal rights in employment of the citizens.

**Article 2 (Definition of Discriminations in Employment)**

Discriminations in Employment, as is prescribed in this Law, refer to the behaviors that employers discriminate, exclude or give special treatments to laborers basing on factors which are irrelevant to professional capacities and inner objective requirements of the profession, which therefore deprive and harm equal rights in employment of laborers.

Discriminations in employment include the following conditions:

- (1) Direct discriminations refer to the behaviors that employers discriminate, exclude or give special treatment to laborers basing on nationalities, genders,

status, religions, beliefs, disability, physical characteristics, age, health conditions, sexual orientation and other factors of laborers, which harm equal opportunities and treatment in employment and occupation of laborers.

- (2) Indirect discriminations refer to the conditions that employers do not make clear that they have discriminated, excluded or given special treatment to laborers basing on the above factors of discrimination, but what their conductions actually have resulted in unequal opportunities and treatment in employment and occupation of laborers.

The above behaviors have resulted in actual unequal adverse consequences to laborers.

### **Article 3 (Conditions not Regarded as Discriminations in Employment)**

The following conditions should not compose discriminations in employment defined by this Law:

- (1) Rational criteria and requirements prescribed by employers basing on objective requirements of the profession, specialized provisions of laws, as well as criteria and requirements which are necessary to relevant businesses and normal operations;
- (2) Special treatments given by employers basing on experiences, job categories and performance evaluation results of laborers;
- (3) Special treatments given by employers basing on personal strengths and capability required for the job
- (4) Special treatments for women who are in pregnancy or lactation;
- (5) Special treatments to a reasonable degree for disadvantaged groups (ethnic minorities, the disabled, etc) to realize equal opportunities and treatment;
- (6) Special requirements for laborers grounding on considerations of national security and special career loyalty;
- (7) Organizations, associations or leagues of religion employ individuals who have specialized religion to undertake works relevant to religious activities of the organization, associations or league.

### **Article 4 (Scope of Application)**

This Law applies to activities in employment and occupation for all employer units (including labor-dispatch units and employment agencies) within the border of the People's Republic of China .

In this Law, employment refers to vocational introductions, recruitments and employments; and in this Law, occupation refers to allocations of work posts after recruitment, remuneration, promotion, working hours, working conditions, professional trainings, labor securities, retirements and termination of labor relations, etc.

### **Article 5 (Status and Validity)**

This Law is the fundamental law in the field of anti-discrimination in employment. This law prescribes the definition, principles, measures and procedures of anti-discrimination in employment, and liability for malfeasances. Specialized provisions on anti-discrimination in employment prescribed in other laws are prior to this Law. Where there are no specialized provisions on anti-discrimination in employment, or the provisions collide with this Law, this Law should be applied.

## **Chapter 2 Measures of Anti-discrimination in Employment**

### **Section 1 General Provisions**

#### **Article 6 (the Governments' Responsibilities of Anti-discrimination in Employment)**

The People's Governments at all levels should ensure the enforcement of equal employment laws. Labor departments and personnel departments should strengthen the supervision of the fulfillment in equal employment and occupation of employer units who are within their administrative regions; and should correct timely the employer units who have discriminations in employment; and should give punishments according to law to the employer units who have severe discriminations in employment or have repeated discriminations in employment.

The People's Governments at all levels should create a circumstance of equal employment, make policies as well as take measures to support and assist disadvantaged groups and individuals who have difficulties in employment.

#### **Article 7 (Functions of Social Organizations)**

The Federation of Unions, the Communist Youth League, the Federation of Women, the Federation of the Disabled and other Non-governmental organizations should promote anti-discrimination in employment, and enhance equal employment, as well as assist laborers to vindicate their equal rights of employment according to law.

#### **Article 8 (Employer Units' Responsibilities of Anti-discriminations in Employment)**

Employer Units should guarantee laborers' equal rights of employment according to this Law, as well as other laws and regulations.

Where employer units recruit laborers, and where employment agencies provide vocational service, they should offer equal opportunities of employment and just professional treatments to laborers and shall not forward discriminatory requirements.

Employer units shall put clauses of anti-discriminatory in employment into their articles and bylaws, and shall take anti-discrimination as their social responsibilities.

**Article 9 (Prohibitions on Discriminations in Recruitment)**

Employer units shall not indicate or imply discriminatory qualifications of posts basing on the factors listed in the second term of Article 2 of this Law.

Employer units should not enquire applicants' family conditions, social relations, marriage, procreation, not-infective diseases and other personal information with the exception of the situation where the questions are directly relevant to the job category.

**Article 10 (Employers' Responsibilities of Labor Archives Keeping)**

Employer units should establish complete system of Labor Archives Keeping. Labor Archives should include original materials in recruiting procedure, labor contracts and all kinds of relevant materials.

**Article 11 (Prohibition of Arbitrary Dismissal)**

Employers shall not dismiss laborers basing on discriminatory excuses.

**Article 12 (Prohibition of Retaliation against Laborers)**

Employer units shall not retaliate against laborers because laborers have brought appeals, taken lawsuits, taken prosecution, brought accusation, assisted in investigation or offered testimony. Retaliations include reallocation of employee's post, bandh, debasement of headship, reduction of pay, dismissal or other ways to compel laborers to cease labor relation without any proper reason, with the exception of the situation where employee is not competent in his or her current position.

**Section 2 Discriminations against Status****Article 13 (Discriminations against Agricultural Migrant Workers)**

Agricultural laborers who enter cities for employment enjoy equal rights as other laborers. It is prohibited to set discriminatory restrictions against agricultural laborers who enter cities for employment, and it is prohibited to give unequal discriminatory treatments to agricultural laborers in employment and occupation.

**Article 14 (Discriminations against regions)**

In recruitment, employer units shall not refuse to recruit laborers from specific regions, and should not elevate criteria of recruitment aiming at laborers from specific regions or give them unequal discriminatory treatments in occupation.

**Article 15 (Discriminations against Household Registration)**

In recruitment, employer units shall not refuse to recruit non-local laborers because they do not have local household registrations, and should not elevate the recruitment criteria against non-local laborers, or give them unequal discriminatory treatments in occupation.

**Section 3 Gender Discriminations**

**Article 16 (Discriminations against Women)**

The State shall guarantee that women enjoy the equal right with men, to work. In recruitment, employer units shall not refuse to recruit women or elevate the recruitment criteria against women on the grounds of gender, with the exception of job categories and positions not suitable for women which are prescribed by the State.

**Article 17 (Equal Pay for Equal Work to both Male and Female)**

Women and men should be equally paid in the same work. Women enjoy equal rights with men in labor pays and welfare treatments.

**Article 18 (Equal Rights for Male and Female in Employment)**

Women enjoy equal rights with men in employment and occupation.

**Article 19 (Special Treatment for Women)**

During the period of recruitment and occupation of female laborers, articles which restrict rights of marriage and pregnancy of female laborers shall not be prescribed in the labor contracts.

When female laborers could not undertake their work because of pregnancy, employers should rearrange positions for them, and the new arranged positions shall not harm physical and psychological health of them.

Employers shall not reduce the salaries of female laborers, dismiss female laborers, or terminate labor contracts unilaterally because of marriage, pregnancy, maternity leave, lactation, etc, except for female laborers' requirements of terminating the labor contracts.

**Article 20 (Prohibition of Sexual Harassment upon Women)**

Employers have the responsibility to prohibit all kinds of sexual harassment to female in workplaces.

**Section 4 Discrimination against the Disabled****Article 21 (Responsibilities of the State to Safeguard the Employment of the Disabled)**

The State protects equal rights in employment of the disabled. All levels of People's Government shall create employment conditions for the disabled.

According to laws and regulations, the State offers tax incentives to the employers who employ disabled laborers and the disabled who operate individual businesses, as well as other supports on production, operation, technology, funds, supplies, fields etc.

**Article 22 (Responsibilities of Employer Units to Arrange Employment for the**

**Disabled)**

Governmental departments, social organizations, enterprises and public institution, people-run non-enterprise units shall accept the disabled for employment in certain proportion, as well as give the disabled right to choose suitable job categories and positions. The People's Governments of provinces, autonomous regions and municipalities shall constitute provisions to guarantee the employment of the disabled, as well as prescribe specific proportions of employing the disabled by local employer units according to actual circumstances. Compulsory measures against the breach of provisions shall be prescribed.

**Article 23 (Equal Rights of the Disabled during the Process of Employment)**

Employers shall not give unequal discriminatory treatments against the disabled in employment and occupation.

**Article 24 (Special Treatments for Disabled Laborers)**

Governments shall offer facilities in all public transportations and public places in order to facilitate out-door activities and commutations of the disabled.

Employer units shall offer working conditions and working protections which are adapted to characteristics of the disabled, as well as ensure that workplaces, equipments and living facilities could reach the criteria which are suitable for the movements and use of the disabled.

Employers shall offer post-technical trainings for disabled laborers in order to increase their work skills and technical levels.

**Section 5 Discrimination against Health Condition****Article 25 (Equal Rights in Employment of Pathogen Carriers)**

In recruitment, employer units shall not refuse to recruit laborers with the excuse that they are pathogen carriers of infectious diseases, and shall not dismiss in-service pathogen carriers of infectious diseases or allocate them to inferior positions. However, before they have been cured or their suspicions of infection have been eliminated, pathogen carriers appraised by the medical science shall not undertake works prohibited by laws, administrative regulations and sanitation administrative department of the State Council.

**Article 26 (Prohibitions of Arbitrary Physical Examinations for Employer Units)**

Employer units shall not carry out physical examinations irrelevant to jobs. But it is allowed to carry out physical examinations for laborers, or ask laborers to offer physical and healthy information grounding on requirements of public sanitation and special requirements of jobs. Results of physical examination shall be keep secret.

Information of physical examinations which are carried out by employer units with the aim of guaranteeing the healthiness of in-service laborers, shall not be used to give laborers discriminatory treatments.



## **Section 6 Discriminations in Employment in other Aspects**

### **Article 27 (Discrimination against Nationalities)**

In recruitment, employer units shall not refuse to recruit laborers with the excuse of nationalities, or elevate the criteria of recruitment against laborers of certain nationality, or give discriminatory treatments to laborers of certain nationality in occupation.

### **Article 28 (Discrimination against Physical Characteristics)**

In recruitment, employer units shall not refuse to recruit laborers with the excuses of physical characteristics such as stature, avoirdupois, visage, etc. with the exception of the situation that some jobs have obvious and necessary special requirements about those.

### **Article 29 (Discrimination against Age)**

Employer units shall not set irrational age limits, which harms laborers' equal rights in employment. It is prohibited to set age limits in job positions and promotions, and it is prohibited to give discriminatory treatments in the retirement age of men and that of women. For the purpose of giving advantage to women, it is allowed to prescribe that female laborers can retire five to ten years in advance under the condition of free will application.

### **Article 30 (Discrimination against laborers who have received criminal punishments)**

Employer units shall not discriminate workers who have received criminal punishments and refuse to recruit them only because they have crime records, except for the consideration of national security and special requirements of certain professions.

## **Chapter 3 Committees of Equal Opportunities in Employment**

### **Article 31 (Organization Structuring)**

The State sets up National Committee of Equal Opportunities in Employment taking charge of organizing, coordinating and guiding nationwide anti-discrimination in employment work.

Provinces and autonomous regions set up Committees of Equal Opportunities in Employment taking charge of organizing, coordinating and guiding anti-discrimination in employment work in their respective administrative areas.

Municipalities and cities divided into districts set up Committees of Equal Opportunities in Employment taking charge of receiving accusations and appeals brought by laborers relevant to employment discrimination within their local

administrative areas.

### **Article 32 (Organizations of National and Provincial Committees of Equal Opportunities in Employment)**

National Committee of Equal Opportunities in Employment consists of 1 director, 2 vice-directors, and a number of members. The director will be nominated by the premier of the State Council, and be approved by The Standing Committee of The National People's Congress through voting. The tenure of the director is 5 years and can be resumed. The director should come from legal experts or those who have acted as judges before. The vice-directors and members should come from representatives of relevant governmental departments, laborers, employers, legal experts and labor experts, and should be appointed by the State Council.

Provincial or autonomous regional Committee of Equal Opportunities in Employment consists of 1 director, 2 vice-directors, and a number of members. The director should be nominated by the nomarch or the chairman of the autonomous region and be approved by The Standing Committee of the People's Congress of the province or the autonomous region through voting. The tenure of the director is 5 years and can be resumed. The director should come from legal experts or those who have acted as judges before. The vice-directors and members should come from representatives of relevant governmental departments, laborers, employers, legal experts and labor experts, and should be appointed by the government of the province or the autonomous region.

### **Article 33 (Responsibilities of National, Provincial or Autonomous Regional Committees of Equal Opportunities in Employment)**

National, Provincial or Autonomous Regional Committees of Equal Opportunities in Employment fulfill the following responsibilities:

- (1) Study and draft policies on anti-discrimination in employment;
- (2) organize investigations and evaluate the current situation of employment discriminations, submit annual reports to the People's Congress of the same level every year, and promulgate evaluation reports;
- (3) constitute, promulgate policies and action guides on anti-discrimination in employment;
- (4) coordinate administrative enforcement of law on anti-discrimination in employment;
- (5) develop legal publicity and education on equal employment;
- (6) publish the list of employer units who have bad records of severe discriminations in employment if necessary;
- (7) edit and publish collections of legal cases on employment discriminations;
- (8) other authorities authorized or prescribed by laws.

### **Article 34 (Composing of Committees of Equal Opportunities in Employment in Municipalities and Cities Divided into Districts)**

Committees of Equal Opportunities in Employment in municipalities and cities divided into districts consist of 1 director, 2 vice-directors, and a number of members. The director should be nominated by the mayor and be approved by the Standing Committee of the People's Congress of the same level through voting. The tenure of the director is 5 years and can be resumed. The director shall come from legal experts or those who have acted as judges before. The vice-directors and members shall come from representatives of relevant governmental departments, laborers, employers, legal experts and labor experts, and shall be appointed by the government of the municipalities or cities divided into districts.

#### **Article 35 (Responsibilities of Committees of Equal Opportunities in Employment in Municipalities and Cities Divided into Districts)**

Committees of Equal Opportunities in Employment in cities divided into districts fulfill the following responsibilities:

- (1) receive laborers' appeals on employment discriminations;
- (2) carry out investigations according to laborers' appeals;
- (3) carry out investigations initiatively aiming at employment discrimination, report the results of investigations to the National Committees of Equal Opportunities in Employment and Committees of Equal Opportunities in Employment of provinces and autonomous regions, as well as inform the results to labor administrative departments of governments;
- (4) conduct conciliation on relevant appeals;
- (5) make award on relevant appeals;
- (6) carry out legal publicity and education on equal employment.
- (7) provide relevant information, consultation and trainings to governments and communities;
- (8) offer legal consultation and suggestions to parties;
- (9) where employer units severely breached this Law and Committees of Equal Opportunities in Employment deems necessary, the Committee may bring actions to court entrusted by individuals or groups who have suffered discriminations.
- (10) The Committees shall undertake obligations of secrecy for relevant evidences and information obtained in processes of investigations, conciliation, award and lawsuits. The Committees shall not publish the evidences and information to the public or divulge them to others without the consent of the relevant parties.
- (11) Municipal Committees of Equal Opportunities in Employment may exercise the authorities prescribed in this Article and Article 33.

### **Chapter 4 Relief Mechanism**

#### **Article 36 (Requirements of Appeals)**

Bringing appeals to the Committees of Equal Opportunities in Employment shall meet the following conditions:

- (1) the appellant must be a laborer who has direct interest with the discriminatory action, or be an individual or a social organization who are entrusted by the laborer;
- (2) there must be a specific defendant or defendants;
- (3) there must be specific claims and preliminary evidences;
- (4) the appeal must fall within the scope of cases acceptable to the Committees of Equal Opportunities in Employment.

#### **Article 37 (the Time Limit of appeal)**

Laborers who considers himself suffered employment discriminations shall appeal to the Committees of Equal Opportunities in Employment within 180 days after the occurrence of the discriminatory action.

The time limit of appeal specified above would be discontinued where one party claims rights to the other party, or one party applies for relief to relevant departments, or the other party consents to fulfill the duty. A new limitation shall be counted from the time of the discontinuance.

If the party fails to observe the time limitation prescribed in the first item of this Article due to force majeure or other proper reasons, the time limit shall be suspended. The time limit of appeal shall resume counting from the day in which the reason for suspending the time limit has eliminated.

#### **Article 38 (Acceptance of appeals)**

The Committees of Equal Opportunities in Employment shall accept an appeal which is considered meeting requirements of acceptance upon examination within 10 working days after the receipt of the appeal, and inform the appellant. As for appeals not considered meeting requirements of acceptance, the Committees shall inform the appellant in a written form, as well as explain the reasons. If the Committee does not accept the appeal or does not settle the appeal within the time limit, the appellant may bring an action to the court.

#### **Article 39 (Service)**

The Committees of Equal Opportunities in Employment shall send the copy of the bill of appeal to the defendant within 5 working days of accepting the appeal.

The defendant shall file a bill of defence to the Committee within 10 working days of receiving the copy of the bill of appeal. The Committee shall send the copy of the bill of defence to the appellant within 5 working days of receiving it. Failure by the defendant to file a bill of defence shall not affect the proceeding of the award procedure.

#### **Article 40 (Compromise)**

After the appellant appeals on employment discrimination, two parties may reach a

compromise of their own accord before the Committee of Equal Opportunities in Employment gives an award. Two parties may withdraw the appeal if the compromise agreement has reached.

#### **Article 41 (Investigation Power of the Committee)**

After accepting the appeal, the Committee of Equal Opportunities in Employment may carry out investigations on the situation of employment discrimination, and collect relevant evidences. The employer unit being appealed and other relevant units and individuals, have the obligation to assist investigations, and shall offer the objective information which they know.

The Committee of Equal Opportunities in Employment has the power to consult and make copies of employment records and other relevant materials for the purpose of collecting evidences. The unit being investigated shall provide convenience.

Investigators from the Committee of Equal Opportunities in Employment shall provide a certification issued by the Committee when they carry out the above mentioned investigations.

#### **Article 42 (Conciliation)**

Before giving an award, the Committee of Equal Opportunities in Employment shall first attempt to conciliate.

Conciliations of employment discrimination cases shall follow the principle of free will. The Committee shall fully hear the statements about facts and reasons of the two parties, and actively push the parties to reach the agreement.

When an agreement is reached by conciliation, the Committee shall make the conciliation statement. The conciliation statement shall clearly set forth the claims and the result of the conciliation. The conciliation statement shall be signed by the members of the Committee who preside the conciliation, and be stamped by the the Committee, then be sent to the two parties. The conciliation statement will come into force after the two parties receive it by signature.

The conciliation shall not be held in public, except for those that both parties to the dispute agree.

#### **Article 43 (Hearing)**

After accepting the appeal of employment discrimination, the Committee of Equal Opportunities in Employment may hold hearings if considering necessary.

- (1) The Committee should inform the two parties the time and location of the hearing 7 working days before the hearing;
- (2) Generally the hearing shall not be held in public, except for those that both parties agree. Hearings involving state secrets, business secrets and individual privacy shall not have the exception;

- (3) The hearing shall be presided by a committee member appointed by the Committee; if a party considers the host to have direct interest in the appeal, the party shall have the right to demand his withdrawal;
- (4) The parties may attend the hearing in person or trust agents to attend;
- (5) During the hearing, the parties may debate and the host may host the cross-examination.

#### **Article 44 (Burden of Proof)**

The appellant shall first provide the evidences through which the facts of discrimination by the defendant could initially be deduced with reason.

The defendant shall provide the evidences and reasons which could testify his action does not constitute employment discrimination.

The appellant should argue and testify that the evidences and reasons given by the defendant are untenable.

If the defendant cannot provide evidences and reasons, or the evidences and reasons provided are insufficient to testify the action does not constitute employment discrimination, the defendant shall take the legal liability for discrimination.

#### **Article 45 (Award)**

If the conciliation agreement is not reached or any party repents after conciliation, the Committee of Equal Opportunities in Employment shall make an award.

The Committees of Equal Opportunities in Employment shall give an award within 45 days from the day of accepting the appeal. Extension of the time limit necessitated by complicate appeals shall be approved of the Director of the Committee, and shall not exceed 15 days. The two parties shall be informed about the extension. If the award has not be given within the prescribed time limit, the parties may bring a lawsuit to the court with the dispute of employment discrimination.

The award statement shall clearly set forth the claim of appeal, the matters in dispute, the grounds upon which an award is given, the results of the judgement and the date of the award. The award statement shall be signed by the members of the Committee who preside the award, and stamped by the Committee of Equal Opportunities in Employment.

#### **Article 46 (Bring an Action)**

If a party refuses to accept the award made by the Committees of Equal Opportunities in Employment, he shall have the right to bring an action in the People's Court within 15 days of receiving the award statement. All award statements that have not been sued within the prescribed time limit shall be legally effective.

If the party of employer unit who brings an action because of refusing to accept the award loses the lawsuit, the employer unit shall bear all the litigation costs of the winning party.

**Article 47 (Accepting a Case and Trail by the Court)**

The People's Court shall accept the actions brought by citizens because of discrimination. The court shall trail the case in the civil litigation procedure or the administrative litigation procedure according to the facts of the case. The burden of proof shall be allocated according to the Article 44 of this Law.

**Article 48 (Implementation)**

The parties must perform the legally effective award statements within the prescribed time limit. If one party does not bring an action and not perform the award statement, the other party may apply for execution in the People's Court according to relevant regulations prescribed in the *Civil Litigation Procedure Law of the People's Republic of China*. The People's Court which accepts the application shall execute it according to law.

## **Chapter 5 Legal Liability**

**Article 49 (Legal Liability of Breach of Duties)**

For employer units who have breached any duty prescribed in this Law, governmental departments in charge shall give a warning and order rectification of the matter, and could impose a fine not exceeding RMB 10,000 in light of the actual circumstances. An award shall be given by the Committees of Equal Opportunities in Employment, or judgement shall be made by the People's to impose to bear the liability of violating the law.

**Article 50 (Legal Liability for Employer units' bylaws)**

If the bylaw of an employer unit violates law and regulations, and has constituted discrimination against laborers' equal rights of employment, governmental departments in charge have the responsibility to warn and order it to correct; if the employer unit refuses to abolish the illegal bylaw by itself, the relevant departments in charge shall announce the bylaw invalid, and may impose a fine not exceeding RMB 10,000 on the employer unit.

**Article 51 (Legal Liability for Labor Contracts)**

Where the labor contract signed by the employer unit and laborers violates this Law, and infringes equal rights of employment of laborers, the terms involving employment discrimination shall be invalid. If the discriminatory contracts have caused harms to laborers, the employer unit shall assume the liability for compensation. If any spiritual damage is caused, the employer unit shall give compensation according to the degree of damage.

**Article 52 (Legal Liability in Employment and Occupation)**

Where the employer unit violates this Law in employment and occupation, and has harmed equal rights of employment of laborers, governmental departments in charge should warn it and order it to correct, and may impose a fine not exceeding RMB 10,000 on the employer unit.

Where the Committees of Equal Opportunities in Employment or the People's Court consider employer units losing, it may rule or judge employer units to rehabilitate or give laborers corresponding treatments; where rehabilitation could not be made or corresponding treatments could not be given, or the laborer refuses to rehabilitate or be given corresponding treatments, employer units shall give compensations according to the extent and seriousness of the act. Where harms are severe, punitive compensations shall be exerted; where spiritual damages are caused, spiritual damage compensations shall be exerted according to the seriousness of damages.

**Article 53 (Administrative Liability)**

Where state governments violates this Law, harms laborers' equal rights in employment and causes severe consequences, the personnel responsible shall be exerted administrative penalty or administrative sanction, as well as the unit shall be punished correspondingly.

With respect to the employer units who have damaged laborers' equal rights in employment and caused severe consequences, and the employer units who have damaged laborers' equal rights in employment repeatedly, governmental departments in charge and the Committees of Equal Opportunities in Employment may list them into the roll of bad record employer units and publish the roll to the public.

**Chapter 6 Supplementary Provisions****Article 54 (Charges)**

Appeals on employment discrimination accepted by the Committees of Equal Opportunities in Employment is free of charge. Operating expenses of The Committees of Equal Opportunities in Employment are guaranteed by state finance.

**Article 55 (Date of Implementation)**

This Law shall come into force from      Date      Month      Year.



Drafted by

Study Group of Anti-discrimination in Employment,  
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# SEXUAL HARASSMENT

Xue Ninglan

## *Prevention and Prohibition of Sexual Harassment in Employment: Legal Reform in China*

Xue Ninglan \*

The expression “sexual harassment” began to be used by Chinese around the time of the UN Fourth World Conference on Women in 1995. However, this did not mean that before the convening of the Conference, there were no incidents of sexual harassment in Chinese society. As a matter of fact, when coming to this kind of unwelcome and sex-related conducts, Chinese people have our own native words and expression, that is, “harassing people by indecent means”(Shua LiuMang).

Since the new millennium, China has witnessed efforts to protect women’s rights in terms of anti-sexual harassment and a number of lawsuits filed in this respect. The drafting of the law of sexual harassment is lagging behind the above-mentioned development. The two sexual harassment lawsuits in 2003, causing a sensation all over China, had not only made sexual harassment a widely-discussed subject among the public, but also, to some extent, promoted the incorporation of the provision “prohibition of sexual harassment against women” during the process of amending the Law on Protection of Women’s Rights and Interests by the legislative body in 2005. Such amendment represents a major step towards the drafting of the law on prevention and prohibition of sexual harassment in China. **According to the comments made by some scholars in relation to this legislative measure: it is a small step in legislation, yet a vigorous stride in society.** Nevertheless, the provision contained in the Law on Protection of Women’s Rights and Interests remains in principle, thus not sufficient to provide legal remedy for the victims (most of them are women), to provide clear legal basis for judges in relation to the collection and determination of evidence in handling the cases, and to require employers improve relevant rules and regulations, so to shoulder the social responsibility of prevention sexual harassment in employment.

By interviewing women victims of sexual harassment, family members of victims, lawyers and judges, we recognize the social, cultural environments in which the practice of sexual harassment is allowed in the following three areas: 1) regarding the

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curbing of sexual harassment, other factors are of similar importance as compared with women's attitudes. Other factors include identity, social status, and power, system and environmental influence, and so on; 2) lack of policy and mechanism of prevention of sexual harassment in working units/organizations; and 3) dual standards applied to women and men by informal opinion in sex-related matters. The public opinion tends to blame victims. As a result, many women victims have to subordinate themselves or be silent or give up lawsuits under the external pressures or pressure of "saving reputations".

At present, the judicial remedies which victims of sexual harassment may be relied upon have the following three problems: 1) lawsuit lodged under other legal wrongs; 2) Difficulty in meeting the requirement of burden of proof by victims; and 3) limited legal remedies available to victims. All these have revealed insufficiencies and ineffectiveness in the prevention and prohibition of sexual harassment by the existing Chinese laws. As discussed, they include: 1) difficulties in putting the Law on the Protection of Women's Rights and Interests into operation; 2) inadequate provisions provided by the General Principles of Civil Law; and 3) lots of defects in labor law. For example, the existing Labor Law (1995) pays much attention to the prevention of potential harms caused by "material" environment to workers' health, while neglecting the need to improve "human" environment; the Law on the Labor Contract (2008) fails to include the requirement for employers to take measures to prevent sexual harassment in employment as a necessary provision; and the Law on the Promotion of Employment (2008) also fails to contain the prevention and prohibition of sexual harassment as a required link in promoting employment in China.

Analyzing the international law-making experiences, the dual system consisting of employment-oriented and rights-oriented efforts can serve as an effective legislative pattern for the prevention and prohibition of sexual harassment, which may also be regarded as the trend of development in legislative mode to combat sexual harassment in China. Before the establishment of an ideal legislative mode in China, within the existing legislative framework, or through judicial interpretations, or by amending the available laws and enacting new laws, we may also provide accessible and effective legal remedies for victims of sexual harassment, too. Relevant measures of legal reforms in this respect shall mainly cover: 1) urging the Supreme People's Court to issue judicial interpretation; 2) adding relevant provisions in the law of tort; and 3) promoting special law on prevention and prohibition of sexual harassment.

Sexual harassment stems from abuse of power. Reflecting in employment, it is a kind of control exerted by the power against the powerless. Therefore, the legal intervention against sexual harassment in employment needs to be enhanced in China. Meanwhile, we must be fully aware that prevention and prohibition of sexual harassment is a legal issue, but even more, a social issue as well. The promotion of gender mainstreaming and change of traditional concepts at social and cultural levels, therefore, should go side by side with the acceleration of legal reforms.

## 中国防治职场性骚扰的法律改革

薛宁兰\*

### 前 言

众所周知,“性骚扰”一词由美国女权主义法学家创造,是美国法上的特有概念。<sup>6</sup>中国人开始使用“性骚扰”一词,是在1995年第四次世界妇女大会召开前后。但这并不等于说,此前中国社会中不存在性骚扰现象。对这类不受欢迎的与性有关的行为,中国人有着自己的本土语言——“耍流氓”。1999年,中文新版《辞海》中首次收录了“性骚扰”词条。该条指出“性骚扰是20世纪70年代出现于美国的用语。指在存在不平等权力关系的背景条件下,社会地位较高者利用权力向社会地位较低者强行提出性要求,从而使后者感到不安的行为,是性别歧视的一种表现。”<sup>7</sup>

新的千年以来,中国妇女反性骚扰的维权行动和诉讼是先于立法的。2003年发生的两起轰动全国的性骚扰诉讼案<sup>8</sup>,不仅使性骚扰成为当年备受公众关注的话题,也在某种程度上加速了立法机关在2005年修改《妇女权益保障法》时,增加规定“禁止对妇女实施性骚扰”的进程。

修改后的中国《妇女权益保障法》在新增加的条款中,第40条规定:“禁止对妇女实施性骚扰。受害妇女有权向单位和有关机关投诉。”第58条规定:“违反本法规定的,对妇女实施性骚扰……构成违反治安管理行为,受害人提出请求的,由公安机关对违法行为人依法给予行政处罚。受害人也可以依法向人民法院提起民事诉讼,请求侵权损害赔偿。”这是中国法律首次明确对性骚扰说“不”,也是此次修法的一大亮点和热点。

《妇女权益保障法》的上述规定是中国在防治性骚扰立法方面迈出的重要一步。它对于创造两性和谐相处、共同发展的社会环境,对于中国社会的文明进步具有深远意义。学者对这一立法举措的评价是:“立法一小步,社会一大步”。然而,《妇女权益保障法》的规定依旧是原则性的。这两个条款不足以实现对性骚扰受害人(多为女性)的法律救济,不足以使法官审理案件时在证据收集与认定等方面有明确法律依据,也不足以促使用人单位完善规章制度,承担起预防职场性骚扰的社会责任。

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<sup>6</sup>美国女权主义法学家凯瑟琳·麦金侬(Catharine · Mackinnon)在她的划时代著作《对职业妇女的性骚扰:一个性骚扰案例》(Sexual Harassment of Working Women, A Case of Sexual Harassment, 1979)一书中首先提出这一概念,认为“性骚扰使得女性一直被男性性奴役并且一直处于劳力市场底层的这种环环相扣的结构永久地持续下去。两种力量的汇集:男性对女性的性控制以及资本对雇员工作生涯的控制。”D.Kelly Weisberg (ed.), Applications of Feminist Legal Theory To Women's Lives: Sex, Violence, Works and Reproduction, Philadelphia, Temple University Press, 1996, pp.725~732.

<sup>7</sup>《辞海》(1999年版缩印本),上海辞书出版社,2000,第1194页。

<sup>8</sup>当年,先是北京一女职员诉上司性骚扰案在法院开庭审理,后是武汉女教师诉教研室副主任性骚扰案在一审、二审胜诉。

## 一 从个案访谈看中国反性骚扰的社会文化环境

2005 年，中国社会科学院法学研究所性别与法律研究中心与中国法学会反家庭暴力网络，联合开展了“工作场所性骚扰研究及推动反性骚扰法律和政策制定”项目。项目由两部分组成：一是个案访谈；一是起草司法解释建议稿。截至 2007 年，我们在全国范围内对 20 多名性骚扰受害女性和部分受害人的同事、亲属、律师、法官等进行了访谈<sup>9</sup>。

个案访谈是关于工作场所性骚扰的定性研究。考虑到性骚扰问题的私密性和界定的模糊性，与大规模的定量研究相比，对性骚扰受害者一对一的访谈更具有可操作性，也便于对这一现象的过程、互动、性质等进行探索性的挖掘和定义。访谈中，我们着眼于受害女性的经验和解释，通过她们对亲历的性骚扰事件的态度和感受，了解性骚扰背后的制度和文化因素，以及这些制度和文化因素对女性态度和自我定位的影响。综合 20 例个案，我们对性骚扰存在的社会文化环境有以下三方面的认识<sup>10</sup>。

### （一）对于遏制性骚扰的发生，其他因素与女性态度同等重要

对于性骚扰的发生，中国社会存在着“一个巴掌拍不响”、“苍蝇不叮无缝的蛋”等类似说法。一些人认为，没有女性的默许或迎合，性骚扰不可能发生。这使得公众舆论顺理成章地“责备受害者”。因此，许多研究指出，女性明确说“不”的态度，对遏制性骚扰的发生或延续具有重要作用。

我们在访谈中，首先关注了女性态度的作用，以及影响女性态度的因素。受访女性的经验显示，说“不”的重要性主要体现在：含混、逃避和隐忍的做法，无一例外地会纵容性骚扰的持续和发展，甚至导致更加恶劣的结果，在数起案例中直至发展成为屈从性的性行为或强奸。受害女性在总结自己的经验教训时也往往特别强调，对性骚扰一开始就要说“不”。然而，女性的态度是制止性骚扰的必要条件，却不是充分条件。除此之外，还存在着与女性态度同样重要的其他影响因素。主要有：

**第一，身份、地位和权力因素。**在明确说“不”的被访女性中，能够遏制性骚扰的，多数都具有较高的社会身份，有的是大学教师，有的是单位负责人。此外，骚扰者与受害者的工作关系相对平等，在彼此互动过程中，较少权力等足以构成胁迫和威慑性的因素夹杂其内；而在未能成功遏制性骚扰的女性中，大部分的社会身份地位相对较低，有的是下岗工人，有的是家政工、临时工，等等。在与骚扰者的权力关系和互动过程中，这些女性处于明显的弱势地位，她们的拒绝只能起到微弱的作用。

**第二，制度与环境因素。**在女性只身面对性骚扰时，制度和工作环境的支持非常重要。对餐馆服务员的案例分析后发现，在对来自客人（第三方）的性骚扰有积极应对措施的工作环境中，女服务员受到客人性骚扰的可能性大大降低。这说明，好的企业政策对有效防范性骚扰有着积极意义。（我们发现，餐馆对性骚扰的防范显然是出于对其经济利益的考虑。）对于发生在单位内部的性骚扰，包括餐馆在内的几乎所有受访者的单位都没有这方面的控制和

<sup>9</sup> 20 名女性分布在全国 13 个省市自治区。她们的职业身份包括单位负责人、教师、国有事业单位干部/专业技术人员、企业员工、非正规就业的下岗工人、临时工、服务员、家政工等；她们供职的单位类型有：国家机关或企事业单位、私营或个体经济部门；年龄多数在 30-40 岁之间。

<sup>10</sup> 反对工作场所性骚扰课题组：《工作场所中的性骚扰：经验、环境及后果——对 20 个案例的调查和分析》，唐灿执笔，2008 年 2 月北京。

监督措施。餐馆女性服务员，在遭遇来自单位内部的性骚扰时，往往孤立无援。单位对性骚扰的姑息，对肇事者的袒护也会使女性的反抗归于无效。

总之，在制止已经发生和避免即将发生的性骚扰时，女性坚决说“不”的态度是非常重要的，但是，女性说“不”的有效性还受到其他因素的制约。在骚扰者和受害者的互动过程中，权力、身份、地位等结构性因素深刻地影响着双方的自我判断和需求。可以说，接受或拒绝性骚扰往往首先不取决于女性的主观愿望，而是取决于其社会身份和地位。

## （二）单位/组织普遍缺乏防范性骚扰的政策和制度

国内外研究表明，鉴于女性在工作和性别关系中普遍的弱势地位，单位、组织、工作环境对女性工作就业的公平性应予以特别关注。工作环境中防范性骚扰的政策和制度，以及工作环境对可能的权力滥用和性别歧视的高度防范意识，可以有效地保护女性免受因不平等的权力地位关系或性别歧视所造成的性骚扰。

访谈发现，许多单位/组织处理性骚扰事件的态度和具体做法存在着种种问题。它们大多忽视、不关注或者无视受害女性的权利、尊严以及利益和感受，缺乏对工作场所中女性人身权益的保护意识，受害女性难以从单位行为中真正获取公平利益和保护。目前，绝大多数单位与组织还没有建立起防范性骚扰的政策和制度。

## （三）非正式舆论在与性有关的问题上实行男女双重标准

近十余年来，中国正式舆论对性骚扰问题的态度发生了极大转变。性骚扰问题从 90 年代中期以前被小报当作花边新闻、被严肃的媒体和知识分子不屑一顾，开始越来越多地被主流媒体和知识界关注，并被纳入性别不平等的讨论之中。尤其是 2005 年中国《妇女权益保障法》修正案首次明确禁止对妇女实施性骚扰，在正式舆论层面上，反对性骚扰，性骚扰是对女性的人身侵害和歧视性行为，希望以法律和其他制度形式防范和惩治工作场所中性骚扰的声音成为公众舆论的主流。然而，在非正式舆论层面上，性骚扰至今仍是一个难于启齿的沉重话题。非正式舆论对待性骚扰显示出与正式舆论几乎完全不同的评价标准<sup>11</sup>。

首先，非正式舆论在性骚扰问题上实行男女双重标准。对男性而言，有性骚扰这种事，“同事之间最多是一笑了之。大家对这种事就当是生活作风问题”，当作笑谈。甚至有的骚扰者威胁受害女性：“声张出去丢人的是你，不是我！”。对于受害女性而言，她们因此饱受舆论非难、难以为人。为“顾全名声”，许多女性不得不选择隐忍，放弃诉讼。这种社会评价也影响到她们的自我评价，自我责备并产生羞愧感。

非正式舆论责备性骚扰事件中的女性受害人的根据主要有两点：第一，把男性的性侵犯归罪于女性的引诱和不检点。“无风不起浪”“苍蝇不叮无缝的蛋”的说法，便是这种观念的体现。这使得侵害与受害的界限变得混淆不清；第二，臆测女性有不良动机。推断性骚扰是女性对男性有“特别目的”的勾引行为，是女性“为某种目的和男人上床”，“得不到好处后，

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<sup>11</sup>正式舆论，是指那些以法律和社会制度为依据，由官方和主流社会媒体传播的知识、观点和声音。非正式舆论，则是指非制度的、以社会习俗为基础的、主要来自民间世俗社会的观点、意见和声音。正式舆论可以通过制度安排的方式，如制定法律和政策，通过制度化的传播手段加以改变；非正式舆论则扎根于社会风俗中，改变的速度比较缓慢。非正式舆论在社会生活中对人们的价值观念和行为方式有着极大的影响。

才会起诉性骚扰”。在商品经济发达的地区，这种舆论和猜测尤甚。

## 二 从性骚扰诉讼案看中国反性骚扰的立法缺失

新千年以来，中国出现若干起性骚扰诉讼案。<sup>12</sup> 这些案件多是发生在工作场所的性骚扰。它们不仅侵害女性人格尊严，危及其身心健康，还妨碍她们实现平等就业权。回溯多起性骚扰诉讼案，目前对性骚扰受害人的司法救济存在以下三方面问题。

### 1. 借名诉讼

中国《妇女权益保障法》修正前后，性骚扰诉讼一直存在着借“名”诉讼问题。不仅受害人不清楚被告侵害了自己的何种权利，执法者（法官、代理律师）对此的认识也不尽一致。2001 年，西安性骚扰诉讼案的原告向法院起诉时，并不清楚对方侵犯了她什么权利，法院甚至不是以 xx 权纠纷确定的案由；<sup>13</sup> 2002 年，贵阳案的审理法院认定被告行为损害了原告的生命健康权；2003 年北京案原告的诉由是“多次干扰其在计算机行业就业”，似乎是就业权诉讼，后又改为“名誉权”纠纷；武汉性骚扰诉讼案原告的律师在起诉时认为，被告侵犯了原告的各项权利：名誉权、身体权、人格尊严权，法院最终则以侵犯名誉权立案；<sup>14</sup> 2004 年北京闫某案的审理法院认定，被告行为侵扰了原告保持自己与性有关的精神状态愉悦的性权利；2005 年重庆性骚扰案立案过程中，审判人员起初认为应以健康权作为案由，律师根据有关司法解释规定说明以健康权立案不妥，法院最终以“人格权”纠纷立案。<sup>15</sup>

### 2. 受害人举证难

依照中国民事诉讼法，性骚扰属于民事侵权行为，举证责任规则实行“谁主张，谁举证”。然而，性骚扰与其他侵权行为不同，构成性骚扰不一定要有对身体的攻击和殴打行为，语言上的性挑逗和性建议更为常见，即便是身体的骚扰，也多为触摸、亲吻、搂抱等接触行为。性骚扰的发生又具有隐蔽性和突发性特点，事发之前受害人无法预见，一般也没有第三人在场，因此难以举出证明其发生的直接证据。一般认为，性骚扰案件中的直接证据主要有：（1）原告与被告的陈述；（2）第三人亲眼目睹事件发生经过所作的证人证言；（3）被告向原告发送的带有骚扰性质的手机短信；（4）被告所写承认性骚扰行为的检查、保证或道歉信等。<sup>16</sup> 在已披露的性骚扰诉讼案中，法官常认为，仅凭原告人的陈述，不足以定案。他们更加依赖证人证言和被告人陈述。由于法律依据不足，法官又缺乏审理性骚扰案件的经验积累和社会性别观念培训，因此，对原告举出的一系列人证、物证，法官通常不做综合判断，使之形成“证据链”，以证明案件事实，而多以证据不足驳回原告起诉，许多案件最终以原告败诉结案。再者，普遍存在的责备性骚扰受害人的社会舆论环境，也使得原告在收集证据时困难重重。这是许多受害人（主要是女性）遭遇性骚扰后放弃诉诸法律而选择隐忍的原因之一。

<sup>12</sup> 例如，2001 年西安女职员诉总经理案、2002 贵阳女工诉局长案、2003 年的北京女职员诉原公司部门经理案和武汉女教师诉教研室副主任案、2005 年重庆小学女教师诉校长案和北京女模特诉美术学院学生案。

<sup>13</sup> 薛宁兰：《性骚扰侵害客体的民法分析》，《妇女研究论丛》2006 年 8 月增刊，第 5～6 页。

<sup>14</sup> 张绍明：《反击性骚扰》，中国检察出版社，2003，第 41～42 页。

<sup>15</sup> “A 女士职场性骚扰案件追踪”，资料来源：<http://www.womenwatch-china.org>，2005 年 12 月 19 日。

<sup>16</sup> 于怀清 张庆武：《职场性骚扰案件的证据问题》，《妇女研究论丛》2006 年 8 月增刊，第 43 页。

### 3. 受害人获得的法律救济有限

在有一定社会影响的性骚扰诉讼案中，有四起案件的原告胜诉，一起案件的原告以庭外和解方式获得赔偿。受害人获得的法律救济主要是民事救济。法庭通过判令被告承担赔礼道歉、赔偿精神损失的民事责任，来救济原告受到侵害的权利。还没有出现追究单位承担连带民事责任的判例，也没有判令单位纠正受害人因拒绝性骚扰而被调岗、降低待遇、降级或被解雇的决定的，更没有因此对骚扰者治罪的。

上述司法问题也突显了中国现行立法在防治性骚扰上存在诸多不足。

#### （一）《妇女权益保障法》缺乏操作性

禁止性骚扰入法，在推定中国社会文明进步方面具有划时代意义。但是，立法的这一步还不到位。《妇女权益保障法》过于原则的规定使妇女维权依旧艰难。性骚扰侵害的直接客体是自然人作为民事主体的人格权，妇女法将禁止对妇女实施性骚扰归入人身权一章本无可。然而，在中国现行劳动法尚无防治职场性骚扰具体措施的情形下，立法机关最终决定删除妇女法修正草案中“用人单位应当采取措施防治工作场所的性骚扰”内容，<sup>17</sup> 难免会造成用人单位在防范职场性骚扰方面的义务缺位与责任不明，最终使妇女维权的成本增大。

#### （二）《民法通则》的疏漏

目前，1986 年颁布的《民法通则》是性骚扰受害人依法提起民事侵权诉讼所依据的民事实体法。该法只列举性规定公民享有生命健康权、姓名权、肖像权、名誉权、荣誉权和婚姻自主权等人格权，没有列举性自主权。这是在民事诉讼中，原告人提起性骚扰之诉立案难的实体法根源。

#### （三）劳动法的多重缺失

工作中的性骚扰是反性骚扰的重点，也是法律规制性骚扰的重点。中国劳动法在这方面的缺失是多方面的。

第一，《劳动法》“劳动安全卫生”一章，注重传统的“劳动安全与卫生”，注重“物”的环境对劳动者健康潜在威胁的预防和损害发生后的处理机制，没有关注到“人”的环境的改善。由于中国劳动法没有从工作环境权角度禁止职场性骚扰，在劳动法层面也就没有确定用人单位负有保障劳动者工作环境安全的义务。

第二，《劳动合同法》“劳动合同订立”一章，没有明确将用人单位应当采取措施预防工作场所性骚扰，作为劳动合同的必备条款之一。各级劳动行政部门依法对实施劳动合同制度的情况进行监督检查这一条款中，也没有明确列举对“用人单位履行劳动安全卫生义务和创建防治性骚扰工作环境的情况”进行检查。

第三，《就业促进法》确立禁止就业性别歧视原则，但没有将预防和制止性骚扰做为促进就业的一个必要环节。该法的相关章节没有强调政府负有为劳动者创造体面的就业条件和

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<sup>17</sup> 信春鹰主编：《中华人民共和国妇女权益保障法释义》，法律出版社，2005，第 183 页。



环境的义务，也没有强调用人单位在保障劳动者合法权益时，应当承担的相应社会责任。

### 三 理想立法模式与当下法律改革措施

当今世界许多国家及地区制定了或多或少地带有美国痕迹的反性骚扰法律制度，立法模式经历了由单一到复杂，由散见立法到专门立法，专门法与其他法律相互协调，“齐抓共管”的过程。各国及地区规制性骚扰行为的法律类型主要有：性骚扰防治专项法、平等或反歧视法、人权法、劳动法、侵权法及刑法。许多国家最初是在反歧视法或人权法中对之加以禁止的，但法律救济性骚扰受害人的基本途径，主要是民事侵权损害赔偿和对行为人的刑事制裁。由此可以得出一个基本认识：当今规制性骚扰行为的国际立法模式是职场主义与权利主义并行的二元体制。职场主义以劳动者保护为中心，主要通过劳动法律制度规制性骚扰行为，雇主的责任因此被推向重要位置；权利主义以自然人私权保护为中心，规制性骚扰行为的法律制度主要是民事法律，因此，责任人是侵权行为人，法律通过对行为人的制裁达到对受害人人格权之救济。<sup>18</sup> 性骚扰行为具有多样性，任何一个法律部门即便是专门立法，都不可能对性骚扰所导致的法律救济与责任承担进行全面规制。职场主义与权利主义并行的二元体制是防治性骚扰的有效立法模式选择，它应是中国对性骚扰问题法律规制立法模式的发展方向。

在理想立法模式未建立之前，当务之急是在现有立法框架之下，或通过司法解释，或通过修旧改法、制定新法，使性骚扰受害人寻求法律救济成为可能。这方面的法律改革措施主要有：

#### （一）推动最高人民法院颁布相关司法解释

反对工作场所性骚扰课题组于 2007 年和 2008 年两次向中国全国人大会议提交建议案。课题组草拟的《人民法院审理性骚扰案件若干规定》司法解释建议稿内容主要包括：人民法院审理性骚扰案件的基本原则、性骚扰的定义、用人单位的义务和责任、证据规则、损害赔偿等，其中，证据规则、用人单位的义务和责任是建议稿的两个主要内容。例如，建议稿在证据规则中，采取举证责任合理转移规则。当原告提供的证据达到了初步可信的程度时，法院可以责令被告提供反驳性证据；被告不能提供反驳性证据的，法院可认定原告所主张的事实成立。这样规定，有助于促进双方当事人积极举证，也有助于查明案件事实。

#### （二）在侵权责任法中增加相关规定

在中国，民法的法典化进程已经开始。继合同法、物权法之后，今年中国立法机关开始制定《侵权责任法》。中国社会科学院法学研究所性别与法律研究中心已经向相关部门今年提交了两种性骚扰侵权责任法的方案。

##### 方案一：在侵权责任法草案的精神损害赔偿部分增加相应规定

根据侵权责任法草案框架和条文，建议修改草案第 24 条，将之作为解决“性骚扰”纠纷的主要依据之一。第 24 条可修改为两款：

第一款 故意侵害他人人格权、身份权，造成他人严重精神损害的，受害人可以请求精

<sup>18</sup> 参见杨立新 张国宏：《论构建以私权利保护为中心的性骚扰法律规制体系》，《福建师范大学学报（哲学社会科学版）》2005 年第 1 期，第 16 页。

神损害赔偿。

第二款 以性骚扰、侵害他人隐私等违反社会公共利益、社会公德方式侵害人格利益，造成他人严重精神损害的，受害人可以请求精神损害赔偿。

#### **方案二：在侵权责任法草案的企业主责任部分增加相应规定**

职场性骚扰是性骚扰的主要表现形式。从侵权责任法草案框架和条文看，还可在规定企业主责任的第 33 条（用人单位的工作人员在工作过程中造成他人损害的，由用人单位承担侵权责任。）之后设置第 34 条，规定：用人单位未尽必要注意，使其工作人员在工作中遭受性骚扰并有损害的，由用人单位承担侵权连带责任。

#### **（三）推动制定性骚扰防治专项立法**

2009 年 2 月，北京红枫妇女心理咨询服务中心向立法机关提交了《工作场所性骚扰防治法》项目建议稿。建议稿对专门法的目的、基本原则、工作场所性骚扰的定义、政府责任、用人单位和雇主的义务、救助措施及法律责任等问题均有所规定。

## **结 语**

性骚扰是权力滥用的表现，其为人不以建立正常的情欲关系为目的，而是认为自己“可以”这样做。这是职场性骚扰所体现的权力关系与通常的行政隶属关系中的权力关系之不同。因此，它是相对的强势者对相对的弱势者的强权。在中国，完善法律对性骚扰的规制是必须的。同时又必须看到，防治职场性骚扰是法律问题，更是社会问题。在社会文化层面上积极干预，推动社会性别主流化和传统观念转变，应与推进法律改革同步进行。

**Li Ao**

## ***Incorporating Gender Perspectives and Methods into Mainstream Legal Education***

Li Ao<sup>19</sup>

“赋教育以社会性别”, means using gender perspectives to investigate and critique education. A gender perspective can bring about valuable changes in the educational field. Gender analysis can be used to explain existing gendered discrepancies in the enjoyment of educational rights and educational resources, as well as the societal, political, economic and cultural reasons behind those discrepancies. Such an analysis uses the argument that society constructs gender, to explain the starting point of today's education. That starting point is that the differences between the genders in society are not the result of “nature”. Gender perspectives also encourage a reexamination of discourses concerning gender and gender

In terms of feminist education, to bring about change by discovery and criticism means to encourage gender equality in education and promote gender equality in society through education. The task of incorporating gender perspectives and gender analysis into legal education is one with particularly important implications.

### **I. Three Objectives**

1. *Develop consciousness of gender issues among law students.*

Teachers' gender awareness and conceptions of equality have a direct impact on students' value systems and worldviews. Not only can educators help law students develop conceptions of gender by discussion and by example; they should also consciously incorporate gender perspectives and gender analytical methods into their teaching. Those who will work in the law should be modern professionals who are conscious of questions of gender equality, and capable of gender analysis.

2. *Conduct critical analysis and reexamination of the current legal system and legal institutions.*

A history of gender inequality has brought about legal structures and legal norms that replicate that inequality. Gender theory allows an examination of these

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structures and norms from a critical perspective, questioning the gender neutrality of the current legal system. The incorporation of gender analysis into mainstream legal education can make both law students and law faculty more aware of the fact that facially neutral law is in fact gendered.

The pursuit of gender equality does not and cannot mean the complete removal of gendered elements from the law. Rather, it means adding a new perspective to the research and study of the law, the design and drafting of the law, the enactment and enforcement of the law. It means realizing legal values from the point of view of multiple genders rather than only one. The inclusion of gender theory in legal studies and research helps expand the scope of their theoretical vision, imparting new force to legal norms. The gender analysis of law takes account not only of the ways in which legal norms are expressed, but also of the value orientation of the legislative process, of the realization of legal norms, of the law's functions and its effects on society. Gender analytical theory provides a unique perspective on the question of how to achieve substantive equality in legal rights.

### 3. *Re-examine legal educational values*

The challenges posed to legal education by the “knowledge economy”, the “legalization of society”, sustainable development, and globalization manifest themselves primarily as challenges to the value systems that define human talent. The convergent state of guiding values in contemporary legal education indicates that legal education can only meet these challenges by cultivating values of knowledge, skill, thought, professional responsibility, and conviction. The Chinese legal educational value system has been said to emphasize values of “cultivation of quality”(素质 教育), human rights education, collective education, openness, humanistic education, and others.<sup>20</sup> The acknowledgement and consideration of women's human rights, and the promotion of gender equality, should undoubtedly be included in this value system. Legal and sociological research on women's human rights can vastly enrich education in the law.

## **II. Gender, Law, and Education at Wuhan University**

The *China Women's Development Outline (2001 – 2010)* expressly provides that “reform of curricula, educational content and educational methods [should] incorporate gender into teacher training, and [should] establish, in relevant higher educational fields, coursework in Women's Studies, Marxist Conceptions of Women, Gender and Development, and related topics, improving the gender consciousness of educators and students.” Gender mainstreaming can only be realized by the incorporation of gender issues into policy and policymaking, and the incorporation of gender into education in

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<sup>20</sup> Fang Wencui, *The Values of Legal Education (and the Direction of Chinese Legal Education Reform)*, Peking University Press, 2005, 141-143.

turn helps ensure its incorporation into policy and policymaking. Only by the achievement of gender mainstreaming in education can the next generation further develop conceptions of gender and a more acute awareness of questions of gender equality.

Only when policy and policy decisions are made by those with an awareness of gender equality, can that policy give equal place to all regardless of gender. Gender mainstreaming in education, then, ensures gender mainstreaming in policy, and serves as its foundation. It should be the task of institutions of higher education to take the lead in incorporating gender education into the educational mainstream.

### **A. Gender Education at the University Level**

Beginning in 2007, the current author has taught gender-related coursework at Wuhan University. This coursework has included the following:

#### **1. *Open Elective Course on “Gender and Women's Development”***

Using the humanities and social sciences as a starting point and gender perspectives as a foundation, this course covered a wide range of issues in women's development, including female political participation, women's rights protection, women's employment, anti-gender discrimination work, the historical successes of the women's movement, and the influence of gender issues on the development of law. The course also served as a platform for discussion of issues affecting university students, especially females: relationships, marriage, and future employment.

All of these topics provided students, especially females, with a new point of view, including new theories, information, and conceptions. The course was taught jointly by instructors with a shared recognition of the importance of gender mainstreaming, drawn from the Wuhan University Law School, School of Literature, School of Journalism, School of Sociology, School of History, and School of Philosophy. The author was responsible for content relating to “Gender and Law”. The course elicited a powerful response from the undergraduate student body and was considered to be among the best-received open electives.

#### **2. *Practical Coursework for Undergraduate Law Students: Clinical Education***

Starting in the year 2000, the author began teaching legal clinics at Wuhan University Law School. The author's clinical courses have been merged with “Gender and Law” materials and strategies to form the following specialized clinics: *Anti-Gender-Discrimination Clinic*. Clinic students successfully took on cases involving the socialization of housework; gender loopholes in administrative enforcement, residence rights for a married woman who lost her father; sexual harassment; domestic violence; and employment discrimination. In the course of their work representing clients in these cases, students became deeply aware of the

influence of gender awareness on legislation, law enforcement, the judicial system, and legal practice. This experience helped develop students' conceptions of gender, and their ability to solve legal problems by analyzing them from a gender perspective. Indeed, in this way students may even be able to affect gender conceptions in the larger sphere of legal practice.

We also chose several sexual harassment, employment discrimination, and other representative cases for argument in student Moot Court performances. They were all open to the public and held with the original presiding judge on hand to give commentary and lead group discussion on gender discrimination in today's workplace. This served not only as training for students in litigation technique and strategy, but also as a useful one-time public education session on workplace and other discrimination.

*Gender Equality Mediation Clinic:* In cooperation with civil tribunals, case-filing tribunals, and accelerated judgment tribunals (速裁庭) at local courts, this clinic allows students to gain direct experience with issues of gender equality and gender relations by serving as assistants in judicial mediation of divorce, custody, visitation rights, and other domestic legal disputes. The clinic combines direct exposure to the operations of the mediation system, with education in issues of gender equality. This not only allows students significant experience with actual legal disputes and parties, but also allows for useful exchange between educators, students and judges on the subject of gender in the legal system.

Participating judges have noted that they “had never heard of gender theory before,” and admitted that “there was gender bias in [their] handling of cases, especially in their handling of mediation”. Judges have also expressed the opinion that “gender conceptions definitely have an effect on the way judges conduct trials and make judgments.”

*“Gender and law” course for graduate students specializing in litigation;* The graduate course on “Gender and Law” seeks to develop individual gender awareness and give a systematic introduction to gender theory, but also to use the case method to conduct a systematic comparative analysis of representative gender-related cases from American and European courts. Through close reading and discussion of the judicial arguments and analysis from these cases, students can gain an understanding of the administration of justice from a gender-conscious perspective, and of the idea of “incorporating gender into the judicial mainstream.” Finally, this course includes an analysis of both open and indirect gender discrimination in the current Chinese legal system. Discussion of social conditions and legal cases is used to illustrate the current state of gender equality in Chinese society, as well as current conceptions of gender equality and social responsibility in the legal profession.

### A. Student Feedback

American psychologist G. J. Posner has proposed the formula, *Growth = Experience + Reflection*. The success or failure of a program of educational reform depends in large part on the quality of educators' reflections on their own practices. Constant reflection by educators on the educational process is not only necessary for the development of educational practices and the improvement of the quality of education; it is also necessary for an educator's professional growth.<sup>321</sup> The establishment of "Gender and Law" courses has presented an entirely new challenge, and the author hopes to gain as much as possible from reflection on this experience, and search out more ideal methods through the process of continued teaching practice. After the end of the graduate students' "Gender and Law" course, the author asked students to share their opinions of the course – the need for such a course, the content of the course, its effectiveness, and any other issues – in an open-ended anonymous evaluation. The author was both happy and perturbed when the classroom fell silent for twenty minutes as all of the students wrote with their heads down. No one spoke and no one turned in an evaluation before time was up; the scene was reminiscent of a closed-book test, though this time the students were the evaluators and the teachers were the ones being tested.

"This term's 'Gender and Law' course was no less than a reconstruction of my idea of the rule of law."

"In the beginning, I really didn't have much interest in this class, I thought we could either have it or not have it, but after a few weeks of lecture from Professor Li, and classroom interactions with other students, I gradually started to feel a deeper interest in 'Gender and Law', and brought out real my thoughts and views to exchange and share with my classmates and the professor – I feel that the results were quite good, it changed and corrected understandings that I had always thought were correct and rational, and gave me a fuller and deeper understanding of some 'abnormal' situations in society."

"I feel that as a law student, I should have an understanding of what was discussed in 'Gender and Law'. Equality is one of the important goals pursued by the law, but due to gender discrimination, the law can cause great harm to equality. If the legal system itself incorporates unequal or discriminatory conceptions, this raises doubts about the fairness of the law itself, and this is extremely harmful to society's ability to correct gender discrimination."

"In those canonical foreign cases that the professor discussed in class, the judges' analysis was really ordered, really human! These cases are extremely helpful to our studies; I hope to hear about more cases."

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<sup>21</sup> Zheng Xinrong, *Gender and Education*, Educational Science Press, 2005, 325.

“I feel lucky for having chosen 'Gender and Law' – it was the best decision I made this term!”

To receive this feedback from students was a great relief: after a full term of class, students who had originally been skeptical of the course or even resisted it outright, no longer wore “rose-tinted glasses” or expressed doubts about gender equality. Classroom discussion, which had initially consisted mostly of whispered private conversations, was infiltrated by a spirit of interactive education and discussion, and became both more orderly and more democratic. Where female and male students began with clearly disparate attitudes on the subject of gender equality, these attitudes became more diverse and rational with class discussion. Where the tone of the class – including that of the teacher – had been tentative, it gained confidence with the care and participation of the students.

### **C. Summary and Reflections**

#### *1. Teaching Objectives*

In determining the educational objectives of this curriculum, we have given particular consideration to three issues: First is the development of law students' democratic awareness, especially the idea that all people are created equal. In our view, gender perspectives or gender conceptions are like human rights, environmental awareness, population awareness, and other perspectives – they signify a kind of modern consciousness. As representatives of the conscience of human justice and the legal professionals of the future, it is law students most of all who must possess this kind of awareness.

Second is the promotion of the awakening of gender awareness. Humans are born with a “natural” (biological) sex, determined by genetics and heredity. But socially speaking, human gender is not natural in the same sense. Rather, it is gradually formed in and by the cultural constructions of social life. An awareness of this leads us to ask: In this course, how can we consciously develop students' individual awareness of gender questions? How can we encourage individual reflection on gender issues, and produce the basic sense of equality and fairness that people operating in the modern legal field should possess?

Third, in terms of education, we believe this curriculum to be extremely helpful in the development of students' analytical ability, expanding the perspective they use to approach legal and other problems. Students who took “Gender and Law” courses have subsequently reported that in the writing of their graduation theses, they found that their perspectives had broadened – they felt that in analyzing different problems, they were no longer limited to any single approach, or the approach of any single field. They had learned to examine existing social conditions and problems with a critical, rational eye, no longer assuming that experience must reflect conditions that are in some way immutable or correct.



We have placed the focus of these courses on an exploration of how the field of legal studies can expand to include gender education; of how to unify teaching and practice, teaching and research; of how to direct law students in their study of and training in gender conscious approaches to law and society; of how to incorporate gender education into these students' future careers, maintaining their awareness of gender perspectives, of issues of equality and fairness between genders, and of the need to educate others in these same issues.

We hope they will observe and analyze their own future work for gender-related problems and discrepancies, and work to make adjustments and corrections, reducing gender bias and unfairness.

## *2. Teaching Strategies*

In teaching “Gender and Law”, I encountered difficulties I had never faced in teaching any other subject, including vocal challenges – skepticism, refusal, resistance – as well as the silent challenge of unresponsiveness. The latter is more frightening and more difficult to address.

It may be hard to imagine that students who have always excelled academically, who have always been obliging in their personalities and open-minded in their thinking, could still hold deeply ingrained traditional and discriminatory views with regard to gender. Students were often totally in the dark about this, displaying no skepticism at all toward traditional and backward conceptions of gender, denying that such deeply rooted ways of thinking could be difficult or even painful for them to shed, like a mantis' shell. In order to help these students accept new ideas concerning gender and gender equality, I gradually compiled a set of methods and strategies for the teaching of gender-related courses.

First, build a foundation of common understanding. A shared set of values and a common understanding are prerequisites to exchange. In the “Gender and Law” classroom, then, it is necessary to avoid, as much as possible, the sudden introduction of entirely strange new concepts and theories. A stable starting point should be provided by preliminary review of theory and information already known and accepted by students. For example, at the beginning of my “Gender and Law” course at the Law School, I review theories of equality and human rights as well as relevant constitutional provisions and relevant facts about human historical development. These are the logical starting points for formal theoretical opposition to gender discrimination.

Second, use interactive teaching methods from clinical education, including visual aids, video, games, case analysis and other methods to raise questions concerning gender equality in a direct and interesting way. The goal is to break silence, and

encourage students to voice their dissatisfactions and aversions. In order to avoid silence and encourage active participation in the educational process, students must be given a safe environment and atmosphere. No matter what views students may have at the beginning of their studies, I only allow them to argue, and make absolutely no judgments as to any of their opinions.

Third, present and explain theory using cases with which students are already familiar. Gender theory is “imported” from other countries, but gender discrimination exists in every country. We study “Gender and Law” not to learn about a theory used abroad, but in order to use this theory to address problems existing in China. To introduce gender theory using Chinese cases, then, reduces the unfamiliarity and psychological distance felt by students; it makes theory more valuable practically, and more convincing.

Fourth, allow students to express any differing or opposing viewpoint they desire, and conduct a completely open discussion. Avoid stating any concluding opinion at any time. The success or failure of a “Gender and Law” course depends not on the teacher but on the students. If a teacher is able to create a sufficiently free, open, and lively atmosphere in the classroom, and make students want to speak, such a course is already halfway to success.

With the expansion of a course to new topics and the deepening of discussion, students will tend to challenge and correct their own past viewpoints; their mutual discussion and criticism are far more effective than a simple lecture by the instructor.

After two years of teaching experience, the author believes even more firmly in the necessity and feasibility of gender education as a part of legal education. To combat gender discrimination and achieve gender mainstreaming in the legal field, it will be necessary to develop new approaches in legal research, legislation, enforcement, the administration of justice, legal education, and every other field of the law. Legal education is the most important way we can develop new societal forces for gender equality.

# RURAL WOMEN'S ACCESS TO LAND RIGHTS

Guo Jianmei

## *Rural Women's Land Rights*

Explore the Approach to Address the Issue of Land Rights and

Interests of Rural Women in the Process of Actions Taken

——*Proceeding from the Rights Protection*

*Practice of Peking University Women's Law Studies & Legal Aid Center*

By Guo Jianmei

As the very first NGO for women's legal aid in China, Peking University Women's Law Studies & Legal Aid Center is committed to protecting women's human rights and promoting the legal progress by means of representing the typical public interest litigation, especially those worth of our studies and advocacy. Land rights of rural women are a pronounced issue that has stood out in the field of women's rights and interests over the recent years. Since 2004, our center has represented 61 cases selected from more than 2300 applications for legal aid, with an involvement of 1650 people in 19 provinces, municipalities and autonomous regions. Currently, among those cases we represented, 8 cases went in our favor (thus recovering the economic loss worth 13.2 million yuan for rural women); 21 cases were dismissed by the court; 9 cases were against us; 23 cases are yet to be adjudicated. While representing the legal cases, the center also conducts investigations in four provinces, namely, Yunnan, Zhejiang, Hebei, and Hunan. Our practices in case handling and field investigation make us aware of the following facts: The violation of rural women's land rights has become a common and serious problem; the living for rural women in some places is worrisome; the right protection actions designed to guarantee rural women's land rights are greatly challenged. Such conclusions are drawn from nationwide investigative reports on rural women's land right over the years as well as ever-increasing complaint lodging and advocacy, in addition to our practices.

### **I. Overview and Problems of Rural Women's Land Right**

Problems related to rural women's land right concentrate on the following three aspects: first, the land contracting right for married-out, divorced and widowed women is restricted and deprived; second, women's distribution right to economic proceedings of rural collective economic organizations is restricted and deprived;

third, the women's right to the compensations from land appropriation is restricted and deprived. Meanwhile, such restrictions and deprivation take on complex and various characteristics as follows:

1. Women lose the land due to marriage. When some women get married, or move to another village or city due to marriage, their contracted land is forcefully taken back by the villager's council, whether they get non-rural household registration and land from husband's village or not. Their land contract right will be lost, together with other land-related rights. However, the villages to which those married women have moved frequently to refuse to give them land.
2. Rural women lose the land due to the change of marital status (widowed, divorced, and remarried). Whether the women get land from their parents' village or new husband's village, the village committees tend to scrap those women's household registrations through forceful measures, ask them to transfer their household registration back to their parents' domicile, and deprive them of their land contract right. Besides, their parents' village tends to refuse women's resumption of land contract right. Some villages even force to nullify women's household registration and take back their land, but only keep land and contract right to their children after their husbands have passed away.
3. Pre-married women have less or even no land. Many places practice "marriage anticipation" of the unmarried women, thus depriving the unmarried women or women about to get married of their eligibility for land contract. Some localities set the rule that when women come to a certain age, unmarried as they are, their land would be taken back. Other places even stipulate that new-born boys are entitled to village treatment whereas girls are not.
4. The right to the compensation for land appropriation is deprived. As the urbanization has accelerated, the land between the cities and towns is appropriated. Land compensation has become an important source for rural income, or even for the pension funds. Due to the conflict of interests, some villager's organizations force the married women to give out their distribution right to compensation by means of "village rules and customs". This phenomenon is becoming more and more pronounced.
5. **Men lose the land if they get household registration in their wives' village due to marriage. Male farmers and their children are also treated unfairly in terms of land contract right, if they get married and get household registered in wives' villages. In essence, such a practice is a kind of violation to the land right that should be entitled to those wives as they are members of rural collective economic origination. It is also a phenomenon of women's land right violation that deserves our attention.**

Deprivation of land rights and interests has a profound impact on rural women. Compared with male counterparts, they are more attached to land, for land tends to be

the only foundation for their survival. If they lost land and its proceedings, they would be materialistically and spiritually deprived, and even overwhelmed by family burden.

## **II. Litigation Practices and Our Challenges**

As part of the effort to respond to those phenomena, the center has dealt with a batch of typical cases related to serious rights violation. However, our experience in right protection litigation is riddled with obstacles, risks and dismay, as evidenced by the results of 61 cases we have represented. Our challenges are multifaceted, complicated and burdensome. Arguably, all the legal relief channels provided in the laws and regulations are inaccessible. The problems behind it are as follows:

### **A. Incompetence in Judicial Relief:**

As for the land disputes confronted by most of the rural women, they usually turn to villager's council first, and then township government, women's federation, complaint letter and visit department or governmental agencies concerned for coordination, and finally the court. Having gone through all the channels without much relief, many women resort to the court many times or lodge visits for complaint every year. But the courts in most of these localities dismiss such cases for several reasons listed below:

1. Administrative intervention. Competent governmental departments notify the courts to dismiss the cases; B. Difficulty in judgment execution. Even though the court was in favor of the women victims, they couldn't execute their judgment. The villages either have distributed all the money or refused to pay the victims. However, execution by force might engender serious conflict among those villagers; C. Case dismissal for fear of similar case upsurge if the final judgment of the previous case is in favor of victims. Otherwise, the workload would be too burdensome for the courts to manage. Furthermore, the judgments that are hard to execute may affect the case closing rate and performance evaluation of the courts. In order to avoid too much pressure, the court transfers the risks to the litigants by means of more rigorous procedure and evidence standards; D. Some judges refuse to handle such cases by various excuses due to lack of legal awareness, work ethics and understanding of laws.
2. Absence of administrative intervention and supervision. **Most of the grassroots cadres know state laws and policies, and even the practice of women's land right deprivation through "village rules and customs". However, when it comes to handling such issues, they are passive and indifferent on-lookers who take no action. Some of them even adopt suppressive or blocking policies. The reasons are as follows: First, the notion that safeguarding social stability is superior to all has influenced their attitude and effort. To prevent mass incidents and ensure social security is currently the top priority for grassroots governments. Thus, the governments at the grassroots level tend to put the existing interest pattern under the umbrella so as to avoid public conflicts; second, traditional customs, deep-rooted in the mindsets of the**

**grassroots cadres, affect their ways of dealing with problems; third, some grassroots cadres are biased when confronted with interest disputes, given their inadequacy of legal awareness and ethics and their connections with village leaders.**

3. The “high degree of autonomy” practiced by villager’s organizations falls short of effective supervision and standardization under the state administrative power. *Law on Organization of Villager’s Councils* empowers the villagers with “autonomy”. However, the democracy seems to be distorted and challenged in the rural areas absent of democratic and law-based tradition. Although the law provides that “village rules and agreements” shall not run counter to state laws and policies, the villager’s organizations, when faced with conflict of interests, would “lawfully” deprive women of their rights in the excuse of “village rules and agreements”. The reasons are self-evident: the scarce land resources in rural areas; farmer’s dependence on land; shortage of per-capita land area due to population explosion; absence of rural social security system; interest conflicts; added interests brought about by land system reform; vital influence of the traditional mindset, such as “male superiority”, “living in the place where husbands reside”, popular folk sayings such as: “married daughter like sprinkled water”. As for the village rules and agreements engendered by such ballooning power, the laws are yet to decide who shall supervise and regulate their “legality and justice”, thus leaving too much power to village autonomy and a regretful blind spot for rights protection.
4. Legislative and institutional deficiency. Undoubtedly, given that laws and policies designed to provide state protection over rural women’s land right and interest are almost “institutionalized”, it appears to be legally grounded. However, why is it hard to address the issue of rural women’s land right, for they are merely simple cases with clear facts and well-defined legal relation? As far as I am concerned, it has something to do with law and policy deficiency, along with poor enforcement, administrative inaction and the effects of a traditional mindset. This can be explained in the following three aspects: first, related laws and regulations are too generalized in principle to encompass the operable and procedural details. Principle-based declaration in the legal articles is reduced to empty words under the overwhelming resistance from traditional forces and agreed-on “laws” by the general public. Second, laws and policies are gender insensitive. Although laws and policies appear to be neutral, fair and even in favor of women protection, their failure to take into account the Chinese society featuring gender inequality, and women-hostile social and family structure would cause such genderless provisions to produce unfavorable consequences to women when implemented. Third, absence of female status and rights in related laws and systemic configuration. The existing land system, a mode featuring collective ownership of land and household-based contract, is a 30-year contracting system on the basis of “no more land for increased population people, and vice versa”. On one hand, this system fails to factor in the negative impact brought about by long-term land

stability under the marriage custom of living where husband resides with women; on the other hand, the mode of household-based family land contract, in the context of male-dominated family structure in China would make women with land in their names easily lose land due to change of marital relationship. In fact, such configuration in legal system reinforces the cultural mode in male-dominated families.

### **III. Reflection on the Strategy of Rural Women's Land Right Protection and the Actions Taken**

Those phenomena make us fully aware that the issue of rural women's land right is intricately-involved with various elements, which embodies the controversy and conflict between history and reality, between laws and tradition, between politics, economics and culture and between reform and development. Therefore, to address such an issue requires a long-term diverse mechanism characterized by governmental leadership, public basis and judicial support, rather than a single litigation or a single approach alone.

As a resulted-oriented, action-based NGO for women legal aid, we need strategic insight and innovative tactics to make achievement in addressing the issue of rural women's land rights. Our basic roadmap is as follows:

1. Be well-targeted to the problem-solving approach by employing the concept and method in public interest litigation. In our opinions, **land right protection for rural women is the best battlefield to practice public interest litigation, for it is of great significance and worth our effort to make experiment and breakthrough. Public interest litigation is not only about litigation itself, but also a systematic project integrating comprehensive methods and strategies.** We may help solve the problem through various approaches, such as litigation, promotion of litigation influence, investigative research, workshops, public interest petition, training, administrative intervention, mediation, media coverage or regional pilot programs
2. **Establish Pilot Programs Build models, and Promote the Legal Reform through a Bottom-Up Approach.** Given the state policies and laws mismatch the current situation, it is practical to promote institutional innovation at various localities. To our knowledge, sound experience and practices in some places are yet to be tapped and replicated. It is hoped that experience and models in the pilot areas will be promoted through various methods. Currently, we have established pilot programs in Hebei and Hunan provinces which proceed smoothly.
3. Urge the government to play a leading role in addressing the issue of rural women's land rights; explore new approach by administrative means. On one hand, litigation with the aid of administrative intervention or litigation can help us resolve problems. The challenges in the litigation process, such as the court dismissal, resistance of villager's organization, enforcement difficulty, may be

overcome with the help of administrative intervention. As for the administration that runs counter to laws, administrative litigation may serve as a resort in order to resolve the land rights cases indirectly. On the other hand, in the context of Chinese society that has been based on administration for thousands of years, government has an immense clout over the society, for their policies and guidance. Therefore, another best practice is to address a universal problem in a certain region by mobilizing administrative intervention and promoting the issuance of local policies or guiding documents.

4. Establish the supervision and approval mechanism for “village rules and agreements”. The agreed-on rules set by villages enable the villager’s organization deprive rural women of their land rights in the so-called “legal” form, but they are seldom supervised and restricted. Although the Article 4 of Law on Organization of Villager’s Council prescribes that township governments have the duty to supervise “village rules and agreements”, the governments tend to take no action. Hopefully, it can be addressed by administrative litigation. On the other hand, a gratifying progress is that the **Article 63 (b) of Property Law issued in 2007 has adopted the proposal of our center: “Where the legitimate rights and interests of any member of the collective are infringed upon by any decision made by a collective economic organization, villagers committee or the principle thereof, such member may require the people’s court to cancel the decision.”** This article, inaccessible as it might be, opens a window for initiating the supervisory procedure of the “village rules and customs” and provides a relief channel for women victims, although it is yet to clearly identify supervisory functions and power of certain governmental departments. We plan to file a litigation in which the local rules run counter to the state laws. That will be a new and significant exploration.
5. Advocate legislative reform and clear up the channel for judicial relief. Laws are the most authoritative and powerful tools to address the issue of women’s land rights; judicial relief the most reliable and standardized approach to realize rights. As for the legal deficiency and enforcement loopholes, on one hand, we will continue to advocate legal reform through public interest petitions, especially in the detailed aspects related to women’s land rights, such as women’s ownership status, land right shared by family members, separation of individual right from matrimonial and family relationship, legal operability; on the other hand, make effort in litigation exploration as a way to promote case handling in court and improvement of law content and procedure.

We only name just a few of the proposals. On top of that, it is imperative for us to conduct trainings, investigations and educational campaigns on rural women’s legal awareness and right protection ability. The resolution of rural women’s land rights is a long-term, arduous, and systemic project that can’t be finished overnight. Meanwhile, we are deeply aware that we should be risk and pressure resilient to promote its resolution. Come what may, we are ready to devote our



painstaking efforts to this undertaking with patience and confidence.

**Li Huiying**

***Government Responsibility: Exploration of Paths to Protect  
Women's Land-related Rights and Interests***

**I. Lack of Government Responsibility and Decentralization of Power**

Women's land-related rights and interests is a issue that has appeared along with the implementation of the land stock cooperation system; in over 20 years in the past, the government has failed to take effective measures to solve the issue but instead decentralized the power of law-based administration to villager teams for them to decide at their own discretion the qualifications of villagers for and the criteria of land resource allocation to married women, and to supervise and rectify unlawful practices of villager teams, which has resulted in frequent occurrences of infringement of such rights and interests of married women.

Government here refers to not only judicial organs, but administrative government, including all levels as national, provincial, municipal, county and countryside. The difference lies in that the former solves existing problems through judicial procedures, while the latter solves future problems through periodicity of policy implementation. The administrative government could be divided into two layers, namely the top and the mid-low. The top layer is the place where policies are made, while the mid-low is where they are carried out. When relevant policies are made by the top layer, the direct target and income are generally considered, but almost never take into consideration the different influences gender aspect brings, showcasing the blind spot in gender perspective in policies. It is characterized both in the 30-year land contract policy, and the Organizational Law for Villagers' Committee. The goal of land contract policy is to guarantee the activeness of farmers to the arable lands. But this neglects the negative impact of woman-marry-man marriage mode on the land right of women. The Organizational Law for Villagers' Committee emphasizes the principle and procedure of democracy, however neglects the possible abuse of majority rule, so that democracy may result in the conflict of law. The replacement of the villagers' autonomous democratic policy-making over administration by law results in the decentralization of the power of the government of administration by law to the village committee and group. There is no requirement, no monitoring, and no inspection for the village committee. The distribution of collective resources will be up to the majority rule by the village. As a result, village committees in rural areas go in their own ways respectively. Two practices are commonly seen. One is that villager teams initially adjust their rules and villager conventions and revise the patriarchal

culture and rules to **permit a man to join his wife's village after marriage, so that a woman continuing to stay in her home village after marriage can enjoy equal rights as a man, which reflects the principle of equality between men and women. Examples of this practice include Yidu City in Hubei, Dingzhou County in Hebei, Lueyang County in Shaanxi, etc. This is a new type of gender culture created by Chinese farmers and represents the tendency toward equality between men and women.** It's quite limited in terms of coverage, and is therefore incapable of standing up to patriarchy and has to be promoted and generalized gradually. The second practice is that villager teams refuse men to join them after marrying women in the villages and continue to stick to the patriarchy-based land allocation rules, which has led to extension of household-based patriarchy into collective patriarchy and total deprivation of married women's rights to land resource/land compensation/collective land stock distribution. This practice is extensively seen across the nation; in the investigation we did in Yancheng of Henan Province in 2005 with regard to village rules and villager conventions and women's land-related rights and interests, we found that the distribution principle of all villages is that the distribution is made only to men but not to women. The longstanding existence of this phenomenon is related to the local government's acquiescence and even support, as many executive officials take it for granted that a man should take his wife home while a woman should be taken to her husband's home after marriage/and that land distribution shall only be made to men but not to women. In a training seminar of section-level officials held in Beijing, we did a survey by asking whether the view that a man should take his wife home while a woman should be taken to her husband's home after marriage involves sex discrimination. Eighty two percent of the officials responded that it poses no problem. It is because of officials' collective lack of awareness of the harms of patriarchy that village rules and villager conventions reflecting sexual discrimination have been smoothly and extensively brought into practice.

## **II. Path I: Women Appeal to Higher Authorities for Protecting Their Rights and Interests—Governments Assumes Their Responsibilities.**

Changes have been seen since last year, some grassroots governments have considered it their responsibility to protect women's land-related rights and interests, and not only respect the autonomous/democratic decisions of villagers, but also supervise and rectify the provisions of village rules and villager conventions that infringe the rights and interests of women. They focus on administration according to law, protect women's land-related rights and interests and entitlement to collective resource distribution, which has resulted in quick resolution of the longstanding problem concerning married women's land-related rights and interests. For instance, as over twenty thousand of married women in Nanhai District, Foshan City, Guangdong Province have suffered infringement of their rights and interests, the government has taken measures since last July to solve the problem, and as of July 10 this year, lawful land stock distribution has been finalized to 95.2 percent of the married women and their children and that to the rest of the women will be fully

fulfilled by the end of this year.

What are the methods and paths taken by governments to solve the problem? The practice and paths taken in Nanhai District is different from those in other places, as in most regions, the problem is resolved primarily by means of judicial remedies, and through paths including personal appeal to higher authorities, involvement of Women's Union and judicial remedies. Such paths and methods are subsequent remedies after occurrence of problems and are without prior prevention. Furthermore, legal actions involve high costs and long duration, wherein a married female petitioner has to face a majority of members in her village and the village committee. Many married women have thus shrunk back and submitted to the inequality. Only very few married women have kept fighting against the inequality but their effort has often been fruitless. The practice in Nanhai District is characterized in the way that administrative and judicial means are incorporated together, with administrative law enforcement as dominance and with compulsory judicial enforcement as supplement. During cases for protecting women's rights and interests, the Party committee and the administrative government have played a dominant role to shift their effort from taking subsequent remedies to making advance prevention of problems. As lead by the administrative government and implemented by the appointed coordinating authority, village rules and villager conventions have been revised, and preliminary resource distribution in various villager teams is done on the principle that all qualified married women and their children are entitled to the distribution based on "equal place of origin, rights, age, land stock and interest". The problem of infringement of married women's rights and interests is solved as much as possible by means of administration intervention. In the event of very few noncompliant village committees, the judicial enforcement proceedings will be initiated instead of letting them be: first, qualified married women and their children apply to the town government for ruling, the town government verifies the fact and issue an administrative award accordingly and may request the court to enforce the award if the villager team has neither executed the award nor appealed for review or lodged a legal action within the specified time limit; once such judicial proceedings are started, the court will, after ruling for maintenance of the lawful administrative award made by the government, make the valid award enforced in a timely and effective manner according to applicable enforcement procedures. The effective combination of administrative and judicial means has enabled the resolution of the longstanding problems concerning married women's rights and interests.

Why have the grassroots governments assumed the responsibility of protecting women's rights and interests? What is the force behind the governments' great determination for resolving the problem? It has been found through investigation that the reason lies in women's persistent effort to pursue their due rights and interests, and in the active driving force from women's federations. In the Pearl River Delta in Guangdong Province, there are 200000 married women that have stayed in their hometown villages after getting married, who have formed an formidable force, they

and their children had for many years been deprived of the treatment provided to villagers, and their conflict of interest has become increasingly fierce along with the accrument of land value and the widening of economic benefit gap between them and other villagers. In order to pursue their lawful rights and interests, they had appealed to higher authorities persistently/collectively/by bypassing the immediate leadership for more than ten years. They had become the local government's headache and been regarded as a factor of social instability. Officials of Nanhai District said that the money used to solve such appeals had exceeded the claimed amount of bonuses that ought to have been distributed to the women. Therefore, the government came to be aware of the necessity and urgency of protecting the land-related rights and interests of women in rural areas, and also driven by the fact that the district was selected as one of nine focused districts in Guangdong Province for experimental practice in 2007.

The interaction between women's effort for protecting their rights and interest and governments' responsibilities can be seen through the experience of Nanhai District. At the beginning, women's land-related rights and interests did not draw the attention of local governments, and would be included in working coverage and converted into responsibility of the governments only after they had caused social conflicts and negatively affected operation of the governments and the "general situation" of social stability, and only after that the governments would begin to take a series of fruitful measures. It can be said that women's pursuit of their own rights is the first impetus that drives conversion of such pursuit into governments' responsibility. It can be viewed as a pattern of women's effort to protect their own rights and interests plus intervention by governments.

A notable character of such intervention pattern is that the women involved shall be in a sufficient number and shall have persistent actions to protect their rights and actions, and thus become a force that can put pressure on society. **However, such practice is of tremendous risk in China, the degree of infringement of the women's rights and interests is also very high, and the resulting social cost is huge. It is often that only when the resulting social conflict has become very acute can the problem draw governments' concerns and attention.** Such situation will cause more losses to and complaints from both the women/society and the governments, and we are therefore going to explore the second path, through which the conflict can cause government concerns and be solved in early stages and governments can become earlier aware of their responsibility for promoting the equality between men and women.

### **III. Path II: Intervention of Women's Organizations-Research-Training-Action Model**

It was in 2008 that women started cooperation with governmental departments to explore how to jointly drive the revision of village rules and villager conventions and

include equality between men and women into the new rules and villager conventions, and initiated quiet but profound reforms, which successfully brought the first Chinese villager rules and villager conventions that are of the awareness of such equality.

The problem concerning women's land-related interests and rights not only involves infringement of such rights and interests, but also will cause a series of social problems, for instance, unbalanced birthrate in terms of sex. Women whose land rights have been infringed will also express their views in different ways. For example, married women in Nanhai District insisted on their own rights and turned such insistence into reform to drive equality between men and women. However, in other places, more women have submitted to the inequality due to their weak strength, conformed to local custom, and reduced their loss by only keeping sons, which has resulted in worsened gender imbalance of birthrate. Our practice is to start with the most difficult social problems within jurisdiction of government agencies, find out inherent connection with sex equality, and seek ultimate solution by solving the inequality between men and women. Work closely with government departments and become their partners, and find and settle women's land right problems when they are still in early stages. Our model is research plus action.

We will start with study to understand the connection between preference for sons and birthrate ratio between two genders. **Through ad-hoc survey/interview of villagers/gender analysis, we found that behind the preference for sons are two ultimate causes, one being the thought that a son can support their parents when they are old, and the other being degrading a daughter's while improving a son's value in the family through women's joining their husbands' families after marriage, keeping the father's name as family name and following paternal lines, which is reflected in three ways, namely family culture, village culture including distribution of collective resources, and folk culture.** Village committees do not allow married women to remain in their villages, and the women's inability to enjoy entitlement to collective resource distribution means that daughters cannot raise their parents when they are old/inherit estates/use keep their family names throughout following generations. To ensure equality between daughters and sons, village rules and regulations must be revised to add diversity of marriage and residence models and provisions for support of old parents by both their sons and daughters, and change the existing single-way marriage and residence pattern and patriarchal inheritance. **Revision of village rules and villager conventions can thus not only become an effective way to correct birthrate imbalance in terms of sex, but also solve the problem concerning women's land rights and interests.**

The next step is to carry out training. Revision of village rules and villager conventions cannot be achieved if only depending on women's organizations, which shall instead rely on village committees, villager team leaders and villager representatives (including female representatives). They are the subjects amending and implementing such rules and villager conventions, and their view has to be

changed first in order to embody the sex equality awareness into the rules and villager conventions, in which course training appears to be requisite. The training must function as the bridge between study and action, which differs from the traditional training for acquiring knowledge/improving skills and is of the significance of social reform. The training shall not simply be class teaching, the rationale shall be made thoroughly clear to stimulate sympathetic response from trainees, so that the trained leaders can have the willingness to act and then explore through actions.

The final step is action. We selected two areas for consultation with the villager's officials, changed the traditional local habits and custom, drove the reform of the marriage and residence pattern, and adjusted the village rules and villager conventions to make female villagers equally treated as male villagers. The revised village rules and villager conventions comply with two important principles, that is, lawful content and democratic procedures, which also strengthened the supervisory responsibility of the government. Common effort of various parties is required during such exploring actions. Villager team leaders and villagers' representatives are the **main force** of marriage and residence pattern reform and revision of village rules and villager conventions. Only their sincere willingness to act can really drive the revision and in turn affect the change of the whole village's rules and the villagers' views. At the same time, we also paid attention to women's participation in order to prevent missing of such participation in village affairs. In many rural areas, women participate in their villages' public matters in a concealed manner and their voice is not heard, but women in Zhoushan Village have played a very important role in the revision of their village rules and villager conventions. The rate of their participation in revision drafting and in voting reaches 40 percent and 30 percent respectively, and their insights, courage and initiative have particularly impressed us. **Gender experts are a driving force.** Compared with the village committee, they represent an external force, which has research, training and action capabilities and can override the traditional gender culture to provide active intervention, can treat coworkers in an equal and sincere manner and with respect and trust, focuses on consultation, guidance, win-win and reflection, and is the pioneering force driving the reform to village rules and villager conventions.

The revised village rules and villager convention of Zhoushan Village have incorporated significant breakthroughs, for instance, 1) **they have upgraded the standing of women and promote their participation in community affairs.** Article III Actively assist the Party sub-branch to recommend advanced members to join the Chinese Communist Party, and the percent of women so recommended shall be brought to 50% as practicable. Article IV. Support and encourage women's participation in governmental and political affairs and political consultation, the percent of women elected as villager representatives during election of new village committee shall not be less than 50%, and women elected as members of the two committees of the village, villager team leader and other villager organizations shall not be less than one third. 2) **Promote the reform of marriage and residence**

**pattern and break the traditional pattern that a woman shall “live with her husband’s family” after getting married.** Article VII. Children in a household purely with female members or with both sons and daughters enjoy marriage freedom, they may stay in their hometown village or join their wives’/husbands’ villages at their own discretion, in both situations they are entitled to the treatment offered to local villagers. Article IX. A male/female villager who has had his/her permanent residence registration moved back to his/her hometown village as result of divorce or spouse’s death is entitled to the treatment offered to villagers (treatment to their children is subject to the provisions of valid legal documents). Article XXV. (5) Both committees of the villager will provide appropriate support to all marriages wherein the husbands join the wives’ households after marriage, and to funerals of old villagers in households purely with female family members, and the “Committee for Promoting Rural Custom and Civilization” will preside or attend the weddings/funerals. After revision of village rules and villager convention, various associations have been successively established in the experimental villages to promote the building of new civilized habits and custom, which have effectively dissolved the difficult problem of women’s land rights.

Women’s organizations have actively cooperated with the government, adopted the pattern of study-training-action and made joint effort with two committees of the village to explore methods and paths to incorporate equality between men and women into village rules and villager conventions. This can also be deemed as another pattern to settle the problem of women’s land interests and rights.

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