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WOMEN IN A CHANGING CHINA

ROUNDTABLE

BEFORE THE

CONGRESSIONAL-EXECUTIVE COMMISSION ON CHINA

ONE HUNDRED ELEVENTH CONGRESS

SECOND SESSION

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SUBMISSION FOR THE RECORD

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WOMEN IN A CHANGING CHINA

MONDAY, MARCH 8, 2010

CONGRESSIONAL-EXECUTIVE
COMMISSION ON CHINA,
Washington, DC.

The roundtable was convened, pursuant to notice, at 2 p.m., in room B–318, Rayburn House Office Building, Douglas Grob, Cochairman's Senior Staff Member, presiding.

Also present: Charlotte Oldham-Moore, Staff Director; Kara Abramson, Advocacy Director; Abigail C. Story, Research Associate and Manager of Special Projects; and Anna Brettell, Senior Advisor, Congressional-Executive Commission on China.

OPENING STATEMENT OF DOUGLAS GROB, COCHAIRMAN'S SENIOR STAFF MEMBER, CONGRESSIONAL-EXECUTIVE COMMISSION ON CHINA

Mr. GROB. Well, good afternoon, everybody. Thank you for attending today's Congressional-Executive Commission on China [CECC] roundtable on "Women in a Changing China." My name is Doug Grob, and I am Cochairman Sander Levin's Senior Staff Member on the Commission staff. I would like to recognize Charlotte Oldham-Moore, Staff Director of the Commission, in the audience. We would like to welcome you here on behalf of Chairman Byron Dorgan and Cochairman Levin.

I will give a brief introduction and then turn it over to my colleague, Abigail Story, our staff specialist and research associate on women's issues. Then we will turn it over to the panelists, who each will have seven minutes to speak. Then we'll open the floor to questions from all of you.

The topic of today's roundtable is women's issues in China, a fitting focus for today, International Women's Day. China ratified the Convention on the Elimination of All Forms of Discrimination Against Women in 1980, and 30 years later we are holding this roundtable today in part to ask, what has been the impact of this commitment, and what progress has been made, both at the central level and local levels in China, toward greater protection of women's rights. We hope to attain a deeper understanding today of what specific challenges remain.

As this Commission has reported, most recently in our 2009 Annual Report—and I invite you all to take a copy from the table outside—Chinese officials continue to pursue policies that aim to protect women's rights, in line with China's international commitments. There have been improvements in efforts to combat sexual harassment and domestic violence in China, and there has been

significant development of a legal framework to support and institutionalize those efforts. Chinese authorities also have promoted women's employment and taken steps to eliminate gender-based discrimination in the workplace, which remains a widespread problem. We'll hear more about the challenges facing women in China from our panelists today.

I will now turn the floor over to Abigail Story, our staff specialist and research associate on women's issues, to introduce our panel.

STATEMENT OF ABIGAIL C. STORY, RESEARCH ASSOCIATE AND MANAGER OF SPECIAL PROJECTS

Ms. STORY. Thank you, Doug. I will briefly introduce the witnesses; however, I encourage you to take a look at their full bios on the sheet outside.

Also, I just want to take a moment to remind you to turn your cell phones to vibrate if you haven't done so already.

First, is Rangita de Silva de Alwis. Ms. de Silva de Alwis is director of International Human Rights Policy Programs at the Wellesley Centers for Women. Rangita has worked with a network of civil society and government organizations to develop innovative women's rights and human rights initiatives around the world. Her work focuses on using international human rights norms to guide law and reform initiatives.

To my right is Katherine Zhao. Ms. Zhao is a graduate student at the University of Chicago and a Boren Fellow. Her current research focuses on popular contention and protests in China and cross-border human trafficking. She spent the 2008–2009 academic year in China as a Fulbright Fellow, examining women's access to justice and social services. She also served previously as a Senior Research Associate at the CECC.

Also to my right is Ambassador Mark Lagon. From 2007 to 2009, Dr. Lagon served as Ambassador-at-Large and Director of the Office to Monitor and Combat Trafficking in Persons at the Department of State, statutorily chairing the U.S. Government's Interagency Group on TIP Policy. Until February 2010, Dr. Mark Lagon was Executive Director and CEO of the leading anti-human trafficking nonprofit agency, Polaris Project, headquartered in Washington, DC.

Mr. GROB. Thank you, Abbey.

We'll get started now. I just would like to preface the panelists' remarks by saying that we have asked our distinguished panel here to discuss women's issues in China from three perspectives. First, we have asked Rangita de Silva de Alwis to discuss gender-based legal reform in China in the context of the Chinese Government's international commitments. Ms. Zhao will then speak about the specific grassroots impact of government regulations, as well as the impact of general social conditions on the basic rights of women in the home, in the workplace, and in accessing public services.

Finally, we have asked Ambassador Lagon to discuss China's efforts and the challenges China faces in the ongoing battle against human trafficking. We are just very privileged and honored to have the three of you here with us today, and thank you for joining us.

I would like to turn the floor over now to Rangita de Silva de Alwis.

STATEMENT OF RANGITA de SILVA de ALWIS, DIRECTOR OF INTERNATIONAL HUMAN RIGHTS POLICY, WELLESLEY CENTERS FOR WOMEN

Ms. DE SILVA DE ALWIS. The Beijing Women's Conference in 1995 and its progeny, the Beijing Platform of Action, marked a watershed event in the history of local and global women's movements. The clarion call to take Beijing back home resonated, both locally and globally, and reverberated in China.

Fifteen years after this historic event and 30 years after the landmark Convention on the Elimination of All Forms of Discrimination Against Women [CEDAW], is an important political moment for us to reflect on this twin legacy and how this has catalyzed gender-based lawmaking and mobilized women's groups in China to hold stakeholders accountable to both the letter and the spirit of the guarantees enshrined in the CEDAW.

In the final analysis, as a universally recognized norm-setting instrument, the CEDAW has become a powerful benchmark for women's rights groups in China to monitor the implementation of existing legislation. Most importantly, as a universal bill of rights for women, the CEDAW legitimizes and augments the voices of Chinese women's rights groups in their call for law reform and practice in China. These calls in China are a call of reforms taking place in analogous areas in other countries, however, international norms are sometimes a double-edged sword.

Despite the fact that they are powerful tools to advocate for, and monitor, women's rights, China and the Chinese state party, too, has cloaked weak lawmaking in the garb of international norms. In spite of the rhetoric of the Chinese state, which emphasized at the CEDAW committee hearings in 2006, that the new reforms to the law were governed by the CEDAW, theCEDAW concluding observations made after the fifth and sixth state party report in 2006 were very similar too, and reinforced prior concluding observations made after the third and the fourth state party report in 1999. This leads one to question the actual impact of the concluding observations on the state. What in fact had been adopted were the forms, and not the substance, of international human rights norms.

Juxtaposed with the state's change-resistant articulation of women's rights, China's women's rights practitioners' innovative views of international women's rights norms has powerful transformative potential.

The 2005 reforms on the law on the Protection of Women's Rights and Interests of 1999 was a milestone in women's rights advocacy in China and it spawned a panoply of gender-based law reform initiatives, both locally and nationally.

The new and incubating developments in gender and the law in China are the result of reform initiatives that have sparked local to global engagements.

First, the new law manifests a marked movement away from paternalistic notions on the protection of women and embraces a more human-rights-based concept of the empowerment of women.

Second, and in direct consequence of the ambiguity and the aspirational nature of the national laws, has led women's groups to redirect their efforts to mobilize strong guidelines at the provincial

level, thus creating greater opportunities for the vindication of women's rights at the local level.

Although domestic violence has now been clearly prohibited in China, China still lacks national legislation on domestic violence. The existing prohibitions do not harmonize with international guarantees, however, women's groups have again been creative in their search for redress and have seized for themselves the mantle of change; some of the most widespread new developments in the area of domestic violence law and policymaking, and women's rights groups have helped shape a trail of reform in this area.

The Supreme People's Court's Trial Guide to Domestic Violence-Related Cases in 2008 breaks new ground by providing protection orders in pilot courts under limited circumstances. Leading women's rights advocates hail this as a small step in law theory, but a big step in judicial practice. The challenge now is to expand the protective orders beyond the nine pilots and push the boundaries of its scope.

Informed and animated by international guarantees and new developments in domestic violence lawmaking around the world, the anti-domestic violence network of China has developed a strong experts' draft on domestic violence. This experts' draft is a blueprint for national law reform and embraces many of the international law definitions of domestic violence. However, deep-seated traditional mores, such as son preference and devaluation of the girl child, are inextricably interrelated to violence against women and must be captured in any narrative on women's rights law reform and practice.

Despite more women in employment, feminization of part-time work, gender bias in advertisements and recruitment, sex segregation in employment, the commodification and objectification of women, ghettoization of women in lower ranking employment, and the over-inclusion of protections in the law that stereotype and subordinate women, family responsibility-based discrimination, and cross-cutting and multiple forms of discrimination continue to disadvantage and subordinate women in China. Differential retirement practices that force both blue collar and professional women to retire 10 years ahead of their male counterparts are some of the biggest threats to economic development in China.

The law of employment promotion, in 2008, broke new ground by outlawing discrimination on the grounds of nationality, race, gender, religious belief, et cetera. The labor contract law, which came of age in 2008, too, reflects a paradigm change in labor relations, as it articulates that a contract must be based on principles of fairness, equality, and negotiated consensus.

Despite these good-faith efforts, these laws have had a disproportionate impact on women workers and more women have been forced into part-time employment. The under-implementation of these laws in a time of global economic strain is a threat that runs through most laws.

In the absence of a national anti-discrimination law, anti-discrimination scholars and practitioners in China have developed a model anti-discrimination law based on ILO [International Labour Organization] guidelines and other international norms. This draft, known as the Experts' Draft on Anti-Discrimination, outlaws dis-

crimination based on multiple grounds of discrimination, including nationality, gender, religion, and sexual orientation. And these experts' drafts, which are unique to China, are often blueprints for reform and catalysts for action.

A similar experts' draft on sexual harassment and a sexual harassment guidelines for companies are exciting new developments initiated by Chinese scholars and once again augment the call for international guarantees.

These dynamic initiatives by civil society scholars fill the lacuna left by inoperable and hortatory laws. For example, although the revised LPWRI, for the first time, outlawed sexual harassment, this prohibition only remains aspirational.

The law does not provide a definition of sexual harassment, nor the elements of the offense. So far, of the 19 national cases that have gone to courts, not a single case has articulated sexual harassment as a cause of action, but based a claim for damage on other provisions in the law.

The face of poverty in China is that of a rural women. Due to patriarchal norms, male-dominated village committees and autonomous village committees' regulations, women who are married out, divorced, widowed, or single are deprived of access to land tenure or responsibility law. Here, too, women's rights leaders have seized the opportunity for reform to call for a form of judicial review of village committee rulings and more egalitarian decisionmaking at the village levels to amplify women's voices in community affairs.

In conclusion, although international human rights norms are yet to be read directly into lawmaking or judicial decisionmaking in China, women's rights advocates use these norms as a model to inform their advocacy and to bolster their arguments before a public or political forum.

To this extent, human rights norms have been important building blocks of the emerging and evolving reform processes on behalf of women in China. China's women's groups have galvanized around the universally shared, rather than unilaterally held, goals of the CEDAW. It has sparked the process of transnational engagements and a more multilateral and comparative approach to law and practice.

These internationalization processes have provided useful interpretative tools and a litmus test to gauge the gap between law and practice. In the final analysis, the rights' rhetoric remains largely symbolic and is not always fully translated into action. However, women's rights groups in China have emerged and reinvented themselves as the true agents who ignite debates that would otherwise lie dormant.

Though China's progress in women's rights lawmaking has not delivered on all its promises, the journey continues and Chinese women's groups are constantly challenging themselves to find new and alternative ways to address unresolved issues, re-imagining strategies, and finally to propel women's rights as pivotal to the rule of law. Thank you.

Ms. STORY. Thank you, Rangita.

I will now turn the floor over to Katherine Zhao.

[The prepared statement of Ms. de Silva de Alwis appears in the appendix.]

STATEMENT OF KATHERINE ZHAO, DIVISION OF SOCIAL SCIENCES, UNIVERSITY OF CHICAGO AND FORMER FULBRIGHT FELLOW

Ms. ZHAO. I want to first thank the Commission for giving me this opportunity to speak here today. Amid China's transition from a socialist to a more market-based country, there has been a host of social problems that has emerged that has disproportionately affected women. An important question to ask in this regard is: how has the Chinese state responded?

Building on Rangita's insightful analysis, I will address three areas of progress, as well as four remaining challenges.

One area of progress is improved laws and policies. Within the past 30 years, the central government has released various national laws and policies that prohibit the violation of women's rights. Yet, it is often local areas, such as Hunan Province, that push legislative boundaries and anticipate national legislation. For example, Hunan issued the first local regulations related to domestic violence in 1996 and it issued the first guiding opinions by a provincial high people's court in 2009.

On a second level, there have been increased services, awareness, and access to justice. For example, there have been services in the form of hotlines, shelters, and activity centers that provide vocational training for women. In addition to greater public awareness, more women are using the courts and other dispute resolution channels to seek redress for their grievances. This has resulted in a small but growing number of successful cases, including the first criminal case involving sexual harassment.

On a third level, there have been advocacy efforts that involve NGOs, scholars, women federation officials, and allies within the state. For example, advocates began to notice an increase in the use of violence by women against their batterers. The Supreme People's Court, partly as a way to provide alternatives and to allow for normal court proceedings, introduced protection orders on a trial basis in 2008 in select courts involving divorce cases.

The introduction of protection orders has further mobilized advocates in their push for legislation against domestic violence. Specifically, in January 2009, a woman seeking divorce due to domestic violence was brutally assaulted by her husband. Her brother had previously asked the municipal court to issue a protection order on her behalf.

The court refused, citing the non-binding nature of the trial project. This galvanized advocates to draft a judicial interpretation expert proposal that would make protection orders available nationwide. Many advocates see the passage of the judicial interpretation as a seat-warmer for the release of a long-awaited anti-domestic violence law in China.

In the case of Hunan Province, which has issued the most protection orders, active engagement by a variety of stakeholders has played a pivotal role in the number and kinds of protection orders that have been issued. For example, courts have issued protection orders that go beyond prohibiting violence, to specifying that the perpetrator must stay 200 meters away from the victim's residence, place of work, or her family's place of residence.

At the same time, there are remaining challenges. For example, despite written legislation, implementation lags. Notwithstanding vague legislation, officials may ignore, circumvent, or are not aware of certain legislation, especially when work related to gender equality is not linked to a performance assessment or promotion prospects.

Enterprises and other organizations, when faced with who bears the cost of pregnancy and maternal leave, discriminate against women at every stage of their employment. In other words, the Chinese state has created inadequate structural incentives and distribution of resources to enforce policy related to gender equality.

Organizing bodies such as the All-China Women's Federation exist, but they are under-staffed and have limited power. Some provincial-level women's federation offices may only have four or fewer staff members. In addition, some officials see economic development and the preservation of the family as incompatible with the promotion of women's rights, so the former takes precedence.

Last, the lack of knowledge about legislation and services that help women, even by women's federation officials, reinforce the need to increase awareness. For example, the existence of government-run shelters is sometimes intentionally not publicized for fear that it will create demand that surpasses capacity.

Second, another impediment to the realization of women's rights involves Chinese legislation that unintentionally affects women in a negative manner. For example, population planning policies that allow the parents of a daughter to have another child follow the belief that daughters are not as good as sons. In this regard, conducting a gender impact assessment might be helpful in anticipating harmful effects of legislation.

A third challenge that remains is wider constitutional controls on freedom of speech and assembly, as well as rule by law, which make it difficult for China's female citizens to address their grievances through formal channels. Courts may refuse to take cases, especially cases involving sensitive issues such as land, and even when cases are successful, enforcement of the ruling remains an issue.

Last, norms impede the full protection of women's rights, and these are often linked to discriminatory practices. One example is the practice of women marrying out of their village. There is a preference for sons because parents believe that it is sons who will take care of them in old age. Gendered norms also make these women vulnerable to deprivation of their access to land, including shares of moneys that are earned from land appropriation for urban or commercial development.

At another level, slogans often heard in rural areas, such as "Pumpkins aren't vegetables, women aren't people" and "Why is a woman running for village head? Did all the men die?" erode the state's commitment to gender equality.

In conclusion, Chinese women increasingly have more tools to protect their rights, such as the law, but in practice victims cannot readily access these protections due to various hurdles. In the most motivated areas, women enjoy greater access to justice because there is a network of key institutions and stakeholders that publicize and enforce legislation related to gender equality.

Thank you.

Ms. STORY. Thank you, Katherine.

And now, finally, we will hear from Ambassador Lagon.

[The prepared statement of Ms. Zhao appears in the appendix.]

STATEMENT OF MARK LAGON, FORMER AMBASSADOR-AT-LARGE AND DIRECTOR, OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS (TIP), U.S. DEPARTMENT OF STATE

Ambassador LAGON. Thank you very much. It's a pleasure to take part in the Commission's work, and I really appreciate the invitation.

"Human trafficking," which I have had occasion to work on in both the nonprofit world and the State Department, is a jargon term that is often misunderstood. It may, or often, involve migration but it is principally about exploitation, whether for commercial sex or labor. One sees in China ways in which human trafficking is particularly dangerous and harmful to women and girls, as it is all over the world.

What kinds of trafficking have we seen in China in recent months which victimizes girls and women? A number of cases have been documented in the annual report done by the State Department's human trafficking office. They include instances of women lured and forced into commercial sexual exploitation abroad in Taiwan, Thailand, Malaysia, Japan, and Europe, including the United Kingdom, and even to Africa.

There have been documented cases of women forcibly trafficked or manipulated to go to Ghana, then when returning to China, identified as victims, not being given the kind of depth of protection returned victims of trafficking need, in particular accounting for the possibility of retribution by the traffickers.

Chinese women have been smuggled throughout the world and forced or lured into either commercial sex or forced labor because of the pattern of recruiters who get trafficking victims, purposely, deeply into debt. That is used as leverage. I met two women in Osaka, Japan who had been just such victims of manipulation, going to Japan, and it was in fact the debt which was the traffickers' key lever against them.

Ethnic Hmong from Vietnam have been trafficked for forced marriages or into Internet sex operations in China. There have been allegations that government-led labor transfer programs have forced Uyghur girls and women to work unpaid in factories in eastern parts of the PRC based on false promises, because in fact trafficking involves not just sheer coercion, but manipulation. This, of course, is a counterpart to the policy of more and more Han Chinese coming into Xinjiang—moving Uyghur females out.

North Korean women, in particular, have been victims of human trafficking, brought into the sex trade and forced marriage. Most troubling, they are typically deported if found by authorities. A few hundred are sent back to North Korea every month and face severe punishment in North Korea. That effort did not winnow down, but in fact was stepped up moving toward the Beijing Olympics.

Last, an example, not just from North Korea, has been the vulnerability of Burmese who have been trafficked for forced marriage,

and some, when found, were deported and were sentenced to three months in prison and were treated as criminals or a deportable alien, as opposed to victim.

If one is to assess the record of Chinese authorities at various levels dealing with human trafficking, there have been a number of successes and improvements in recent years, in particular, law enforcement efforts in some places, aimed at sex trafficking, not so much trafficking for the purposes of labor. Examples include Fujian police finding a number of Vietnamese women who were trafficked into multiple provinces, such as Yunnan and Guangxi, for the purposes of bartered or forced marriage. Fujian police also broke up the efforts of gang members trafficking prostituted women for the purpose of being used by men in remote places. Finally, there have been some examples of convictions for trafficking of dozens of females into forced marriage in Guizhou Province.

Other examples of success or progress include training border officials to see something as trafficking. The Ministry of Civil Affairs started to work on training with the International Organization for Migration, and there was mobilization of provincial women's federation offices, giving counsel and aid to human trafficking victims.

Finally, a public awareness campaign was run by the All-China Women's Federation, which is, of course, a kind of quasi-governmental institution, especially aimed at awareness of young female migrant workers, although arguably that public awareness campaign is limited compared to the scale of the problem in the country.

But that said, despite these successes, there are a number of failings which are tied to larger contributing factors which allow women and girls to be victimized in human trafficking. First, it is a penchant of PRC authorities to have the prevalence of a law and order approach or what I would call a "migration security" approach as opposed to a human rights approach. The laws on the books in China do not match the terms of the Year 2000 Trafficking in Persons Protocol, the Palermo protocol to the UN Crime Convention, and China has not ratified that Palermo protocol.

Domestic law does not cover labor trafficking. It insufficiently focuses on sex trafficking. Then as far as sex trafficking goes, girls who are between 14 and 18 in the sex industry are not considered sex trafficking victims, even though that is the international norm, that there is no question of volition when it comes to minors.

The State Department assesses that the PRC Government has a tendency to conflate human trafficking and human smuggling, and the victims of human trafficking are sometimes punished. The All-China Women's Federation has noted that it has had to intervene in some cases of unjust punishment. There really is not a screening process for those who are arrested in prostitution to see whether they are actually sex trafficking victims.

A second important failing is the policy with regard to desperate migrants' status, most notably in the case of North Koreans, who are treated as economic migrants rather than refugees. Arguably, the PRC authorities do not live up to their commitments under the 1951 Refugee Convention and its followup 1967 protocol, and merely giving access to the UN High Commissioner for Refugees would

help. I think some of these same policies on migrant status are also relevant to dealing with Burmese.

A final area of problems lie in the general labor rights situation. Laws do not provide for sufficient fines and prison sentences for forced labor, and indeed labor infractions more generally do not have sufficient fines and prison sentences on the books, much less to speak of implementation. The household registration system in China, controlling the movement of internal migrants, is unfair, unevenly implemented, and contributes to the vulnerability of human trafficking.

There are a couple of other contextual factors that are worth considering: a booming sex industry, which is a little bit a part of the context that Katherine Zhao refers to, a kind of movement from the highly ideological Communist system to a more Wild West capitalist system, and there is something of a moral vacuum and a booming sex industry. Most important as a contextual factor, though, is a demographic gender imbalance. A shortage of marriage-available women and the situation of a male-to-female ratio being imbalanced, fuels sex trafficking and forced marriage.

The population policies of government authorities at all levels, even though softened from the one-China policy, unevenly implemented, does contribute to the problem. It is, of course, especially striking in the form of the most horrifying, direct curbing of reproductive choice: forced abortions and sterilizations.

So as a final assessment, I would say, what are the prospects for reducing human trafficking as threats to women's and girls' rights? Given the lack of transparency of government authorities, sharing, for instance, no information whatsoever with the UN Office on Drugs and Crime or the Department of State in their preparation of their respective global reports on human trafficking, a lack of access given to international organizations, and limited freedom to non-governmental organizations, progress by nature in China will be slow.

Despite all of this, I think dialogue with Chinese authorities is essential. I think it would be appropriate to appeal to Chinese authorities to say, you are frequently calling for economic, social, and cultural rights in a UN context rather than political and civil liberties. Human trafficking engages just those economic, social, and cultural rights for women and girls. Appealing to Chinese interests as a matter of law, and ultimately human rights in terms of economic rights and women's rights, is a very important part of the dialogue.

I am happy to talk more about that in the rest of our session. Thanks.

[The prepared statement of Ambassador Lagon appears in the appendix.]

Ms. STORY. Thank you, panelists, for your testimonies and perspectives on these important issues.

We would now like to jump right into the question and answer session. I will seize the opportunity to ask the first question, and then we will open up questions to the audience.

This is directed at all three panelists in your varying issue areas. Maintaining stability has been at the forefront of the Chinese Government agenda in recent years. In what ways do you perceive the

women's issues that we've just discussed as a stability issue? Do these issues impact the stability in China as a whole?

Ms. DE SILVA DE ALWIS. I'd like to build on your question and on Ambassador Lagon's comments. I think when we're talking of security, I think one of the greatest threats to security is the illegal sex-selective abortion issue, which really skews the sex ratios. CASS, the Chinese Academy for Social Sciences, predicts that in 10 years, there will be one out of five men that will be unmarried due to a lack of girls in China.

I think that is going to cause an enormous threat to security in every way, and that will also accelerate marriage trafficking and violence in society, as well as violence against women. So I think that lies at the very heart of the security issue, the way in which sex-selective abortion, son preference, and the devaluation of girl children all play out and intersect in creating a threat to security.

I think apart from that, the way in which women are excluded from employment because of over-protections in law, because of over-inclusive laws that not just disadvantage women, but exclude women from a variety of employment opportunities that are available to men, is an enormous threat to economic security, as well as the security of the family and the community.

Again, differential retirement practices that exclude and marginalize women from continuing to work beyond 50, in the case of blue-collar workers, and beyond the age of 55 in the case of cadre workers, have an enormously negative economic impact, not just on women, but on the lives of their children, their families, and their community. So we have to see that again in that context of non-traditional security which affects economic security.

And to again echo the Ambassador's words, although China has not ratified the ICCPR, the International Convention on Civil and Political Rights, China is a party to the ICESCR, the International Convention on Economic, Social, and Cultural Rights. Economic, social, and cultural rights speak to all of these issues that we have discussed in very powerful terms. So that is a great model through which to give voice to these issues and to hold China accountable to the guarantees under that convention.

Ms. ZHAO. Yes. I guess to add to that, I think that another realm in which women's issues is tied to social stability is access to land, especially for rural women, because access to land is the very essence of their livelihood. So being stripped of that access and being deprived of the economic benefits that come from losing access to the land or being able to use that land to either farm or to contract it out to other people, is a great source of insecurity not only to women, but also to their families. I see this as tied to the greater social stability climate in China.

In addition, one thing I mentioned in my speech that I feel is underplayed is the choice between economic development and women's rights. I don't see them as mutually exclusive. I feel that protection of women's rights and the ability to give them access to employment and healthcare will also greatly benefit and further, for example, economic development goals that the Chinese Government may have.

Ambassador LAGON. Well, I would agree with Rangita about the demographic trends, obviously. I think that there is a tinder box

here that is in danger of being explosive in terms of the gender imbalance, and indeed, the problem of sex-selective abortion and choosing not to have girls come into this world. Also, it is not just simply the matter of there not being more women. If women are being generally shut out from accessing rights, they will become more and more of a powerful force that might be destabilizing if their aspirations aren't met.

I think the general policies on movement of workers, whether the movement of workers within China or migrating out of China, is a source of instability and the government authorities are not providing sufficient and even protections for those who move between regions of China.

I found, when I was Ambassador to combat human trafficking, that there is no other place in the world which had as high fees that were paid by migrant workers to shark labor recruiters to get placed in other countries as China. That is a formula among unregulated labor recruiters for a leverage situation, where two years' salary in the promised job is what the worker has to pay up front. If the job turns out to be something different, they are trapped.

Finally, I think the kind of corruption one sees around the world as the lifeblood of human trafficking is, of course, pertinent in China as well. Corruption is a destabilizing factor in many ways in China; trafficking would not flourish but for law enforcement and migration officials who were on the take. There have been more striking cases of corrupt officials who have been party to children in bonded labor situations. That is a destabilizing factor and not just a human rights issue.

Mr. GROB. If I could just ask a follow-up to that. So the question, obviously, is to what extent are women's rights challenges in China a stability issue? To what extent do Chinese authorities view it as a stability issue? We know that when an issue is seen in the eyes of authorities as affecting stability, it triggers a set of responses that may be somewhat different from those that are triggered if they do not see it that way. Is there any evidence, based on your experience or research, that suggests whether this still is an open question, or are women's issues today perceived by authorities as a stability issue?

Ms. DE SILVA DE ALWIS. I'd like to continue from where Katherine stopped as to China's embrace, and not just China's, but most Asian governments' embrace of the Asian values argument, which is really a convenient way for Asian governments to explain away the erosion of human rights violations and human rights standards. As Amartya Sen, a Nobel laureate and foremost development economist, argues, economic development, universal human rights norms and cultural sensitivity are not necessarily intrinsically opposing values.

Important parts of Asian traditions include notions of human rights, so the very concept that Asian values are to some extent diametrically opposed to Western concepts of human rights is a faulty argument. These are universal human rights norms and therefore they are not in any way the priority or the prerogative of the West.

Having said that, the idea of security, the construction of the word "security," defers from the state construction of what is secu-

rity to civil society construction of the term. I think the state constructs security in a very traditional way as a harmonious society, and a harmonious society as a cornerstone of what would be non-threatening to the state. So I think it is important for us to re-imagine security and deconstruct those conservative constructions of what is security and to re-imagine security in the image of all persons, women, men, and children. So I think that is really the challenge ahead: how do we reconstruct the term "security?"

Ambassador LAGON. Well, I would just say the way to look at this, I think, is to look at who is seen as the source of stability by the authorities. The heart of my opening statement is the pattern of authorities treating victims of human trafficking—women, girls, or men, for that matter—as those who are at fault, those who are the criminals, those who are the irregular migrants to deport and punish.

They are seen as the source of the instability rather than the shark labor recruiter, the person who runs the brick operation in which children are under onerous trafficking conditions, and those who are manipulating or coercing people into commercial sexual exploitation.

Ms. ZHAO. An issue I see the government construing as a stability issue to a limited extent is domestic violence. There have been documented increases of women who commit a variety of crimes, whether it is homicide, or perhaps near-fatal injuries to either partners, another woman, basically a third party or their direct significant other due to long-term exposure to domestic violence.

A comparative example might be the battered women syndrome that we have here. But an increase in women using violence to counter violence has been documented in a variety of provinces. In women's prisons, there have been more individuals who have committed crimes and been sentenced for a variety of crimes linked to marital disputes, and if you look at the reason why, it's mainly because they've been subjected to domestic violence.

So I feel, as a response to this, this was an argument that women's advocates used as one way to, for example, have the Supreme People's Court agree to initiate a guide to provide protection orders and other measures that can alleviate women having to take such drastic measures.

So we see in that way that it was a stability issue and it continues to be that there has been an innovative trial-and-error take at the local level to see if other measures that go through more legalized or more institutional channels can alleviate some of these factors.

For women, some of the reasons why they resorted to these drastic measures was because they couldn't get a divorce, or they tried to access social services, or they tried to access police or courts, but either the police wouldn't intervene or the courts wouldn't take their cases, or perhaps the man wouldn't agree to a divorce. So what you often see is they try to exhaust other sources before they turn to taking measures into their own hands.

It wasn't that they initially wanted to do this, but it was more that other channels were not available or accessible. So I think we see, through the advocacy of a variety of NGO and civil society ac-

tors, the government is trying to once again provide channels where women can actually be free from violence.

Ms. STORY. Thank you.

We'll open up the floor to questions from the audience. If you do have a question, please come to this microphone at the center.

Also, I will remind you that there is a transcript that will be made public of this roundtable, so all questions will be on the record. If you do have a question, please state your name and affiliation, only if you would like it to be recorded on the transcript.

Thank you. Kara Abramson?

Ms. ABRAMSON. Kara Abramson, Congressional-Executive Commission on China. Panelists noted some positive developments in the adoption of some laws and policies, but even if fully implemented, do these laws and policies ultimately have an empowering effect on women, or to some extent do they perpetuate the stereotype that women are weak, passive victims in need of protection? One thing that is prompting this question is, I was recently looking at the National Human Rights Action Plan, which lumps women together with children, so it certainly sends that message to some extent. Thank you.

Ms. DE SILVA DE ALWIS. As I said earlier, there are overprotections in the law and those abound. The laws, especially the labor laws, are replete with provisions that are overprotective, stereotype women, segregate women, and exclude women from various kinds of employment, including travel-related employment, employment above ground, underground, during certain periods of lactation and menstruation, and that is a very paternalistic notion of protection of women.

ILO conventions, as well as the CEDAW, do not argue against all protections in employment, but they call for protections in employment that cover both men and women workers, therefore, what is needed is a more egalitarian application of these laws which will then not discriminate against a particular gender. I think that is very important, to make sure that these laws are gender-neutral and don't result in excluding one gender from employment opportunities.

For example, the CEDAW Committee in 2006 called for a clear and concrete definition of discrimination which is lacking in Chinese laws. I think that is really the result of some of these exclusions in the law and overprotective legislation. The CEDAW calls for not just equal protection in the law, but addresses the way in which even facially neutral laws have a disproportionate impact on women, so both the direct and the indirect consequences of discrimination are covered under international guarantees.

So the idea is to understand that even when a law seems gender neutral, facially neutral, that its impact might have a disproportionate impact and result in excluding women from employment opportunities. So as far as looking at these laws from the standpoint of the international human rights norms, the CEDAW provides the tools and the kind of benchmarks to test how these laws should then get really translated into practice.

Ms. ZHAO. Yes. One thing I noticed when I was in China from 2008 to 2009 is there is active debate about whether we should have gender-specific or gender-neutral laws or policies. For exam-

ple, with the Supreme People's Court guide related to broader marriage cases that introduced a protection order, actually the protection order is gender-neutral, both men and women can apply.

There is at least one instance where a male has tried to apply, but I think the problem is that it is still seen very much as a women's issue, so in one way it stereotypes women, but in another way it actually negatively impacts men who may suffer from domestic violence or, for example, human trafficking, in which we see, again, the laws and also the national action plan that was released in 2008, are very much targeted toward women and children. These are traditionally seen as vulnerable groups, but at the same time it doesn't fully capture the reality of the situation.

Ambassador LAGON. In the realm of human trafficking, I have been an advocate for the equal importance of focusing on sex trafficking and labor-related trafficking. The field is kind of bifurcated. There are some people who are moved by one or the other and I have been focused on the importance of parity.

In the realm of sex trafficking, there is a natural gender bias that arises, but that is one of society and law enforcement authorizations reflexively blaming women in commercial sexual exploitation as being the ones who knew what they were getting into, and as being dirty. For that matter, in this country, if you look at the arrests that are involved in prostitution, of pimps, johns, and prostituted people, two-thirds of them are women.

So, training is something we need in this country as well as China. I think that it is important to treat human trafficking as something that threatens those human beings who are not getting treated as human beings in full. But there are some specific needs for protection and we should have dedicated services for human trafficking, and at times that requires an accounting for special needs of women and girls.

Ms. DE SILVA DE ALWIS. Could I just add something to what Katherine also mentioned? Another lacuna in the Chinese legal system is that there aren't work-family reconciliation laws. The few provisions that relate to work-family reconciliation are targeted only toward women. Women are still considered the primary caregivers and are primarily responsible for family duties. Women are thus targets of discrimination based on family responsibility. That has a negative impact on women's equal treatment in employment and in the public sphere.

So we need to look at the way in which these norms intersect, the way in which equality in the home has an impact on equality in the workplace and norms and laws that relate to employment practices must reflect the way in which gender equality in private and public intersect and are inextricably interlinked.

That is why it is important that these new laws on employment echo the new changes that are taking place around the world and that are captured in international conventions that call for work-family reconciliation policies that privilege not only women, but also male caregivers who choose the right to give care to their family members.

Ms. OLDHAM-MOORE. Ambassador Lagon, how many TIP [Trafficking in Persons] visas are given to Chinese who come to the United States in terms of labor or sex trafficking? Also, what kinds

of programs were there between DOJ [Department of Justice] and Chinese law enforcement?

Ambassador LAGON. Great questions. I don't have statistics handy on the number of T visas given to trafficking victims to stay in the United States, but the pattern of trafficking victims coming from abroad is roughly this: 40 percent of the trafficking victims that come into the United States come from Latin America, about 40 percent come from East Asia. Patterns have waxed and waned about the countries from which the victims are originating in East Asia, but there used to be many more who were from Korea. The trend in recent years has been an increase from China and Taiwan.

But one has to realize that the number of people who have received T visas is small. The number of victims of human trafficking abroad that have been certified is limited and it's a really small "n," a social scientist would say, compared to the larger reality of total victims. But if you were to extrapolate, I think it is probably an increasing trend.

One would think that the greatest area of possible cooperation between United States and Chinese authorities would be on some kinds of law enforcement training. Despite the resistance of Chinese authorities to share information with the United States for preparing the State Department annual report on trafficking, that is important. There have been beginnings of that kind of cooperation, particularly the International Criminal Investigative Training Assistance Program [ICITAP]. Of course, training often benefits from a third party, a third party not just being the law enforcement of the United States, but the law enforcement and the government—but civil society actors. That has been hard to pull off, a non-starter.

Ms. STORY. There's a question over here.

Anna.

Ms. BRETTELL. My name is Anna Brettell. I am also with the Congressional-Executive Commission on China. My question relates to the process by which the Anti-Domestic Violence Network devised their expert draft Anti-Domestic Violence Law and how it compares to the All-China Women's Federation's [ACWF] recent draft, especially in terms of how widely did they seek participation, from whom did they get input, and also how was the draft received by delegates in the National People's Congress [NPC]. Is the NPC seriously considering this draft? What are the prospects for the passage of an anti-domestic violence law?

Ms. DE SILVA DE ALWIS. I think Katherine and I have a response to this. An interesting aspect of the domestic violence draft law that was drafted by the Anti-Domestic Violence Network [Network] is that it defines domestic violence very broadly, far more broadly than the ACWF draft's definition of domestic violence.

The Network's draft includes, I think as I mentioned before, physical, sexual, verbal, economic, and psychological violence. But what I hear is that there is some kind of division or some kind of argument going on within the Network as to whether this is an overbroad definition of domestic violence, and how instances such as economic violence can be proved in court and how that could then be a cause of action. Our work is providing technical assistance on these definitions and how these definitions can then be ac-

tually invoked in a court of law and be operationalized in the case of litigation or in the implementation of the law.

As for the process, my understanding is that the Anti-Domestic Violence Network's draft was introduced in 2009, but there was no response from the National People's Congress on that, so I think they're planning to reintroduce that. The work is ongoing. The Anti-Domestic Violence Network continues to create forums at which this law can be introduced to the public. I need to clarify with Katherine whether, in 2008 it was introduced, and when they are hoping to introduce it again. I know that the sexual harassment guideline was also introduced.

Ms. ZHAO. Yes. I think it is interesting, because both the Anti-Domestic Violence Network, as well as the All-China Women's Federation, introduced their own versions of the Anti-Domestic Violence Law. It did seem like there was not so much communication between the two on definitions, as well as, for example, the scope of the protection order. However, this is only my own understanding.

There are some indications that the women's federation's definition of protection orders might be more narrow, but in my time there it was much harder to get a draft or any sort of information regarding the actual draft that the women's federation was submitting. This also points to a transparency issue.

I think the process—I mean, a lot of it does come from field investigations that people from the Network might do. It's also a network of scholars, so they have their own research. I think they try to get feedback from people that they might talk to during their field investigations, as well as area NGOs that are working on these issues. For example, with the Beijing Legal Aid Center, maybe some of the cases that they take, they might talk to the litigants there.

In terms of the NPC, I think what I would add is that it does seem like both of these drafts were introduced in the early 2000s and they were not made part of the legislative agenda. It does seem like now there's room for one women's law, so there is this idea of, should we have an anti-domestic violence law or should we have a greater violence against women law?

One forum that I attended, an NPC member did speak of—you know, they do their own research as well and he was part of the field investigations. I think for him, he needed to see the need for a domestic violence law. So I think in terms of the response, it did seem like at least some members may not be completely convinced that there is a need right now for this type of law.

Ms. DE SILVA DE ALWIS. Yes. From my research, from reviewing the research that is shared with us by the Chinese, the Anti-Domestic Violence Network's law was introduced to the NPC in 2009.

Ms. ABRAMSON. The panelists talked briefly about sex-selective abortion. I wonder if you could speak a bit more about this issue, including proposals in China to criminalize it. Thank you.

Ambassador LAGON. Sex-selection abortion is a major problem, not only in China, but in India. It's often a problem that is swept under the rug and called other things, or kept secret. I think it's important that it be identified transparently as a crime.

I don't know what the prospects are for that happening in China in short order, but the choice of having a male as opposed to a female is one that I think is a matter of rule of law. I mean, I see it as the ultimate issue of discrimination if you decide that a girl should not enjoy coming into this world.

Ms. DE SILVA DE ALWIS. And Mark reminded us that this is not a problem just in China, but in India, too. But unlike in China, in India the law punishes sex-selective termination of pregnancy, which once again has not been translated fully into action, but it still provides remedies; it provides punitive elements that can be, to some extent a way of stopping these cultural traditions that value the boy child over the girl child. So that would probably be a good model for China to learn from.

But apart from that, I think laws themselves, as we all agree, are futile unless they have corresponding enforcement mechanisms and provide for complementary education and awareness raising on equality between the sexes. I think the CEDAW—again, the Convention on Elimination of Discrimination against Women—calls for these guarantees to be translated into school curriculums.

There are efforts around the world, wherever there is a cultural tradition that violates women's rights, like the practice of dowry, like the practice of unequal feeding practices, like the practice of child labor or child marriage, to introduce awareness-raising programs into the courses in primary and secondary schools.

So I think it would be important if we could have the same kind of insight brought to bear on the education system in China, where issues such as son preference and the devaluation of the girl child are also addressed through the education system. This has been done, to some extent, with some results in countries in South Asia, where there is a decrease in child marriage because of the way in which the education system has been revamped to increase girls' access to and retention in schools.

In India, the domestic violence law also provides prohibitions against the giving of dowries. So again, a prohibition against cultural tradition has been integrated into a domestic violence law. So I think it's important to think creatively when drafting China's domestic violence law. Again, how do we integrate traditional practices and cultural norms which violate women's rights into lawmaking so as to frame them as a threat to human security and to a life free from violence?

The devaluing of the girl child is also a form of domestic violence because, as we know, women are forced to abort their girl babies, and that has an enormous psychological impact on the mother that leads to increased women's suicide rates. So this is not just a stand-alone issue, but an issue that really violates the rights of the family and threatens the security of the family.

Mr. GROB. Ambassador Lagon?

Ambassador LAGON. I agree, China does need to move that step toward where India is, so that there are laws on the books. India needs to go further with implementation, but first, laws on the books are an essential first step in China.

Another comparative example worth raising is South Korea. The Republic of Korea has pursued, in concert with civil society organizations, a Love Your Daughter campaign, really trying to change

mores, change thinking. It might, to some extent, given the rapid economic growth, offer some parallels for changing things in China. Because of the demographic situation, the minds of both females and males are going to have to be changed about this because of the prevalence of males.

Mr. GROB. I wonder if I can just go back to something one of our panelists—Katherine, I believe it was you—mentioned about gender impact statements. Could you elaborate a little bit, and our other panelists as well, on the notion of gender impact statements? Is this something that is being discussed actively either in China or in policy circles? Is it an idea that is gaining some traction or is it one that you think should be gaining traction? In what ways might it be a very tangible item for dialogue and discussion?

Ms. ZHAO. Sure. I think one thing—well, this also ties back to more population planning issues—is this idea that was brought up by researchers from the Central Party School. They did a project related to population planning, asking, for example, why there still exists a preference for sons. The people in the villages they studied listed different reasons. For example, they said, sons care for them when they're older, or carrying on the family line, things like that.

But then they also asked villagers can daughters do this as well, and they all said yes. So immediately there was sort of a disconnect with realizing that actually daughters can do the things that they say are the reason why they prefer sons—but still there's this norm that says, well, you know, we would rather have a son.

I think one of the things that the researchers pointed to was policy, in the sense of the population policy that allows for certain populations to have a second child if their first child is a daughter. What they were pointing to is that this gives the idea that women are not worth as much, maybe worth half as much as men.

For this idea, they had suggested if there had been more gender mainstreaming or a gender impact assessment—that was more a term that I concocted—but the sense that thinking about the impact of legislation might have prevented—or at least made legislators more conscious of—possible negative impacts on society and women in particular.

So, the intent of the policy is, I think, well-meaning, but the impact on the ground might have been misleading. So I think there has been active talk of this idea of gender mainstreaming and lawmaking.

So before a law is actually made, it would be beneficial to have more public participation and public debate about possible impacts of the law. I do think that there have been scholars who have raised this issue, and there does seem to be some discussion in China that I've seen.

Ms. DE SILVA DE ALWIS. Gender mainstreaming is a very powerful legacy of the Beijing Platform of Action, and I think it should be a thread that is woven into every policy or legislation or action plan that should come out of the 12 areas outlined in the Beijing Platform of Action.

So building on gender mainstreaming, I think we need to make sure that gender equality is not just an isolated issue, it's not just a matter of a single law on anti-gender discrimination, but an issue where anti-gender discrimination and gender equality norms and

provisions are integrated into all laws and inform and animate all of the laws, whether they be the land rights law, sexual harassment laws, or employment laws, so that we ensure that the allocation of land, the allocation of property, the allocation of employment and social security benefits are carried out in a gender-equal manner and a non-discriminatory manner. That is really what gender mainstreaming is about.

Gender mainstreaming has been further qualified by the United Nations to ensure that every law, every agency, must ensure that a percent of the budget be allocated for gender advancement, so in any agency, a part of their allocation must be allotted for gender-based training, for gender-sensitive training. So I think that is an important element that should be absorbed into the Chinese legal system.

As for gender impact, again, it's important that we go through the Chinese legal system and privilege gender-neutral laws, but also ensure the equal impact of these laws on women. I think that is why it is so important to make sure that these laws are justiciable in a court of law.

As I pointed out earlier, implementation of laws is weak. As for international conventions—never are international conventions invoked in a court of law in China, but hardly are the actual provisions on anti-discrimination or on gender equality used as a cause of action in a court of law. So, that is problematic.

You mentioned Korea. One of the ways in which Korea reversed its son preference was by mounting an aggressive fight against that, and bringing litigation on gender equality, making sure these laws are invoked in courts of law and that judges are also made aware of and cognizant of gender equality.

AUDIENCE PARTICIPANT. Just bringing together two of the themes that I think you all brought up: one is legal reform, the other is cultural reform. Many have said that some Chinese traditional values discriminate against women in the workplace or in the community.

What I can imagine, is I can imagine a scenario where the male/female ratio increases. You have a surplus of males. That gives males more power in the workplace or in the community. Therefore, if you try to institute, at the same time, legal reform giving women more rights, you'll be coming up against larger opposition and you will have, therefore, strife in the community that is an unwanted sort of backlash of that.

I was wondering if you could comment on that, and if China has recognized this issue.

Ambassador LAGON. That's a very good question about the impact of the demographic trends on making changes in the law. I don't know whether this has been recognized by Chinese authorities—an awareness of the instability that comes from the male/female ratio is coming, but I'm not sure that this element of the instability has been appreciated.

I would just say, as a prescriptive matter, that those who are experts on China, those who have occasion to be in dialogue with civil society and government authorities in China should not propose a "go slow" approach on changing the norms that are written into law. Well, disappointing as it is throughout the world and in China

to see laws on the books not implemented, it is important to get those laws and norms written down. I would not think an implication of your observation is that we should go slow on the norms being codified.

Ms. DE SILVA DE ALWIS. I would agree with his statement.

Mr. GROB. Any other questions?

Ms. OLDHAM-MOORE. Could you talk about the impact on ethnic minority women in China, Tibetans, Uyghurs, Hui? How is their experience different, both from a legal framework and also from an economic standpoint?

Ambassador LAGON. Well, there is a pattern of all sorts of people migrating through the provinces of China looking for better economic opportunities. I think there is a more acute situation where there are robbed economic opportunities, when there is a concerted decades-long policy of the government to neutralize the distinct culture of certain areas—of Tibetans, and of Uyghurs in the Xinjiang Uyghur Autonomous Region.

Importantly, economic opportunity is reduced for ethnic women and girls in those situations. They are more desperate to move, to look for other opportunities, which is unfortunate because it means sort of ceding their territory, and the protections that exist in general arguably are weaker for those ethnic minorities.

Ms. DE SILVA DE ALWIS. I'd like to respond by commenting on the way in which evolving law reform has captured the need to look at multiple forms of discrimination. As I said earlier, the Law of Employment Promotion of 2008 broke new ground by outlawing discrimination on the grounds of nationality, race, gender, religious belief, age, and physical disability. For the first time an articulation of the law dismantles discrimination based on multiple grounds, including race and nationality.

But what is most exciting is this new law that is being drafted by the experts, which I said is known as the Experts Draft on Anti-Discrimination outlaws discrimination based on multiple grounds, including nationality, gender, religion, beliefs, disability, physical characteristics, age, health conditions, and sexual orientation, and other factors. So I think this is the promise of the law, and I hope this promise is fulfilled.

Mr. GROB. Any other questions from the audience? Back there.

Ms. PURDY. Lindsey Purdy from the Laogai Research Foundation. Secretary Clinton will be delivering remarks at the United Nations on Friday morning concerning the 15th anniversary of the Beijing Conference. I was just wondering, to bring this back to international policy, if each of you would address whether or not her remarks should be hopeful with regard to China.

Ms. DE SILVA DE ALWIS. As I said, civil society advocacy is animated by the human rights traditions that were spawned by the Beijing Conference. That had an enormous impact on their advocacy. In fact, they look at the second wave of feminism in China as that which began in 2005, so that was an important watershed moment in the history of women's rights, not just in China, but around the world and it really resonated most with women's rights advocates in China.

This is the tool that they use to launch their advocacy. This is what they use to justify and legitimize their advocacy. So it is one

of the most powerful frameworks in which to locate their human rights advocacy and justify the demands that they make. So, the Beijing Conference was really a watershed moment and its legacy has been enormous.

So, yes, as far as the impact of international human rights norms, the impact of international conferences on China as a mobilizing, galvanizing, organizing tool is enormous and I would not understate that. So I do hope that the Secretary's remarks that she made 15 years ago, that women's rights are human rights, are heard once again very loudly and clearly across the world.

Mr. GROB. Ambassador Lagon, then Katherine Zhao.

Ambassador LAGON. Well, you can count on Secretary Clinton emphasizing women's rights. It's the single issue on human rights that she has been most vocal about in her tenure. I think it's quite important for the administration of the United States to take advantage of multilateral instruments and identify standards that are not just ones that are articulated in the United States, and are important and universal as we sense they are, but citing those international instruments.

But I do think it's the responsibility of the United States to hold a high standard, and I think we would be doing a disservice to the future of women in China to overstate how far toward the aspirational aims laid out in Beijing Conference documents from 15 years ago which China has gotten. There is a long way that has been moved and achieved in the last 15 years, but it would be very good for the United States to cite this international set of norms and say there is a long way to go.

Mr. GROB. Katherine?

Ms. ZHAO. May I just add one remark? I think with regard to China, there is the possibility to be hopeful. There are a lot of challenges, some of which I documented in my speech. But I feel if we just look at the 1995 Beijing platform, for example, in which civil society was relegated to an off-site location from Beijing, and then we look at periodic reports to CEDAW in which a shadow report by civil society in China was not even allowed, to now where the government has allowed more input by Chinese civil society in planning Beijing + 15.

So I feel if we just look at it in terms of a temporal comparison, there has been progress along the lines of more civil society input that we need to recognize. That's definitely there, but at the same time I feel like some challenges which I mentioned, and some that I haven't mentioned, still remain.

Mr. GROB. Additional questions from the audience? Abbey, did you want to ask a question?

Ms. STORY. I do have another question about civil society in particular. Based on your research and anecdotal experience, is the Chinese Government imposing any restrictions on women's rights-focused organizations specifically, or are restrictions placed on civil society organizations in general, having an impact—and what kind of impact—on women's rights-focused organizations?

Ambassador LAGON. My own observation is that there is a consistency. I wouldn't say there's any special harassment of women-related NGOs. I think just in general, if it isn't a GONGO, a

government-organized non-governmental organization, there isn't going to be much room for it.

I think on this, this is the side of affairs where the Chinese Government is classically governing too much, not leaving enough room for civil society. But it is important, including for people like me who in the past sort of had a bias toward thinking the only way to understand the problem of governance in China is to see too much authority, to see that in fact the human trafficking element of women's and girls' rights is an example of, in another respect, government governing too little.

Ms. DE SILVA DE ALWIS. China is one of the few countries that does not submit a real, authentic shadow report to the CEDAW Committee. Whatever shadow reports that are forwarded to the CEDAW Committee are done outside of China and not within China, and the only so-called shadow report is almost always written by the All-China Women's Federation, which is really a part of the government.

So that is really very sad, given the expertise of the women's movement in China and the sophistication of the women's groups in China, that they are not even permitted to write a shadow report, to voice their concerns, to have their voices heard; they have been silenced. So that is an unfortunate aspect of the government's hold on civil society because if that dormant role of the civil society was unleashed, I think what we would see is actually a better framing of the state in the light of international norms.

That is why it is so important that, like in other countries, the women's NGOs not only hold the state accountable to women's rights violations, but are partners with the state to implement these norms and work in partnership with the state to monitor the implementation of women's human rights. So I think that's the missing link, that civil society is not seen to be partners with the government in implementing and monitoring women's human rights.

Mr. GROB. Thank you.

Katherine?

Ms. ZHAO. I agree with Mark. I see restrictions on civil society organizations across the board, not particularly greater restrictions on organizations working on women's rights. In many ways, there are similar patterns of challenges in terms of gaining legal status or being able to work with government organizations.

There are definitely variations in terms of restrictions on organizations in different sectors, and government agencies in certain parts of the country might be more willing to work with NGOs, but it depends. Of course, across the board, there is still not enough collaboration between state and society.

One area of restriction that I do see for women's rights is work with sex workers. Due to the illegal nature of prostitution, NGOs that work on this issue are doubly stigmatized in the sense that it's very hard for them to gain legal status because of the population they're serving. It makes it extremely hard for them to really operate as any sort of vibrant civil society.

Mr. GROB. Finally, just to bring this to a close—and I thank you all for participating today—it has been a great privilege and honor for us. If you had 30 seconds to recommend to President Obama or

to Secretary Clinton one thing that they could do, including one thing that they might say to President Hu or Premier Wen, or one thing they could do as a matter of U.S. Government policy, to promote and advance the cause of women's rights in China, what would it be?

Ms. DE SILVA DE ALWIS. I would say that women's human rights are critical to the advancement of the rule of law and good governance in China. There is nothing as important in the political economy of development in China as women's empowerment.

Mr. GROB. Katherine?

Ms. ZHAO. Something I mentioned earlier is the sense that women can participate and positively promote economic development. Women having more access to education—actually higher education, women, depending on the discipline, have similar, if not higher, attendance rates. So in terms of human capital, they have a lot to contribute. I feel the government can benefit from women's participation and I hope that they see that economic development and women's rights are not mutually exclusive.

Ambassador LAGON. Well, it's important for the United States to emphasize that human rights are universal and that women and girls need to be recognized in terms of their basic dignity in China, as everywhere else. And appealing to China's authorities based on stability as well is important.

To pick up on what you were saying, a movement of thinking over time by the Chinese authorities that civil society actors are in fact a source of cushioning shock absorbers and partners—not threats to the grip on power of Chinese Government—is an important realization that American authorities can play a role in delivering the message about.

Mr. GROB. On that note, I would like to thank you all for coming. I'd like to thank our panelists today for your input and comments. You've given us much to ponder and contributed much to the debate. So, thank you very much.

With that, this roundtable is adjourned.

[Whereupon, at 3:30 p.m., the roundtable was concluded.]

A P P E N D I X

PREPARED STATEMENTS

PREPARED STATEMENT OF RANGITA DE SILVA DE ALWIS

MARCH 8, 2010

The Beijing Women's Conference in 1995 and its progeny the Beijing Platform of Action marked a watershed event in the history of local and global women's movements. The clarion call to take Beijing back home resonated both locally and globally and reverberated in China among women's rights scholars and practitioners.

Fifteen years after this historic event and 30 years after the landmark Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) that China has ratified provides an important turning point to reflect on how the CEDAW has catalyzed gender-based lawmaking and mobilized women's groups in China to hold stakeholders accountable to the letter and spirit of the guarantees enshrined in the CEDAW. In the final analysis, as a universally recognized norm setting instrument, the CEDAW has become a powerful benchmark for women's rights groups in China to monitor the implementation of existing legislation. Most importantly, as an universal bill of rights for women, the CEDAW legitimizes and augments the voices of Chinese women's rights groups in their call for reform in law and practice in China. These calls in China echo the reforms taking place in analogous areas in other countries.

However, international norms are sometimes a double edged sword. For despite the fact that they are powerful tools to advocate for and monitor women's rights, China too has cloaked weak lawmaking in the garb of international norms. In spite of the rhetoric of the Chinese State which emphasized at the CEDAW Committee hearings in 2006 that the new reforms to the Law on the Protection of Women's Rights and Interests (LPWRI) were governed by the CEDAW committees Concluding Observations, the CEDAW Committees Concluding Observations made after the 5th and 6th State report in 2006 were very similar to and reinforced prior Concluding Observations made after the 3rd and 4th State report in 1999. This leads one to question the actual impact of these Concluding Observations on the State. What in fact had been adopted were the form and not the substance of international human rights norms.

The Chinese delegation acknowledged to the CEDAW Committee that there lies ahead "a fairly long historical process to progress from de jure equality to de facto equality."

Juxtaposed with the State's change resistant articulation of women's rights, China's women's rights scholars and practitioners innovative use of international women's rights norms has powerful transformative potential. The 2005 reforms to the LPWRI of 1995 was a milestone in women's rights advocacy in China and spawned a panoply of gender based law reform initiatives both locally and nationally.

I will share with you a thumbnail sketch of the highlights of the new and emerging developments in gender and the law in China and the exciting way in which these reformist initiatives have sparked local to global engagements. Firstly, the new laws manifest a marked movement away from the paternalistic notions on the protection of women toward embracing a more human rights based concept of the empowerment of women. Secondly, an indirect consequence of the ambiguous and the aspirational nature of the national laws such as the LPWRI has led women's groups to redirect their efforts to mobilize strong guidelines at the provincial level thus creating greater opportunities for the vindication of women's rights at the local level. For example, 19 of the 31 provinces and, autonomous regions have formulated implementing regulations for operationalizing the women's law and 24 provinces have some sort of services for victims of domestic violence.

DOMESTIC VIOLENCE

Although domestic violence has now been clearly prohibited by the revisions to the LPWRI, as well as addressed by provisions of the revised Marriage Law, China still lacks national legislation on domestic violence. "The horse I buy and the wife I own are mine to beat" is a popular folk saying and the concept of woman as man's property still exists in many parts of China.

The existing provisions are ambiguous in nature and are silent on a definition of domestic violence or the scope of the law as required by international human rights guarantees. However, women's groups have been creative in their search for redress and have seized for themselves the mantle of change. Some of the most vibrant new

developments are in the area of domestic violence law and policy making and the women's rights groups have helped shape a trail of reform.

The Supreme People's Court Trial Guide to Domestic Violence Related Cases, March of 2008, was published by the Applied Legal Institute of the Supreme People's Court and breaks new ground by providing protection orders in pilot courts under limited circumstances. Leading women's rights advocates hail this as a "small step in law theory but a big step in judicial practice." The challenge now is to expand the protective orders beyond the 9 pilots and push the boundaries of its scope.

Another new development, the Several Opinions on Prevention and Prohibition from Domestic Violence in August 2008 provides an inter department collaboration for addressing and handling domestic violence cases.

Informed and animated by the Declaration on the Elimination of Violence against Women, (DEVAW), the CEDAW and new developments in domestic violence lawmaking around the world, the anti-domestic violence network has developed a strong experts draft on domestic violence. This experts draft is a blue print for national law reform and embraces many of the international law definitions on domestic violence including physical, sexual, verbal and psychological violence; broadens the scope of the law and provides much needed remedies for victims. Set up in 2000, the domestic violence network is one of the strongest networks of civil society advocates in China spanning 28 provinces and autonomous regions and is an important narrative of civil society engagement in China.

Incubating developments include the new *Supreme Court Interpretation on Handling Marriage Cases Involving Domestic Violence* and an *ACWF Guideline on the Prevention of Domestic Violence.* These efforts to draft provincial level laws and national level guidelines complement the continuing call for a national domestic violence law and echo international guarantees to prevent and address domestic violence.

GENDER DISCRIMINATION IN EMPLOYMENT

Although the employment of women in public and private enterprises have increased, women are still concentrated in the lower strata of the informal sector.

Feminization of part time work, gender bias in advertisements and recruitment that call for particular height, weight and looks among applicants, sex segregation in employment, the commodification and objectification of women, family based discrimination, and cross- cutting and multiple forms of discrimination disadvantage and subordinate women in China. Differential retirement practices that force both blue collar and professional women to retire ten years ahead of their male counterparts are some of the biggest threats to economic development in China.

The Law of Employment Promotion 2008 breaks new ground by outlawing discrimination on the grounds of nationality, race, gender, religious belief, age and physical disability. The *Labor Contract Law which came into force in 2008* too reflects a paradigm change in labor relations as it articulates that a contract must be based on principles of lawfulness, fairness, equality, voluntariness, negotiated consensus and good faith. Despite these good faith efforts, these laws have had a disproportionate impact on women workers. The disparate impact of these laws result in more women being forced into part-time employment. The under implementation of these laws in a time of global economic strain is a thread that runs through most laws.

Provincial level laws provide for more effective articulations of gender equality. For example, the *Ways for the Implementation in Guangdong Province* establishes that no woman worker can suffer the termination of labor or decrease in wages or responsibility due to marriage, pregnancy, maternity leave, lactation or other reasons.

In the absence of a national anti- discrimination law, anti-discrimination scholars and practitioners in China have developed a model anti- discrimination law based on ILO guidelines and other international norms. This draft law known as "The Expert's Draft on Anti-Discrimination, outlaws discrimination based on multiple grounds of discrimination including: "nationality, genders, status, religion, beliefs, disability, physical characteristics, age, health conditions, sexual orientation and other factors which harm equal opportunities and treatment in employment and occupation of laborers." These unique experts draft laws in different areas of law in China including domestic violence, anti- discrimination and sexual harassment are often blue prints for reform and catalysts for action.

SEXUAL HARASSMENT

A similar experts draft on sexual harassment and a sexual harassment guideline for companies are two exciting new developments initiated by Chinese scholar practitioners and are informed by ILO Conventions as well as the CEDAW.

These dynamic initiatives by civil society scholars fill the lacuna left by inoperable and normative laws. For example, although the revised LPWRI for the first time outlaws sexual harassment, this provision remains aspirational. The law does not provide a definition of sexual harassment, nor does it provide the elements of the offense. So far of the 19 national cases that have gone to courts no case has articulated sexual harassment as a cause of action but based a claim for damage on other provisions in the law.

RURAL WOMEN'S PROPERTY RIGHTS

With 70 percent of women in rural areas, the face of poverty in China is often that of a woman. Due to patriarchal norms, male dominated village committees and autonomous village committee regulations, women who are married out, divorced, widowed or single are deprived of access to land tenure or "responsibility land."

Here too, women's rights leaders have seized the opportunity for reform to call for a form of judicial review of village committee rulings. Thus Article 63 of the *Property Law of 2007* allows an aggrieved party to appeal to the People's Court when her rights have been threatened by decisions made by a collective economic organization or villagers committee. In another instance of creative advocacy, women in Nanjing and Guandong have mobilized efforts locally to engage in more egalitarian decision making at the village level. As a result, the revised village rules include a greater role for women in participation in community affairs.

The Land Management Law that is currently being drafted provides a new opportunity for women to have their voices heard in the law making process.

In conclusion, although international human rights norms are yet to be read directly into lawmaking or judicial decision making in China, women's rights advocates use these norms as a model to inform their advocacy and to bolster their arguments before a public or political forum. To this extent, human rights norms have been important building blocks of the emerging and ongoing reform processes on behalf of women in China. China's women's groups have galvanized around the universally shared rather than unilaterally held goals of the CEDAW. It has sparked a process of transnational engagements and a more multilateral and comparative approach to law and practice. These internationalization processes have provided useful interpretive tools and litmus tests to gauge the gap between laws and practice.

In the final analysis the rights rhetoric remains largely symbolic and is not always fully translated into action. However, women's rights groups in China have emerged and reinvented themselves as the true agents of change who have ignited debates that would otherwise be dormant. Though China's progress in women's rights law making has not delivered on all its promises, in fact, as seen in the Chinese context, the process for change does not end but begins with the drafting of a law. Seizing the political moment, women's groups continue to forge platforms to shape public opinion and policy. The journey continues and Chinese women's group are constantly challenging themselves to find new and alternative ways of addressing unresolved issues and re-imagining strategies.

PREPARED STATEMENT OF KATHERINE ZHAO

MARCH 8, 2010

INTRODUCTION

I wish to first thank the Commission for the opportunity to discuss China's protection of women's rights, especially on International Women's Day. Amidst China's transition from a socialist to a more market-oriented country, a host of social problems has emerged that disproportionately affect women. How has the Chinese state responded? Building on Rangita's insightful analysis, I will highlight three areas of progress and four remaining challenges by drawing on developments from domestic violence, land rights, and employment discrimination.

AREAS OF PROGRESS

Improved laws and policies

Within the past 30 years, the central government has released national laws and policies that prohibit domestic violence, employment discrimination, and the violation of women's land rights, and gender equality is one of the seven basic state policies. Yet it is often local areas such as Hunan province that continually push legislative boundaries. On the heels of the Beijing Conference on Women, it issued the first local regulations on domestic violence in 1996. In April 2009, the Hunan High People's Court issued the Guiding Opinions Regarding Strengthening Judicial Protections for Women Who Suffer from Domestic Violence (Trial). Intensely debated and only 21 articles long, this is China's first guiding opinion by a provincial-level court specifically on domestic violence cases.

Increased services, awareness, and access to justice

There have also been increasingly more social services available to women, whether in the form of national and local hotlines for domestic violence or human trafficking, shelters, or activity centers that provide vocational training. In addition to greater public awareness as a result of media campaigns, more women are using the courts and other dispute resolution channels to seek redress for their grievances. This has resulted in a small but growing group of successful cases, including the first criminal case involving sexual harassment. An increase in legislation and social services reflects the prevalence of social problems and the state's desire to address these problems through institutionalized or semi-formal channels.

Advocacy efforts

One of the exciting developments in women's rights revolves around innovative advocacy efforts by NGOs, scholars, women federation officials, and allies within the state. Advocates began to notice an increase in the use of violence by women against their batterers;[1] partly as a way to provide alternatives and to allow for normal court proceedings, the Supreme People's Court introduced protection orders on a trial basis last year in select courts involving divorce cases. The preliminary impact of protection orders include (1) enforcement that has exceeded expectations and encouraging women who previously felt afraid to come forward (2) greater interagency cooperation, specifically between courts and the police (3) the mobilization of advocates in their push for legislation against domestic violence. Specifically, in January 2009 a woman seeking divorce due to domestic violence was brutally assaulted by her husband. Her brother had previously asked the municipal court to issue a protection order on her behalf. The court refused, galvanizing advocates to draft a judicial interpretation experts' proposal that would make protection orders available nationwide. Many advocates see the passage of a judicial interpretation as a "seat warmer" for the release of the long-awaited Anti-Domestic Violence Law in China. Lastly, protection orders have also (4) generated public debate, most noticeably online.

In the case of Hunan province, which has issued the most protection orders, active engagement by women federation officials, judges, police officers, as well as the support of the political-legal committee in the capital Changsha, has played a pivotal role in number and kinds of protection orders that have been issued. For example, they have issued protection orders that go beyond prohibiting violence to specifying that the perpetrator must stay 200 meters away from the victim's residence, place of work, or her family's place of residence.

REMAINING CHALLENGES

Lagging implementation and the need for more public awareness

Despite written legislation, implementation lags. Notwithstanding vague legislation, officials may ignore, circumvent, or not know about certain legislation, especially when work related to gender equality is not linked to an official's performance assessment and promotion prospects. Similarly, enterprises and other organizations, when faced with who bears the cost of pregnancy and maternal leave, discriminate women at every stage of her employment from recruitment, compensation and benefits, promotion to retirement. In other words, the Chinese state has created inadequate structural incentives and the distribution of resources to enforce policy related to gender equality. Though organizing bodies such as the All-China Women's

[1] According to data from Shaanxi province women's prisons, there was a 32.47 percent increase in 2005 from the same period in 2004 of female offenders who commit crimes involving the use of violence to counter violence and enter prison. There was a 21.43 percent increase in 2006 from 2005.

Federation exist, they are understaffed and have limited power; some provincial-level women's federation offices may only have four or fewer personnel. In addition, some officials see economic development and the preservation of the family as incompatible with the promotion of women's rights, so that the former takes precedence.

Lastly, the lack of knowledge about legislation and services that help women, even by women federation officials, reinforce the need to increase awareness. For example, government-run shelters are sometimes intentionally not publicized for fear that it will create demand that surpasses capacity.

Unintentional effect of laws and policies

Another impediment to the realization of women's rights involves Chinese legislation that unintentionally affects women negatively. Population planning policies, for example, that allow the parents of a daughter to have another child unwittingly further the belief that daughters are not as good as sons. Additionally, restrictions in the 2002 Rural Land Contracting Law and the 2007 Property Law against readjustments make it extremely difficult if not illegal to adjust the land to accommodate women's migration outside of the village. Another subset of legislation includes protective laws that dictate women's early retirement age or participation in certain types of work. In this regard, conducting a gender impact assessment might be helpful in anticipating possible harmful effects of legislation on millions of Chinese citizens.

Constraints on advocacy, access to justice, and the realization of the rule of law

Wider institutional controls on freedom of speech and assembly as well as rule by law not only contravene China's international commitments and its own laws, but make it difficult for China's female citizens to address their grievances through formal channels. For example, courts sometimes refuse to take cases involving land, and even when cases are successful, enforcement of the ruling remains an issue.

Lingering patriarchal norms

Norms impede the full protection of women's rights, and are often tied to discriminatory practices. The practice of women marrying out of the village, for example, fuels the preference for sons because parents believe that it is sons who will take care of them in old age. It also makes these women vulnerable to the deprivation of their access to land, including shares of monies that are earned from land appropriation for urban or commercial development. At another level, slogans often heard in rural areas such as "pumpkins aren't vegetables, women aren't people," and "why is a woman running [for village head], did all the men die?" erode the state's commitment to gender equality, especially when condoned by those in power.

In conclusion, Chinese women increasingly have more tools to protect their rights, such as the law, yet in practice, victims cannot readily access these protections due to various hurdles. In the most motivated areas, women enjoy greater access to justice because there is a network of key institutions and stakeholders that publicize and enforce legislation related to gender equality.

I look forward to questions you may have and further discussion. Thank you.

East Asia Law Review

OPPORTUNITIES AND CHALLENGES FOR GENDER-BASED LEGAL REFORM IN CHINA

By Rangita de Silva de Alwis

OPPORTUNITIES AND CHALLENGES FOR GENDER-BASED LEGAL REFORM IN CHINA

RANGITA DE SILVA DE ALWIS*

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I. INTRODUCTION

"The [CEDAW] Committee's comments on consideration of the last [State Party] report in 2003 [have] served as the basis for efforts on behalf of women since then."

- Huang Qingyi, Executive Vice Chairperson of China's National Working Committee on Women and Children of the State Council[1]

This Article examines some of the new and emerging developments affecting gender-based lawmaking in China. Years of advocacy by gender and law scholars and advocates in China have sparked these reforms, and have spawned a great number of pioneering initiatives in China. These new developments, however, have yet to be explored outside of China. In this Article, I seek to identify these new legal and policy reform efforts in China within a framework of comparative law in order to analyze these new initiatives during a critical turning point in China's gender and law initiatives.

This Article explores the strengths and weaknesses of these burgeoning initiatives using gender-based lawmaking in other parts of the world as a backdrop, and analyzes China's recent reformist efforts through a comparative lens. The 2005 amendments to the 1992 Law on the

[1] Press Release, Committee to Eliminate Discrimination Against Women, *Committee To Eliminate Discrimination Against Women Recognizes China's Advances Since Last Review, But Urges Greater Progress*, U.N. Doc. WOM/1575 (Aug. 10, 2006), *available at* http://www.un.org/News/Press/docs//2006/wom1575.doc.htm.

Protection of Women's Rights and Interests (LPWRI)[2] in China was a milestone law reform initiative. Since then, other gender-based law and policy reforms have spawned nationally and locally in the wake of the LPWRI revisions, and have mobilized a slowly growing gender and law network in China. This network, which has the potential to serve as an embryonic movement, is spearheaded by an elite group of gender and law scholars from China's leading universities. These scholars and practitioners have looked outward to multilateral strategies for advocacy, and have scoured the landscape for international human rights norms, comparative law, and policies to inform their efforts in the call for new laws or revisions of existing laws. Although not all of their efforts have been fully realized, they have propelled lawmaking by proposing new legislation, and have provided a benchmark and barometer for lawmaking initiatives. Further, their efforts have continued to revitalize a much-needed critique for future reform.

Transnational legal processes have often been described as a bridging exercise between international theory and practice. Although the revisions to the LPWRI have taken some important, albeit tentative, steps to articulate the concerns of women's groups, these steps have failed to reflect all the concerns voiced by the nascent women's movement in China. The implementation of these provisions remains the biggest challenge; lawmaking does not always translate into law-in-action. While China's globalization and state transformation have spawned a whole new economic structure, they have also spurred a new wave of activism by women's groups in what is now known as "globalization from below." The translation of women's human rights rhetoric into concrete action is often done by the women themselves through the way in

[2] Revised Law on the Protection of Women's Rights and Interests (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 28, 2005, effective Dec. 1, 2005) (P.R.C.), *translated at* http://www.wcwonline.org/pdf/lawcompilation/TheRevisedLawProtection.pdf.

which they raise inherent weaknesses in the laws to the surface--namely, by challenging inequities and enunciating alternative theories and practices. In addition, heightened activism, particularly on the part of Chinese women's rights groups, is one of the chief forces in China's watershed law-reform process.[3] Despite the lack of implementation, the 2005 revisions to the LPWRI represent an important symbolic achievement for women's rights in China. These advances can be attributed, in part, to the role of international treaties and the benchmarks that they have provided to the Chinese government, and to non-governmental organizations that have been a large factor in the drafting of domestic policies on women's issues.

The transnational flow of ideas is rapidly transforming Chinese women's activism, but what is more remarkable is the way in which it has inspired the thinking of women's groups.[4] Human rights discourse has created a legitimate space for the articulation of deeply felt needs and provides an effective framework to advance these compelling needs. The intersection of human rights, civil society engagement, and globalization from below has shaped new developments in international law. For example, do social movements trigger the transformative process, or are they merely participatory? The answers to this question, at least according to social theorists,[5] are often less clear in the Chinese context. In the Chinese context, we see a complex mix of legal and social transformation based on a growing rights discourse, as well as some resistance to the human rights framework. Although the contested nature of human rights

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[3] This Article uses a host of other anti-discrimination and anti-violence against women laws in other parts of the world as comparative examples.

[4] Central government institutions such as the State Council Working Committee on Women and Children and the All-China Women's Federation (ACWF), have advocated for legal reform in the areas of domestic violence, sexual harassment, and women's education. Several Chinese women's organizations were founded in conjunction with the 1995 World Conference on Women in Beijing, including the Center for Women's Law Studies and Legal Services at Peking University, and the Maple Women's Psychological Consulting Center. In April 2005, several Chinese women leaders jointly founded the advocacy project Women's Watch China to monitor women's human rights violations in China.

[5] *See generally* BALAKRISHNAN RAJAGOPAL, INT'L LAW FROM BELOW: DEV., SOCIAL MOV'T & THIRD WORLD RESISTANCE (2003).

has been much debated in China and elsewhere, the dynamics of the rights discourse have helped to create greater possibilities to claim rights and energized incipient women's rights movements in China.

An examination into the new and emerging gender-based developments in Chinese law has yet to be written. Thus, this Article seeks to fill that void through analyzing these new developments in gender-based lawmaking through a women's human rights framework and examining comparative developments in other countries. This is particularly relevant because a hallmark of the burgeoning gender and law movement in China has been its interaction with transnational conferences and colleagues.

Part I of this Article discusses the background of the LPWRI and its revisions, focusing on the analysis and recommendations of the United Nations' Committee to Eliminate Discrimination Against Women (CEDAW). In Part II, I examine the new reformist efforts, especially the much-heralded revisions to the LPWRI and its local progeny and efforts in the area of comparative law that might be instructive to the ongoing revisionist efforts in China. Part III explores the response to gender violence reflected in China's laws. Finally, Part IV focuses on the need for an enforcement mechanism and legal service for women as essential tools to actualize these new developments in the laws.

II. A CALL TO ACTION: REVISIONS TO THE LAW ON THE PROTECTION OF WOMEN'S RIGHTS AND INTERESTS AND THE ROLE OF INTERNATIONAL NORMS

A. Setting the Stage

Although the changes to the LPWRI[6] were first introduced in August 2005, the reform process has taken over two years to mobilize and bring together women's groups in China. In short, the overall process has been unprecedented, and although this process has not fully realized the goals of reframing women's issues in terms of rights and legal remedies, it has enlivened debate and discussion among women's rights academics, lawyers and activists in China, and further sparked considerable changes in the landscape of women's advocacy.[7]

The process first began in June 2004, when China submitted its combined 5th and 6th Periodic Report to CEDAW. The National Working Committee on Children and Women under the State Council (NWCCW) drafted the State Party report. Among other groups, the All-China Women's Federation (ACWF) provided extensive input into the writing of the report.[8] The

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[6] Revised Law on the Protection of Women's Rights and Interests (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 28, 2005, effective Dec. 1, 2005) (P.R.C.), *translated at* http://www.wcwonline.org/pdf/lawcompilation/TheRevisedLawProtection.pdf.

[7] The amendments to the LPWRI, adopted in August 2005, include the following key principles: 1) the national policy of gender equality; 2) the state's responsibilities in promoting national women's development and integrating it into overall national economic and social program; 3) clarification of the government's responsibilities in protecting women's rights, and the role of ACWF; 4) reaffirmation of the need for greater representation of women in government, and for addressing women's rights to education, work, and their person; and 5) prohibition of domestic violence and sexual harassment. *See* EXECUTIVE SUMMARY, ADB PEOPLE'S REPUBLIC OF CHINA, COUNTRY GENDER ASSESSMENT xi-xii (2006). The amendment is an important step forward, but some critics note that it, along with other recent laws for women, lack binding force for implementation and retain the image of women as caregivers rather than promoting an image of women as functioning in all occupations. *See id.* at xii-xiii.

[8] In August 2006, the CEDAW Committee conducted its review of the State Party reports. The mainland's delegation consisted of twenty-three representatives who were drawn from the State Council's National Working Committee on Women and Children, Ministry of Foreign Affairs, Ministry of Education, State Ethnic Affairs Commission, Ministry of Public Security, Ministry of Civil Affairs, Ministry of Personnel, Ministry of Labor and Social Security, Ministry of Health, National Population and Family Planning Commission, Permanent Mission of China to the United Nations and Supreme People's Court. The CEDAW Committee acknowledged the presence of many high level delegates representing China.

revised LPWRI was one of the major pieces of legislation highlighted by the Chinese delegation in the 5th and 6th combined State Party reports to the CEDAW Committee.[9]

The Chinese State delegation described the recent revisions to the LPWRI as an important indicator of the transformative changes in China--going from legislation to protect women to legal prohibitions on discrimination against women. The Chinese delegation acknowledged that "a fairly long historical process to progress from *de jure* equality to *de facto* equality,"[10] still remains, and noted that their work on advancing women's rights had been defined by the concluding comments and recommendations made by the CEDAW Committee to China's combined 3rd and 4th State Party Report in 1999.[11]

Thus, it is important to analyze the LPWRI and its 2005 amendments in the context of international law, and to highlight the changes as well as the gaps and silences in this law. Accordingly, a special focus of this Article will be an examination of some of the significant provisions of this law in light of the CEDAW Committee's Concluding Observations made in China's 5th and 6th State Party report by the CEDAW Committee in August 2006, and the Concluding Observations made by the CEDAW Committee in 1999 in relation to China's combined 3rd and 4th State party report. With this examination, this Article attempts to analyze the similarity of the observations in the reviews of both reports. The revisions of the LPWRI will be discussed against a backdrop of new developments in the law in other countries.

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[9] Apart from the revisions to the LPWRI, the China State Party report highlighted other laws that had been passed or amended which purported to safeguard women's rights. These laws include: the amendments to the PRC Marriage Law adopted in 2001; the PRC Law on Contracting of Rural Land adopted in March 2003; and the PRC Law on Compulsory Education, amended in June 2006.

[10] *See* Mme Huang Qingyi, *Introductory Statement by H. E. Mme. Huang Qingyi Head of the Chinese Delegation at the Consideration of the Combined 5th and 6th Periodic Report of the People's Republic of China on the Implementation of the Convention on the Elimination of All Forms of Discrimination against Women* (Aug. 10, 2006), *translated at* http://www.un.org/womenwatch/daw/cedaw/cedaw36/intro_statement_china.pdf.

[11] Rong Jiaojiao, *Law Revised to Protect Women's Rights* (Sept. 4, 2005), *available at* http://au.china-embassy.org/eng/zt/ndcelebration/t210105.htm.

The LPWRI, first adopted in 1992 as part of China's obligations under the CEDAW, is the first basic law in China to protect women's rights and interests in a comprehensive manner.[12] It was not, however, until ten years after the law was first adopted before efforts to revise the law began. When it came time to revise the law, the ACWF and other women's groups were called upon to seize this exciting reformist opportunity by submitting recommendations for reform. In August 2005, the Chinese Government passed the amendments to the LPWRI in conjunction with a conference commemorating the 1995 Fourth World Conference on Women. The amended law came into operation on December 1, 2005. These much-awaited amendments to the LPWRI included provisions against domestic violence, sexual harassment, and gender-based employment discrimination.[13] The revised provisions also provided women assistance in asserting their rights in court.

Unfortunately, the LPWRI was, and to a large extent still remains, characterized by hortatory and aspirational statements of intentions that are limited in scope and effect, and are of minimal practical significance. Although several important new prohibitions against women's rights violations were included in the revisions, these provisions are still too vague and ambiguous, making it unclear how a Chinese judge might interpret them. In any event, enforcement problems can reduce protective measures to mere goals rather than reality.

Nevertheless, the process by which the 2005 amendments came to light is important. For example, the way in which women's groups in China provided the drafting committee with concerns from the ground and recommendations for the reform of the LPWRI proved to be a fascinating aspect of the revision process. In addition, this process provided an invaluable

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[12] Revised Law on the Protection of Women's Rights and Interests (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 28, 2005, effective Dec. 1, 2005) (P.R.C.).

[13] *Id.*

opportunity to rethink women's roles in China. Moreover, it created a platform to examine deeply felt concerns of Chinese women's rights advocates over the last ten years and analyze the ways in which the LPWRI, a normative set of directives and guidelines, could be transformed into a set of concrete, actionable, and legally-enforceable rights.[14] The provincial and local-level regulations and guidelines adopted to implement the LPWRI also served as major outgrowths of the LPWRI.[15]

Since the effort to revise the LPWRI was first announced in 2003, the ACWF, the Chinese Academy of Social Sciences (CASS), the Women's University of China, the Women's Law Studies and Legal Services at Peking University, and various provincial-level organizations have been actively involved in coordinating seminars, workshops, and roundtables to bring attention to the revisions and the need to inform these revisions. Since the promulgation of the LPWRI in 2005, several new laws and regulations affecting the status of women in China have exploded onto China's legal landscape. These include the Supreme People's Court guide on handling cases involving domestic violence,[16] a notice issued by the Chinese Ministry of Public Security regarding domestic violence,[17] the Employment Law of 2007,[18] and the Labor Contract

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[14] *See id.* art. 49 (stating that where other laws or regulations have provisions for punishing violations of rights set out in the LPWRI, these provisions should be applied).

[15] Several provinces and autonomous regions including Zhejiang, Heilongjiang, Gansu, Shaanxi, Guizhou, Anhui, Ningxia, Tianjin, Jilin, Guangdong, and Shanghai, have passed the Ways for the Implementation of the Law of the People's Republic of China on the Protection of Rights and Interest of Women.

[16] For a discussion of the effects of the Supreme People's Court's Guidance on Cases Involving Domestic Violence in Marriage Law announcement, see All-China Women's Federation, *Domestic Violence in China,* Oct. 10, 2008, *available at* http://www.womenofchina.cn/Issues/Rights_Protection/206783.jsp.

[17] *See* ABA Rule of Law Initiative, *China Anti-Domestic Violence Network Train Police, Judges and Advocates* (Apr. 2009), *available at* http://www.abanet.org/rol/news/news_china_anti_domestic_violence_network_training_0409.shtml.

[18] Employment Promotion Law (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Jan. 1, 2008) (P.R.C.), *translated at* http://www.baliprocess.net/files/China/China_employment%20promotion%20law_2008-eng.pdf. A summary of the new provisions of the Employment Promotion Law can be found in Lester Ross et al., *Changes in China's Labor Law Environment*, Sept. 18, 2007, http://www.wilmerhale.com/publications/whPubsDetail.aspx?publication=8011. For a discussion of the Employment Promotion Law on women's rights, see Li Mingshun, *The Progress and*

Law of 2007.[19] In the past year, there has been a vibrant ferment of activities regarding proposals on women's rights legislation and regulations to the National People's Congress meeting. Several proposals were submitted, including a domestic violence prohibition and prevention law draft submitted by ACWF; a proposed draft of judicial interpretation of sexual harassment; protective orders in domestic violence cases; guidelines for handling domestic violence by courts (which have been applied by some courts at basic level in several provinces); and proposals for same age retirement.[20]

These law reform efforts have spurred the mobilization of women's groups to work together towards shared goals and catalyze action. These efforts have also been a galvanizing force for change within Chinese civil society as it has united together previously disparate women's groups under a common goal. The women's groups have seized this unprecedented opportunity to press for novel perspectives on law reform, in part influenced by the innovations taking place globally in women's lawmaking. For example, a distinctive feature of the LPWRI reform process is the tools used to inform and educate the drafting committee's recommendations. In particular, the CEDAW, the CEDAW Committee's Concluding Observations, and comparative laws were used as powerful lenses with which to critically review the LPWRI. Thus, in and of itself, the law reform efforts have had a positive effect on building women's solidarity and galvanizing their energies as never before.

Analysis of Women's Human Rights Protection in the Legislation 2007 in China, HUMAN RTS. MAG., Jul. 2008, at 24-30, *available at* http://www.chinahumanrights.org/CSHRS/Magazine/Text/t20080730_363942.htm.

[19] Labor Contract Law (promulgated by the Standing Comm. Nat'l People's Cong., Jun. 29, 2007, effective Jan. 1, 2008) (P.R.C.), *translated at* http://www.bjreview.com.cn/document/txt/2007-10/16/content_80896.htm. For a discussion of the new law, *see* You Xueyun, *Labor Contract Law- Legal Guarantee for Harmonious Labor Relations--An Interview with Professor Guan Huai of Renmin University of China School of Law*, HUMAN RTS. MAG., Nov. 2007, at 9-11, *available at* http://www.humanrights.cn/en/CSHRS/Magazine/Text/t20080118_317649.htm. In addition, Mingshun provides an analysis of the effect of the new law on women's rights. *See* Mingshun, *supra* note 18.

[20] *See* 2009 Annual Report on Women's Rights and Interests, Jan. 11, 2010, *available at* http://www.womenofchina.cn/Issues/Rights_Protection/215175.jsp.

B. *The Role of International Norms in Law Reform*

"Once we saw issues and problems through the prism of a village or nation-state. . . . Now we see the challenges of our time through the world's eye."[21]

- Michael Kirby, Justice of the High Court of Australia

When approaching the concept of rights-based approaches to legal reform, one must explore which framework of rights to use. For example, are those rights invoked in international human rights instruments compatible with Chinese concepts of rights? One could argue that since China has ratified the CEDAW and other international human rights conventions, the rights embodied in these frameworks must now be considered to guide the interpretation of legislation in China.[22] Further, in 1991, the Chinese government declared its endorsement of the human rights doctrine in a white paper on the subject, and November 2006 marked the 15th anniversary of China's first white paper on human rights.[23] Most importantly, human rights guarantees were made part of the Constitution in 2004.[24] In addition, China has ratified twenty-two major international conventions pertaining to human rights,[25] manifesting its compliance with these norms.

Around the world, human rights have been the inspiration for legislation. In fact, it has been argued that human rights are the parents of law, since they motivate and inspire specific

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[21] Wayne Morgan, Book Review, *Through the World's Eye by Justice Michael Kirby, speeches selected and edited by Charles Sampford, Sophie Blencowe and Suzanne Condlin*, 25 MELB. UNIV. L. REV. 9 (2001).

[22] China's entry into the international dialogue on human rights dovetailed with the debate about human rights and Asian values. The question was whether the universal doctrine of human rights can be applicable to peoples of all nations and cultures, and how cultural differences might inform the application of human rights in different countries.

[23] *White Paper on China's Progress in Human Rights*, 2004 (P.R.C.); *see also* Zhang Xiaoling, *Human Rights of Women and a Harmonious World*, 6 HUMAN RTS., CHINA SOC. FOR HUMAN RTS. STUD. (2007).

[24] *See White Paper*, *supra* note 23; Xiaoling, *supra* note 23.

[25] *See* Jiang Zhenghua, *Respecting and Promoting Human Rts. and Constructing a Harmonious World*, 6 HUMAN RTS., CHINA SOCIETY FOR HUMAN RTS. STUDIES (2007).

legislations.[26] However, the value of the human rights framework extends beyond its usefulness in informing and influencing legislation; it also provides accountability in prosecuting violations of the law and rights, serves as a benchmark in monitoring the fulfillment of rights, and functions as an organizing tool to catalyze communities into taking action. As Amartya Sen argues, "[t]he implementation of human rights can go well beyond legislation. . . . For example, public recognition and agitation (including the monitoring of violations) can be part of the obligations."[27]

Sen's argument is well-illustrated by the fact that in courts worldwide, judges have invoked international law as part of a creative stratagem to vindicate support for women's rights. In the past few years, courts have increasingly transcended national boundaries to embrace a more universal commitment to human rights. International colloquia and training on the application of international women's rights norms in national courts has spurred this judicial reliance on, and receptivity to, international women's rights norms.[28] The invocation of international norms in judicial decision-making has the potential to transform the women's international human rights movement. It can help facilitate the internationalization of human rights norms through the mutually reinforcing processes of internal persuasion and international pressure. An examination of leading cases across jurisdictions shows how international human

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[26] *See* Amartya Sen, *Mary, Mary, Quite Contrary!*, 11 FEMINIST ECON. 1, 5 (2005) (arguing that Hart's view takes the form, in effect, of seeing some natural rights as parents of law; they motivate and inspire specific legislations).

[27] *See* Amartya Sen, *Elements of a Theory of Human Rights*, 32 PHIL. & PUB. AFFAIRS 315, 344 (2004) (noting that the global NGO's have been involved in advancing human rights through public discussion and support, on the one hand, and publicizing and criticizing on the other).

[28] Judicial colloquia on the domestic application of international human rights norms provide an important forum for judges of common law jurisdictions to develop frameworks and standards of application of international norms in domestic jurisdictions. The first colloquium, held in February 1988 at Bangalore, adopted what has come to be known as the "Bangalore Principles." The Bangalore Principles emphasize the universality of fundamental human rights norms and urge application of such norms in domestic cases in order to enhance administration of justice and the protection of individual rights and freedoms. The Bangalore Principles were later supplemented by the Harare Declaration of Human Rights in 1989, the Banjul Affirmation in 1990, and the Abuja Confirmation in 1991.

rights norms can support domestic women's rights claims and provide a forum for the enforcement of international instruments.

Despite weak enforcement mechanisms in the CEDAW and the challenges in implementing it, the CEDAW has provided a blueprint to guiding the lawmaking processes in different countries.[29] For example, the CEDAW has made concrete contributions to the development of a normative and jurisprudential framework on women's rights, and has served as an interpretive guide for women's rights advocates, lawmakers and judges.[30] A number of countries have cited the CEDAW in case law and legal reform. For example, the South African Constitution mandates that international law must be used to guide the interpretation of the law and comparative laws may be used as interpretive tools.[31] Further, Section 9 of the Bill of Rights of South Africa's Constitution includes a broad mandate to advance gender equality and to abolish gender discrimination.[32] Brazil also relied upon the CEDAW in their constitutional reform that resulted in the prohibition of domestic violence.[33] The Vietnamese Law on Gender Equality provides that in cases of conflict, international treaties on gender equality shall supersede national laws, thus establishing the supremacy of international human rights norms and ensuring that the spirit of international norms serves to guide the interpretation of national

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[29] *See* Convention on the Elimination of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, *available at* http://www.un.org/womenwatch/daw/cedaw/.

[30] *See* Convention on the Elimination of Discrimination Against Women, July 17, 1980.

[31] S. AFR. CONST. § 39 (1996) ("When interpreting the Bill of Rights, a court, tribunal or forum: must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; must consider international law; and may consider foreign law.").

[32] *Id.* § 9 (1996). Section 9 also contains a prohibition against direct and indirect discrimination. Section 12 of the Bill of Rights provides another Constitutional guarantee to women, stating that "Everyone has the right to freedom and security of the person, which includes the right . . . to be free from all forms of violence from either public or private sources." *Id.* § 12 (1996).

[33] Article 226, section 8 of the Brazilian Constitution provides assistance to the family and mechanisms to prevent violence in the family. *See* Violence Against Women in Brazil: A Report to the Committee on Economic, Social and Cultural Rights, *in* VIOLENCE AGAINST WOMEN: 10 REPORTS / YEAR 2003, at 75, *available at* http://www.omct.org/pdf/vaw/publications/2003/eng_2003_02_brazil.pdf.

norms.[34] The guiding spirit of the CEDAW has also animated changes in inheritance laws in Tanzania,[35] citizenship laws in Botswana,[36] sexual harassment cases in India,[37] and Australia,[38] and rape laws in Nepal.[39]

Apart from the Convention itself, the CEDAW Committee's Concluding Observations have helped give concrete meaning to the values and principles outlined in the CEDAW. The CEDAW Committee's recommendations often bolster the work of women's rights advocates as the Committee's recommendations reflect the needs and highlight the gaps in law and practice. The CEDAW, together with other human rights conventions, are powerful tools to challenge stereotypes and discriminatory traditions.[40] International women's rights frameworks can be an effective catalyst for change by mobilizing national and grassroots organizations, thus giving voice to lived experiences of discrimination and disadvantage. Universal human rights can have persuasive impact and moral authority when domestic laws afford little recourse.

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[34] Law on Gender Equality, No. 73/2006/QH11 (promulgated by the Nat'l Assembly of the Socialist Rep. of Vietnam, Dec. 29, 2006, effective July 1, 2007) (Vietnam), *available at* http://www.wcwonline.org/pdf/lawcompilation/VIETNAMLawGenderEquality.pdf. The author provided technical assistance in the drafting of this law.

[35] *See* Ephrohim v. Pastory, [1990] 87 I.L.R. 106 (Tanz.) (finding a customary law that prevented women from inheriting clan land from their fathers to be in violation of Tanzania's own Bill of Rights as well as CEDAW and other international human rights treaties to which Tanzania has acceded and declaring that "[t]he principles enunciated in the above named documents are a standard below which any civilized nation will be ashamed to fall").

[36] *See* Unity Dow v. Attorney Gen., [1991] L.R.C. (Const.) 574; [1992] L.R.C. (Const.) (Bots.) (striking down citizenship laws that permitted male citizens to pass on their citizenship to their children, but prohibited women from doing the same), *reprinted in* 13 HUM. RTS. Q. APP. 614 (1991).

[37] *See* Vishaka v. State of Rajasthan, A.I.R 1997 S.C. 3011 (holding that indeed the account of sexual harassment in CEDAW is binding on the nation, and that the sexual harassment of women in the workplace violated fundamental constitutional rights of gender equality, life, and liberty under the Indian Constitution as argued by petitioner, a group of women's rights NGOs).

[38] *See* Aldridge v. Booth, (1988) 80 A.L.R. 1 (Austl.) (holding that sexual harassment of women was a form of sex discrimination within the meaning of CEDAW and that sexual harassment in the workplace violated the state's obligations under the CEDAW provisions guaranteeing equality in the workplace).

[39] *See* Forum for Women Law and Dev. v. Nepal Ministry of Law, [Supreme Court] (2001-02) (finding the act of sexual intercourse with one's wife without her consent to be a violation of the Equal Protection clause of the Nepalese Constitution, as well as the letter and spirit of the CEDAW, stated, "it cannot be said that any man who commits heinous and inhuman crime of rape to a woman may be immune from criminal law simply because he is her husband").

[40] *See also* Convention on the Rights of the Child, G.A. Res. 44/25, art. 18, U.N. Doc. A/RES/44/25 (Nov. 20, 1989) (recognizing "that both parents have common responsibilities for the upbringing and development of the child").

Although international human rights norms have yet to be read directly into lawmaking or judicial decision-making in China, Chinese women's rights advocates use these norms as the framework or blueprint to inform their advocacy, and to bolster their arguments before a public or political forum. To this extent, human rights norms are important building blocks of the emerging and ongoing reform processes on behalf of women in China.

C. *The CEDAW Committee's Concluding Observations and Recommendations on China's State Party Reports*

The CEDAW Committee's Constructive Dialogue with a state party delegation and the Committees Concluding Observations to a state party report purport to help the State part clarify its obligations under the CEDAW Convention. Although these recommendations are not legally enforceable, they provide a powerful set of advocacy tools to stakeholders. For example, the CEDAW Committee's questions to the Chinese delegation in 2006 echoed the very same concerns the Committee expressed in 1999. This shows that although there were many changes in the realm of lawmaking, the substance of the law, especially dealing with implementation has remained unchanged. It is important to briefly examine the CEDAW Committee comments both in 1999 and 2006 to understand the gap in the laws, and to appreciate some of the new developments that are now emerging.

The CEDAW Committee considered the combined 5th and 6th periodic reports of China in August 2006. The CEDAW sessions reviewed China's last state party reports and provided a valuable space for analyzing changes in laws affecting women in China. What emerged out of these sessions was the sense that although women's rights advocates in China has adapted women's human rights norms to the local context, the State, by contrast, has appropriated

international norms to legitimize a more change-resistant position.[41] Essentially, the State missed an opportunity to review the changes in light of some of the concerns highlighted in the Concluding Observations to China's 3rd and 4th State Party Report. While the Committee commended the State party on recent legal reforms to advance the equality of women in compliance with the CEDAW, it focused on the gaps in the 2005 amendment to the LPWRI.[42]

In addition, the CEDAW Committee's concerns and recommendations focused on similar issues raised by the Committee reviewing China's third and fourth State Party Report in February 1999.[43] An examination of both reports indicated that the major concerns still remained the same in August 2006.[44] Back in 1999, twenty-three United Nations experts comprising the CEDAW Committee reviewed China's State Party report. They noted that Chinese women constituted more than one-fifth of the world's women and commended the Government on strengthening the legislative framework on equality.[45] The Committee commended the passing of the LPWRI, the 1995 Mother and Child Health Laws, the amendments to the criminal law with regard to trafficking in women, the 1996 Law on the Protection of the Rights and Interests of the Elderly, and the recent revision to the law on

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[41] *See* SALLY ENGLE MERRY, HUMAN RIGHTS & GENDER VIOLENCE: TRANSLATING INT'L LAW INTO LOCAL JUSTICE 168 (2005) (noting that while feminist activists find CEDAW useful for advocacy, others recognize that "the national-level support for interventions in violence against women is far less than the international support").

[42] Other laws noted by the CEDAW Committee include: Marriage Law of the People's Republic of China (promulgated by the Nat'l People's Cong., Sep. 10, 1980, effective Jan. 1, 1981, amended by the Standing Comm. Nat'l People's Cong., Apr. 28, 2001) (P.R.C.), *translated in* ISINOLAW (last visited Feb. 18, 2010); Rural Land Contract Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 29, 2002, effective Mar. 1, 2003) (P.R.C.), *translated in* ISINOLAW (last visited Feb. 18, 2010); and Compulsory Education Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., June 29, 2006, effective Sep. 1, 2006) (P.R.C.), *translated in* ISINOLAW (last visited Feb. 18, 2010).

[43] *See* U.N. CEDAW Comm., 36th Sess., 743d to 744th mtg., U.N. Doc. CEDAW/C/CHN/CO/6 (Aug. 25, 2006) (emphasizing the State party's obligation to systematically and continuously implement all provision of the Convention and expressing the continued concern that Chinese domestic legislation still lacks an adequate definition of discrimination against women) [hereinafter U.N. CEDAW 743d to 744th mtg.].

[44] *Id.*

[45] *See* U.N. CEDAW Comm., 20th Sess., 419th to 421st mtg., U.N. Doc. A/54/38 (Feb. 5, 1999) (acknowledging with appreciation the comprehensive efforts undertaken by the Government of China to eliminate discrimination and advance equality between men and women) [hereinafter U.N. CEDAW 419th to 421st mtg.].

adoption.[46] In 2006, the CEDAW Committee acknowledged the LPWRI's new revisions, but focused on areas that were initially raised as concerns in 1999 that remained unexamined in the law.[47] The Committee recommended a greater focus on the "protection" of women rather than on their "empowerment," the absence of a clear definition of discrimination, the lack of clarity in many of the laws governing women's rights, and the gaps in domestic violence legislation and enforcement mechanisms in the law.[48]

In 1999 and 2006, the Committee noted that de facto discrimination was still widespread in China.[49] Furthermore, in both 1999 and 2006, the Committee recommended that the Government adopt legislation expressly prohibiting gender discrimination, including unintentional and intentional discrimination in accordance with the definition in Article 1 of the Convention.[50] In 2006, the Committee stated it remained concerned that the Chinese law still did not contain a definition of discrimination against women, which had already been noted in its previous Concluding Observations.[51] The Committee recommended a broader, more dynamic understanding of equality, which would encompass both formal and substantive equality as required under the CEDAW.[52] The lack of such a definition, the Committee reiterated, would constrain the application of the CEDAW in China.[53]

Additionally, in addressing the provision on discrimination against women, the Chinese government was asked to introduce a definition of gender discrimination, which would cover

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[46] *Id.*
[47] U.N. CEDAW 743d to 744th mtg., *supra* note 43.
[48] *Id.*
[49] *Id.*
[50] U.N. CEDAW 419th to 421st mtg., *supra* note 45, at cmt. 284.
[51] U.N. CEDAW 743d to 744th mtg., *supra* note 43.
[52] *Id.*
[53] *Id.*

practices that, although not intending to discriminate, are discriminatory in effect.[54] The Committee also asked the State to extend the scope of coverage of anti-discriminatory laws to private persons, organizations, and enterprises, and to ensure that laws and policies prohibiting discrimination are effectively enforced through the court system or through other tribunals.[55] Furthermore, the Committee asked whether any special remedies or avenues of redress had been developed to enable women to pursue their rights, whether they were effective, and whether cases of discrimination had been brought before the courts or other bodies in the last four years.[56]

The CEDAW Committee's concerns that the LPWRI focused more on the protection of women than on their empowerment were echoed once again in 2006.[57] The Committee also remained alarmed that the LPWRI did not provide for effective remedies in cases of violation of the law and in the outcome of such cases.[58] The Committee, both in 1999 and 2006, also recommended that the Government improve the availability of means of redress, including legal remedies, under the LPWRI,[59] emphasizing that without effective legal remedies, women's access to justice would remain limited.

In 1999, the Committee also recommended that the government provide assistance to women in the realization of their rights and suggested that one way of achieving this objective was to provide legal aid for women who suffered discrimination in its various forms.[60] In 2006, the Committee urged the State to integrate gender-sensitivity training into legal education, and require judges, lawyers, and prosecutors to undergo training.[61] Above all, the Committee

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[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.*

advised widely publicizing these measures and adopting measures to monitor the implementation of the various laws on gender equality.[62]

The Committee also requested detailed statistics on women's access to redress mechanisms.[63] In particular, the Committee was concerned and recognized a need for gender-disaggregated data in both 1999 and 2006. In its Concluding Observations in 2006, the Committee expressed regret that the report failed to provide sufficient statistical data disaggregated by sex.[64] In addition, it noted in both 1999 and 2006 that monitoring and assessment of the impact of policies and programs were important tools in implementing policies and programs to advance gender equality.[65]

The Committee in 1999 and 2006 recommended that the Chinese Government revise its laws and policies on violence against women in light of the Committee's General Recommendation 19.[66] This included adopting a special law on domestic violence and provisions for services for survivors, such as shelters and hotlines.[67] Further, the CEDAW Committee recommended that the handling of domestic violence cases should be systematically included in the training of law enforcement officials and healthcare personnel.[68] In 1999, the Committee urged the Government to regulate sexual harassment and to provide legal remedies for women victims of sexual harassment in the workplace.[69] The Committee requested that the

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[62] U.N. CEDAW 419th to 421st mtg., *supra* note 45.

[63] *Id.*; *see also* U.N. CEDAW 743d to 744th mtg., *supra* note 43.

[64] U.N. CEDAW 743d to 744th mtg., *supra* note 43.

[65] U.N. CEDAW 419th to 421st mtg., *supra* note 45.

[66] *Id.*; *see also* U.N. CEDAW 743d to 744th mtg., *supra* note 43. Even though the CEDAW does not directly deal with the question of violence against women, the CEDAW announced its General Recommendation No. 19 in February 2002, stating that domestic violence is a violation of women's fundamental human rights and the right to equality before the law. General Recommendation 19, CEDAW, 11th Sess., U.N. Doc. A/47/38 Jan. 29, 1992, *available at* http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19 [hereinafter CEDAW General Recommendation].

[67] U.N. CEDAW 743d to 744th mtg., *supra* note 43; U.N. CEDAW 419th to 421st mtg., *supra* note 45.

[68] U.N. CEDAW 743d to 744th mtg., *supra* note 43.

[69] U.N. CEDAW 419th to 421st mtg., *supra* note 45.

Government provide information in its next report on procedures for ensuring the right of women in custody to protection from sexual abuse and for sanctioning prison officers responsible for such abuse.[70] Both in 1999 and 2006, the Committee was concerned about illegal sex selective abortion.[71]

China's responses to the CEDAW Committee in August 2006 demonstrate that while international human rights language has been useful for the reform of the LPWRI and certainly provided women's groups a framework in which to locate their concerns, the State has, for the most part, attempted to mimic these standards without demonstrating sufficient political will to implement them.[72] While the State has made a good faith effort to absorb the rhetoric of the CEDAW, it has stopped short of creating structures to implement the human rights framework. Thus, the Chinese government has created a tension between the rhetoric of women's human rights and the actual application of those norms. This has left civil society groups anxious to fill in the shell of the law through local efforts.

In 2005, the Committee on Economic, Social and Cultural Rights (CESCR), in considering the initial report of the People's Republic of China (including Hong Kong and Macao) on the implementation of the International Covenant on Economic, Social and Cultural Rights, also requested that China provide in its next periodic report detailed information on the extent of domestic violence, in particular violence against women, and on the legislative and other measures taken by the Government to address this phenomenon, including facilities and

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[70] *See id.* cmt. 286.

[71] U.N. CEDAW 743d to 744th mtg., *supra* note 43, at cmts. 17, 31 (expressing concern over the persistence of stereotypes regarding the roles and responsibilities of men and women, which lead to illegal sex selective abortion despite legal measures and a system of incentives, and the potential impact of an adverse sex ratio).

[72] *Id.*

remedies provided for victims.[73] The Committee urged the State party to provide training to law enforcement officials and judges regarding the serious and criminal nature of domestic violence.[74] In addition, CESCR's concerns assisted women's groups in framing issues of women's economic, social, and cultural rights.[75]

III. EXAMINING NEW AND EMERGING GENDER-EQUALITY LAWMAKING IN CHINA

A. *Addressing Gender Discrimination*

"*The Committee remains concerned that Chinese domestic legislation still does not contain a definition of discrimination against women, in accordance with Article 1 of the Convention, encompassing both direct and indirect discrimination, as already noted in previous comments.*"[76]

- CEDAW Concluding Comments, 2006

Efforts to define and reframe equality and to translate those concepts into law and policy have been part of a global trend. The thread that runs through the CEDAW Committee's Concluding Comments to the Chinese state party report reflects a need for concrete gender equality and anti-discrimination framework in China. This section discusses some of the emerging developments, in particular the revised LPWRI and more recent changes in the law including the Law of Employment Promotion of 2007 and the Labor Contract Law of 2007 that attempt to address these concerns.

The CEDAW Committee, considering the third and fourth State party reports in 1999 and then again the fifth and sixth State party reports in 2006, commented that although attempts had been made to draft enabling legislation to translate the Convention into national law, the LPWRI

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[73] U.N. Econ. & Soc. Council, Comm. on Econ., Soc. and Cultural Rights, 34th Sess., ¶ 57, U.N. Doc. E/C.12/1/Add.107 (May 13, 2005) ("The Committee requests that the State party provide, in its next periodic report, detailed information on the extent of domestic violence, in particular violence against women, and on the legislative and other measures taken by it to address this phenomenon, including facilities and remedies provided for victims.").

[74] *Id.*

[75] *Id.*

[76] U.N. CEDAW 743d to 744th mtg., *supra* note 43.

did not contain a definition of discrimination against women.[77] The State party delegation's response in August 2006 was to point to the revision to the LPWRI, specifically art. 2, and comment that "while these stipulations unequivocally incorporate the basic State policy of equality between men and women . . . the lack of a specific definition of discrimination in China's laws in no way influenced China's legal and practical compliance with its obligations under the Convention."[78]

The revised LPWRI provides general language for an anti-discrimination clause for the first time in China.[79] Although Article 2 does not define discrimination, it opens the door for interpretation with the section, "the state undertakes to take necessary means to protect women's rights and interests and to prevent all discrimination against women" as an anti-discrimination clause.[80] This provision, though lacking in clarity, can present advocates with the necessary entry point to press for more specific anti-discrimination regulations. The CEDAW Committee once again recommended that the "[s]tate party develop capacity to understand the meaning of substantive equality and nondiscrimination, as required by the Convention, and include a definition of discrimination against women in its domestic law, encompassing both direct and indirect discrimination in line with Article 1 of the Convention."[81] Article 2 of the LPWRI could be interpreted to convey a notion of substantive equality as opposed to formal equality.[82] The

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[77] *Id.*

[78] *Id.*

[79] Revised Law on the Protection of Women's Rights and Interests (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 28, 2005, effective Dec. 1, 2005) (P.R.C.).

[80] *See id.* art. 2 ("The state shall implement the policy of equality between men and women as a basic national policy. The state shall take necessary measures and gradually improve the various systems to protect women's rights and interests, and to prevent all discrimination against women. The state will protect special rights and interests of women. Discrimination against, maltreatment of, or cruel treatment in any manner causing bodily injury to or death of women shall be prohibited.").

[81] U.N. CEDAW 743d to 744th mtg., *supra* note 43, at cmt 10.

[82] Revised Law on the Protection of Women's Rights and Interests, art. 2. The changes to Article 23 of the LPWRI reflect the magnitude of the advocacy conducted by women's groups in China. For instance, according to Article 23, labor contracts must be signed and employers cannot discriminate based on marriage and pregnancy.

State's role in undertaking the "necessary means to protect women's rights" can be interpreted to mean that states can take positive steps to address the long legacy of discrimination against women.[83]

However, the question remains as to whether this provision will necessarily vest women with a legal right of action. Although it could be argued that the constitutional provisions of equality have now been translated into a legal statute, it is unclear whether these norms provide women with a legal right to contest unequal treatment. Thus it remains to be seen whether these provisions are real safeguards or simply inspirational concepts. Given the fact that only the Supreme People's Court has the power to interpret these laws, one may not be able to count on these laws to safeguard women's rights in China.

Women's rights lawyers and advocates in China have, for some time, been vocal about the ambiguity in the amorphous and overly inclusive language of the LPWRI. While advocates have argued for clarity in the laws, lawyers have argued for provisions that could be invoked in a court of law in compliance with international law and in keeping with current trends in equal protection law in other parts of the world. In an effort to propose equality guidelines and strong implementation mechanisms, Chinese women's groups have been studying equality laws from other countries, especially in Asia. Basing their arguments on the CEDAW, women's groups argue for both formal and substantive equality, which covers both direct and indirect equality, as well as discriminatory acts both in the public and private sphere.

The absence of strong mandates in the law is an inherent characteristic of Asian lawmaking efforts. For example, Japan's Equal Employment Opportunity Law of 1985 also uses non-mandatory language in calling for anti-discrimination in recruiting, hiring, assigning, and

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[83] U.N. CEDAW 743d to 744th mtg., *supra* note 43.

promoting employees.[84] This equivocal language is similar to some of the legislative language in China, which stops short of mandating anti-discrimination and leaves it to the discretion of the employer. Laws without attached sanctions or enforcement mechanisms are most often mere directives and their implementation is often subject to the will of the employer.[85] Within all of this, however, there is a tension between protecting the special needs of women and achieving equality of employment between men and women. Special protection reinforces negative stereotypes because women are perceived as fragile and more deserving to work at home, rather than getting advancement toward managerial positions. Protective measures also reflect an implicit conceptualization of a woman's role in society by defining her solely as a child bearer and nurturer. It is therefore important to design protective measures, which shape a more dynamic conceptualization of women's roles. The best response to reform of protective legislation for women is to extend protective legislation to both men and women. Non-discriminatory protective legislation will also create more opportunities for men to assume family responsibilities.[86] It is important now to draft guidelines to the LPWRI in order to change

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[84] *See* Jan M. Bergeson & Kaoru Yamamoto Oba, *Japan's New Equal Employment Opportunity Law: Real Weapon or Heirloom Sword*, 1986 BYU L. REV. 865, 872 (1986) ("The strongest measure requires only that an employer should endeavor to follow the provisions" (internal quotation marks omitted)).

[85] *See* Kiyoko Kamio Knapp, *Still Office Flowers: Japanese Women Betrayed by the Equal Employment Opportunity Law*, 18 HARV. WOMEN'S L.J. 83, 88 (1995). According to the author, weak enforcement mechanisms plague many laws meant to address women's rights in the Asian region. One scholar has described the Japanese Equal Employment Opportunity Law of 1985 as an "heirloom sword that is no more than an ornament or a prestige symbol used to make Japan appear respectable in Western eyes." *See also* Bergeson & Oba, *supra* note 84, at 865 ("Although the Japanese Constitution specifically prohibits governmental sex discrimination . . . serious discrimination continues in Japan.").

[86] *See* Int'l Labour Org., *Night Work Convention*, June 26, 1990, at C171. For example, the 1948 International Labor Organization (ILO) prohibition on night work for women was reversed at the 1990 ILO Conference. The 1990 Convention is more flexible than the 1948 Convention and allows women and men to be employed at night. But while the 1990 Convention improves conditions for both male and female night workers, it still preserves the ban on women's night work during pregnancy. The 1990 Convention also provides: 1) health monitoring—medical exams, advice, information on possible health consequences; 2) increased pay for these hours of work; 3) maternity protection- alternative work or extension of leave up to eight weeks before and after birth; and 4) the right to transfer to day work for medical reasons.

stereotypes that place and keep women in low paying jobs and positions, while also developing creative strategies to enforce laws pertaining to women's equality.

B. *Reconciling Work Family Obligations and Dismantling Gender Stereotypes*

Despite general principles of gender equality and equal access to employment in China, women are still disproportionately disadvantaged at home and at work because of their real and potential childbearing and childrearing roles.[87] Thus, although the CEDAW establishes maternity as a "social function," workplace regulations in China do not accommodate the care giving roles of both male and female workers. In China, women must often sacrifice employment opportunities at the expense of family responsibility. In response, CEDAW Article 5[88] calls for appropriate steps to modify the social and cultural patterns of conduct for men and women, which reinforce stereotyped roles of women, and Article 10 imposes accountability on State Parties to identify whether there are certain kinds of work that are considered as "men's work" or "women's work" and whether girls and boys are expected to do different tasks in the home or at school.[89] Apart from the principles of gender equality embedded in the CEDAW, the U.N. Economic and Social Council Report defines gender mainstreaming as a "strategy for making women's, as well as men's, concerns and experiences an integral dimension of the design, implementation, monitoring, and evaluation of the policies and programs … so that women and men benefit equally and inequality is not perpetuated."[90]

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[87] *See* Nadine Taub & Elizabeth M. Schneider, *Women's Subordination and the Role of Law*, FEMINIST LEGAL THEORY: FOUND. 9, n. 8 (D. Kelly Weisberg, 1993) ("Excluded in the past from the public sphere of marketplace and government, women have been consigned to a private realm to carry out their primary responsibilities, i.e. bearing and rearing children, and providing men with a refuge from the pressures of the capitalist world").

[88] CEDAW, *supra* note 29, art. 5.

[89] *Id.* art. 10.

[90] U.N. Econ. & Soc. Council, *Report of the Economic and Social Council for 1997*, at 17, U.N. Doc. A/52/3 (Sep. 18, 1997).

A greater number of lawmaking initiatives around the world have begun to recognize that in the workplace, family needs are not the primary duty of women, but rather, the shared duty of both sexes. Gender discrimination in the form of discrimination against mothers and potential mothers is a particularly salient issue. This form of discrimination, sometimes referred to as the "motherhood penalty," is characterized by overt denials of promotion to women following childbirth or rejections from new jobs due to a perceived inverse relationship between work productivity and motherhood.[91]

In China, workplace policies that facilitate greater male engagement as caregivers in the lives of children can combat the nexus between gender discrimination in the home and workplace. In addition, labor laws that equalize employment opportunities for men and women by redistributing family leave benefits create an environment where women are free from discrimination and stereotyping and where men are better able to shoulder family and care-giving responsibilities. Furthermore, there is a reduction in lost opportunities for career advancement, resulting in more equitable economic situations for both sexes. Equal responsibility between men and women in both private and public spheres enhances the rights of all to equal citizenship by dispelling notions of gendered roles and privilege.

For several reasons, including the need to balance their work and family obligations, many Chinese women work part-time or in the informal sector. The result, however, is an increase in the feminization of part-time work opportunities, and limited access to full-time work opportunities. Consequently, in China and around the world, women find themselves trapped in low-paying, low-ranking jobs that negatively affect both their own and their family's

[91] *See* Shelley J. Correll et. al, *Getting a Job: Is there a Motherhood Penalty?*, 112 AM. J. SOC. 1297, 1298 (2007) (examining the impact of motherhood on women's careers and evaluating the effects of childbirth on a woman's career advancement).

development.[92] The increasing numbers of female migrant and part-time workers in the informal sector further aggravate this trend.[93] Reformist projects in China, however, have paid little attention to women's work in the informal sector.

Around the world, there has been an effort to revise laws concerning work-family reconciliation in order to capture the changing reality of the lives of both men and women and give voice to the needs of both groups. Law and policy reform in China must provide corresponding safety nets and mechanisms so that both sexes can live by values of shared family responsibility. Reforms in China must also be wary of reinforcing traditional gender stereotypes in their efforts to honor women's child-caring duties and parental leave. Furthermore, laws that only focus on women's childrearing and childbearing responsibilities must not disadvantage men who take on the bulk of childrearing responsibilities. Social security benefits must be offered to both men and women who elect to perform child caring and childrearing duties. The laws and policies analyzed below reflect a breadth of approaches to reconciling work-family obligations, whether by addressing the root cause of gender inequality, the resulting symptoms of unfair work policies, or both the cause and its symptoms.

C. *Harmonizing Work/Family Obligations Through Legislative Reform*

The redefinition of men and women's roles in the family setting in other nations can be instrumental to Chinese advocates who are trying to address gender role stereotyping in the context of gender-based workplace discrimination. A re-conceptualization of sex-role

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[92] *See generally* Jeanne M. Woods & Hope Lewis, HUMAN RIGHTS AND THE GLOBAL MARKETPLACE: ECONOMIC, SOCIAL AND CULTURAL DIMENSIONS (2004) (introducing the many issues that fall within the realm of human rights, obstacles to the realization of social and cultural rights, and the laws of different countries concerning these rights).

[93] *See generally* Secretary General, *Report of the Secretary-General on Violence Against Women Migrant Workers, Report of the Secretary-General, delivered to the General Assembly*, U.N. Doc. A/51/325 (Aug. 29, 1995).

stereotypes and socialization of boys and girls can create a paradigm shift in the understanding of the dual roles of men and women in work and family. Several countries have adopted equality laws that not only prohibit gender-specific discrimination, but also discrimination on the grounds of marital status, pregnancy or potential pregnancy, and family responsibility.[94] For example, the United Kingdom's Equality Act of 2006 requires all public authorities to have "due regard" for the promotion of equality between the sexes.[95] The lack of shared caring responsibilities between women and men is often the single biggest cause of the income gap. Thus a key component in achieving gender equality in China is workplace regulations that support both fathers and mothers in taking more responsibility for caring for children.

It is important for China to deconstruct conventional gender roles that have hamstrung gender equality. Many countries are, at least on paper, making efforts to do so. In Japan, Article 4 of the Basic Law for a Gender-Equal Society states that in "consideration that social systems or practices can become factors impeding formation of a Gender-equal Society by reflecting the stereotyped division of roles on the basis of gender, etc., thus having a non-neutral effect on the selection of social activities by women and men, care should be taken so that social systems and practices have as neutral an impact as possible on this selection of social activities."[96] As another example of how law can help reconcile work family obligations and minimize the punitive consequences of those actions, in 2004, Japan passed a revision to its gender

[94] *See* Rangita de Silva de Alwis, *Legislative Reform on Selected Issues of Anti-Gender Discrimination and Anti-Domestic Violence: the Impact on Children* 12-30 (Nov. 2009) (summarizing the legislative measures addressing gender discrimination recently adopted by various countries).

[95] Equality Act, 2006, c. 3, § 4 (Eng.).

[96] Basic Law for a Gender-Equal Society, Law No. 78 of 1999, art. 4 (JP).

discrimination law to prohibit unfair treatment on grounds of taking childcare leave or similar activities, and establish a right to claim exemptions from overtime work.[97]

Similarly, other jurisdictions have treated the lawmaking process as an opportunity to think creatively about dismantling gender stereotypes endemic in most societies.[98] For example, Bosnia and Herzegovina passed a law in 2003 which prohibits discrimination based on child birth, pregnancy, or efforts to reconcile work family obligation.[99] Another exemplary model is Iceland's Act on the Equal Status and Equal Rights of Women, which predicates gender equality on the need for reconciliation of work-family obligations for both men and women.[100] The law aims to achieve as a goal the establishment of equal opportunities for women and men through the following: enabling both women *and* men to reconcile their occupational and family obligations, increasing education in matters of equality, analyzing statistics according to sex, and increasing research in gender studies. In particular, the Icelandic law establishes that reconciliation of occupational and family obligation are the duties and responsibilities of both men and women and that employers shall take the necessary measures to enable women and men to reconcile their family obligations.[101] Moreover, Iceland's Act Prohibiting Redundancies due

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[97] Act on the Welfare of Workers Who Take Care of Children or Other Family Members Including Child Care and Family Care Leave, Law No. 76 of 1991, art. 10, *translated at* http://www.cas.go.jp/jp/seisaku/hourei/data/wwt.pdf. This law was amended in December 2004 to add sick child care leave for part-time employees. *See* Amendment to the Act on the Welfare of Workers Who Take Care of Children or Other Family Members Including Child Care and Family Care Leave, Act No. 160 of 2004.

[98] *See, e.g.*, Act on the Equal Status and Equal Rights of Women and Men, No. 10/2008 (Iceland). The recent amendments, effective March 2008, overturned the 2000 Gender Equality Act (No. 96/2000) and added new provisions to include stronger rights and obligations for implementing gender equality. *See* United Nations Press Release, *New Law on Equal Status, Equal Rights Boosts Icelandic Women's Protection*, U.N. Doc. G.A. WOM/1692 (Jul. 9, 2008), *available at* http://www.un.org/News/Press/docs/2008/wom1692.doc.htm.

[99] *See* Law on Gender Equality (enacted May 21, 2003, effective June 2003) (Bosn. & Herz.).

[100] Act on the Equal Status and Equal Rights of Women and Men, Act No. 10/2008 (Iceland).

[101] *Id.* art. 16.

to Family Responsibilities affirms that a person may not be made redundant solely because of the family responsibilities that they bear.[102]

Legislation like Spain's newly promulgated Law on Guaranteeing Equality between Women and Men, which passed in March 2007,[103] has taken the lead in transforming gender roles by shaping both men and women's work and family aspirations.[104] The highlights of the new Spanish law include fifteen days of paternity leave, which expands to one month in 2013 for new fathers. Under this new law, Spanish companies that achieve a more balanced male-female ratio among their executives and at lower levels will receive favorable treatment when they bid for government contracts.[105] Moreover, the law obligates all companies with more than 250 employers to implement gender-equal policies and to have forty percent of women on their boards by 2015.[106] In addition, women must represent at least forty percent of political candidates.[107] The new regulations also attempt to achieve a reconciliation of work-life balance by providing either parent the right to reduce work time by as much as half in order to care for children under the age of twelve years and for people with disabilities.[108] These provisions not only hope to privilege childcare as a workplace obligation but also hope to promote full citizenship of both men and women.

While hortatory legal reform still remains weak and has not had the desired effect in China, a carrot-and-stick approach will help with strict compliance of the law. In particular, laws

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[102] Act Prohibiting Redundancies due to Family Responsibilities, Act No. 27/2000 (Iceland).

[103] Int'l Fed'n of Chemical, Energy, Mine and Gen. Worker's Unions, *Spain --Equality Law between Men and Women; Agreement to Promote Women in Traditional Men's Jobs*, ICEM Women's Bulletin No. 9 (Mar. 2006) ("Parental rights are defined and broadly extended. Measures to improve work-life balance are also provided for. Furthermore, gender-related social security rights are improved.").

[104] *Id.*

[105] *Id.*

[106] *See* Sharon Reier, *In Europe, Women Gain on Corporate Boards,* N.Y. TIMES, Mar. 22, 2008, at C4 ("In Spain, the Socialist-dominated Parliament has passed legislation calling for 40 percent board participation by women by 2015 . . .").

[107] *Id.*

[108] *Id.*

can be normative as well as effective. For example, in 2002, Norway passed a law requiring all companies to ensure that women comprise forty percent of their boards.[109] If the board has two or three members, both sexes must be represented.[110] Under these rules, the Register of Business Enterprises can refuse to register a company board if its composition does not meet the statutory requirements. Companies that do not comply with this regulation face closure in 2008.[111] Furthermore, there are increasing efforts in different jurisdictions to resolve the tension between protective legislation that result in subordination of women and legislation that make a good faith effort to create work family balance and provide adequate workplace protection for all employers. For example, the recently adopted Vietnamese Gender Equality Law of 2006 attempts to include both men and women in achieving gender equality, and covers both the private and public sphere.[112]

In China, protective legislations for women are often a double-edged sword, since they have the unanticipated consequence of subordinating women in the workplace. To prevent this, workplace transformations should include the basic needs of all workers, and not just women. In effect, the benefits afforded by the law should be available to both sexes. The workplace must be transformed to recognize the role that both parents play in the family. Policies that only privilege women caretakers result in enterprises all over the world opting to hire men over

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[109] *See* Andrew Osborn, *Norway Sets 40% Female Quota For Boardrooms*, THE GUARDIAN, Aug. 1, 2002, *available at* http://www.guardian.co.uk/society/2002/aug/01/publicsectorcareers.genderissues.

[110] *See id.*

[111] *See* Reier, *supra* note 106 (discussing the composition of the board of directors in several European countries); *see also* Yvonne Roberts, *You're Fired!*, THE GUARDIAN, Mar. 6, 2008, *available at* http://www.guardian.co.uk/lifeandstyle/2008/mar/06/women.discriminationatwork (noting that Norway has achieved a 40% proportion of female non-executive directors).

[112] Law on Gender Equality, No. 73/2006/QH11 (Vietnam).

women.[113] While the workplace in China should recognize and privilege family needs, they should not be seen as the primary duty of women, but the shared duty of both sexes.

Additionally, it is imperative for an anti-discrimination provision in China to cover both direct and indirect discrimination in public and private areas, including informal work arrangements. As a majority of women in China works in the informal sector without the benefit of contract, an equality provision that does not cover the informal sector will have little effect. Furthermore, although the number of women employed in public and private enterprises increased by sixty percent between 1995 and 2000, women are still concentrated in the lower strata of the informal sector.[114] And even though women are breaking into the labor market, they rarely break through the glass ceiling and ascend beyond low-income jobs. In particular, the notion that a woman's primary responsibility is to be a caregiver heavily shaped the 1994 Labor Laws, which in turn continue to define women's work choices.[115]

The anti-discrimination clause in Article 22 of the LPWRI is a progressive step; it forbids sex discrimination in hiring, but does not provide an unqualified right.[116] Employers are still permitted to consider a person's gender in "certain work categories or positions that are unfit for women."[117] Article 22 lists exceptions in overly-broad language, which has the potential to

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[113] *See* CEDAW, *supra* note 29, art. 11, § 1 (guaranteeing equal employment opportunities to women by providing to women "all benefits and conditions of service equal to men, as well as equal remuneration, including benefits," and equal treatment for work of equal value).

[114] *See* Zhang Ye, *Hope for China's Migrant Women Workers*, THE CHINA BUS. REV., May-June 2002, *available at* http://www.chinabusinessreview.com/public/0205/ye.html (analyzing the composition of the Chinese migrant labor force).

[115] *See* Labor Law of the People's Republic of China (adopted at the Eighth Meeting of the Standing Comm. of the Eighth Nat'l People's Cong., July 5, 1994, promulgated by Order No.28 of the President of the People's Rep. of China, July 5, 1994, effective Jan. 1, 1995) (P.R.C.), *translated at* http://www.jus.uio.no/lm/china.labor.law.1994/doc.html.

[116] Revised Law on the Protection of Women's Rights and Interests, art. 22 (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 28, 2005, effective Dec. 1, 2005) (P.R.C.).

[117] *Id.*; *see also* Labor Law of the People's Republic of China, Ch. VII arts. 59-63 (limiting women's employment opportunities in categories of work considered particularly hazardous, such as mining on hills or underground, scaffolding, logging timber, high altitude work that entails carrying continuously the weight of twenty

exclude large numbers of women from the Article's protective ambit. The exceptions in Article 22, which emphasize gendered differences between men and women, considerably dilute the effect of the anti-discrimination provisions on hiring, promotion, and dismissal enshrined in Articles 22, 24, and 26 of the LPWRI.[118] The exceptions also have the potential to perpetuate gender segregation in the workplace, stereotype women, and reinforce traditional subordinate roles.

D. *Dismantling Differential Employment Policies for Women*

"The Committee calls upon the State party to put into place a comprehensive approach to overcoming traditional stereotypes regarding the role of women and men in society in accordance with articles 2(f) and 5(a) of the Convention. Such an approach should include legal policy and awareness –raising measures, involve public officials and civil society and target the entire population, in particular men and boys."[119]

- CEDAW Committee's Concluding Observations, 2006

Despite the anti-discrimination clauses in China's labor law and the LPWRI, women still face multiple forms of employment discrimination. The various manifestations of gender bias against women in the employment sector are discussed below.[120]

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kilograms or of over twenty five kilograms at different intervals, and other work categorized as physically intense). Furthermore, the Regulation on the Labor Protection for Women Workers provides that pregnant female workers shall not engage in work involving high intensity physical labor as defined by the State. *See* Regulation on the Labor Protection for Women Workers, art. 7 (promulgated by the Nat'l Working Comm. on Children and Women under the State Council, July 21, 1988, effective, Sept. 1, 1988) (P.R.C.) ("During the pregnancy of female staff and workers, the Units employing them may not arrange for them to engage in Labor involving physical Labor of the third degree of intensity as specified by the state or any kind of Labor to be avoided during pregnancy . . .").

[118] *See* Revised Law on the Protection of Women's Rights and Interests; *id.* art. 24 ("The principle of equality between men and women should be upheld and no discrimination against women is allowed when it comes to promoting a higher position or grade and assessing special skills or duties."); *id.* art. 26 ("No unit is allowed to dismiss female workers or unilaterally terminate a labor contract on the grounds of marriage, pregnancy, maternity leave or lactation.").

[119] U.N. CEDAW 743d to 744th mtg., *supra* note 43.

[120] Li Ying, *A Discussion of Sex Discrimination in the Workplace*, 35 E-NEWSLETTER OF WOMEN'S WATCH CHINA (2008) (discussing the forms, causes, and possible solutions of workplace sexual discrimination in China).

i. Gender Bias in the Job Application Process

In China, gender bias often limits the employment opportunities available to women upon graduation. For example, a study by Xiamen University revealed that even when all conditions are equal,

> [T]he employment of female graduates was less than male graduates. A similar study done in 2003 by the Nankai University Research Centre for Population and Development that sex-selective hiring was not unusual. Furthermore, the study posits that every one of the advertised positions could have been filled by either sex.[121]

Although care-giving or family responsibility discrimination is not limited to women workers, it has a disproportionate effect on women.

Many countries have a strong constitutional equal protection clause or gender equality legislation prohibiting gender discrimination.[122] In the United States, Title VII of the Civil Rights Act eliminates explicit exclusions of women from employment.[123] Hiring practices that utilize differences based on sex can only be upheld under Title VII if the employee's sex is necessary for the job as a bona fide occupational qualification.[124] Title VII has been a critical tool in helping women gain access to employment previously closed to them by eliminating restrictions that imposed additional requirements on women that were not barriers to men, and has been used to challenge discriminatory work-place practices.[125]

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[121] *Id.*

[122] In Australia, the Sex Discrimination Act prohibits discrimination against people on the ground of sex, marital status, pregnancy or potential pregnancy. *See* Sex Discrimination Act 1984, 2010, No. 4 (Austl.). The Act also prohibits discrimination based on an employee's family responsibilities. *Id.* § 7a. In addition, Japan, Bosnia, Herzegovina and Iceland have similar anti-discrimination provisions. *See generally* de Silva de Alwis, *Legislative Reform, supra* note 94 (discussing Japanese, Bosnian, Herzegovinian, and Icelandic legislative measures).

[123] The Civil Rights Act of 1964, codified at 42 U.S.C. §§ 2000e et seq. (2006).

[124] *Id.*

[125] In the United States, some scholars argue that family responsibility discrimination is the new incarnation of gender discrimination. *See* Joan C. Williams, *Family Responsibilities Discrimination: The Next Generation of Employment Discrimination Cases*, 763 PLI/Lit 333, 356 (2007) (discussing family responsibility discrimination cases and their growth over the last decade). The U.S. Equal Employment Opportunity Commission (EEOC) issued

Sex segregation in recruitment is another troubling phenomenon that is emerging in China. Some potential employers may require female graduates seeking employment to recommend one or more male graduates before she is considered for employment. In reference to this practice, a popular saying among female university students is that a woman should "keep an eye on [her] boyfriend."[126]

ii. Focus on Women's Bodies

In some instances, discrimination occurs on the basis of physical appearance rather than solely on gender. This discrimination focuses on the physical characteristics of a woman's body and may include body symmetry, height, weight, attractiveness, or other physical flaws or limitations. On the other hand, men are not required to conform to similar physical specifications as a condition of employment.

For example, in recruiting public servants, one province in China has physical examination requirements providing that a "female characteristics to be fully developed and both breasts be symmetrical."[127] In another instance, a public translation company in Hubei Province has a strict rule on women applicant's weight and height.[128] The rules state that women should weigh between forty-five and sixty kilograms and be between one-hundred-sixty-two and one-

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guidance on caregiver discrimination in May 2007. The Guidance advised that discrimination can take the form of different treatment of men and women with young children, such as selecting fathers but not mothers for a training program. It also advised that discrimination can take the form of stereotyping, such as giving less desirable assignments to mothers on the assumption that they are not as committed to their jobs. *See* EQUAL EMPLOYMENT OPPORTUNITIES COMMISSION, ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES (2007), *available at* http://www.eeoc.gov/policy/docs/caregiving.html (providing guidelines to aid in the determination employers actions towards caregivers may amount to illegal discrimination).

[126] Ying, *supra* note 120; *see also* Guo Huimin, *Gender-Based Employment Discrimination*, *in* WELLESLEY CENTERS FOR WOMEN: PAPERS PRESENTED AT CHINA GENDER AND LAW CONSULTATION 57, 58 (2009) (discussing Chinese employer hiring practices).

[127] Jiefeng Lu, *Employment Discrimination in China: The Current Situation and Principle Challenges*, 32 HAMLINE L. REV. 133, 139 (2009); *see also* Ying, *supra* note 120.

[128] Message from the Editor, 14 E-NEWSLETTER OF WOMEN'S WATCH CHINA (Oct. 19, 2006) (on file with author) [hereinafter Message from the Editor 2006, Vol. 14].

hundred-sixty-eight centimeters tall.[129] If a female applicant cannot meet these standards, she is not employed or retained in employment.[130] In a similar case, in Kunming, the capital city of Yunnan province, a trade company forced new female staff to take pregnancy tests.[131] If the results were positive, each woman was forced to choose between an abortion and forced termination.[132]

In addition, discrimination against women in hiring, promotion, and wages due to their weight is common around the world.[133] Often, weight-based discrimination intersects with gender discrimination and such discrimination is based on a combination of gender and physical characteristics.[134] In Japan, for example, women's appearance in the workforce is a cause for bias.[135] For instance, "[u]gly women," "short women--those less than one-hundred-forty centimeters," and "women with spectacles" fall into the "undesirable employee" category.[136] Thus, it is important to outlaw discrimination based on personal appearance among other characteristics in any new anti-discrimination law.

iii. Pregnancy-Related Discrimination

Despite Chinese labor laws that prohibit discrimination during pregnancy and lactation, many young female university students have difficulties finding good jobs because they are of

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[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *See* Jennifer S. Fan, *Recent Development. From Office Ladies to Women Warriors?: The Effect of the EEOL on Japanese Women*, 10 UCLA WOMEN'S L.J. 103 (1999) (analyzing Japanese equal employment opportunity laws); Alexandra W. Griffin, *Women and Weight-Based Employment Discrimination*, 13 Cardozo J.L. & Gender 631 (2007) (examining weight-based discrimination in the United States); Elim Kim, *Korean Women's Activities for Legislation to Guarantee Gender Equality in Employment*, 5 J. KOREAN L. 49, 60 (2006) (discussing Korean legislative measures for combating weight discrimination); Allyson Singer, *Sex Discrimination in the Hong Kong Special Admin. Region*, 11 IND. INT'L & COMP. L. REV. 215, 248 (2001) (noting the height and weight exceptions to the Sex Discrimination Ordinance of Hong Kong).
[134] *See* Griffen, *supra* note 133, at 635.
[135] Fan, *supra* note 133, at 105.
[136] *Id.* at 109.

child-bearing age.[137] Other female students have been asked to sign contracts promising not become pregnant within three to five years.[138]

Furthermore, the Labor Law includes special protection for female workers who are pregnant, about to deliver, or lactating.[139] In particular, examples of these protections are reimbursement for birth-related expenses employment security during these periods.[140] However, employers often ignore these rules and breach the rights of women employees with impunity, or simply demote the female employee.[141]

iv. Employment Status Dependent Upon Spouse's Employment

In certain state-led enterprises, a woman's job is contingent upon her husband's employment.[142] Thus when a husband leaves the employer, the employer may also terminate the wife's employment.[143] In light of these circumstances, the General Office of the Department of Labor issued a letter which stipulated that

> Enterprises, in formulating rules, should act within the scope of the Constitution and the law, and must not dismiss family members of a staff member who leaves their position without authorization, nor take other measures as punishment. Enterprises with rules that involve the family of the person leaving without authorization do not comply with policies on the implementation of the national Labor Law, and are therefore not able to be resolved by labor arbitration. This type of behavior from enterprises should be prevented and redressed.[144]

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[137] *Gender Discrimination in Employment in China*, WOMEN'S WATCH—CHINA, Apr. 5, 2005, *available at* http://womenwatch-china.org/PageInfo/ShowNewsEN.aspx?ID=20091130000050 (discussing the aspects of Chinese labor law which contribute to sexual discrimination in the workplace).

[138] *Id.* In addition, some employers include clauses in employment contracts that discriminate on the basis of sex. These provisions may prohibit marriage and/or pregnancy during the period of the contract. *See* Ying, *supra* note 120.

[139] *See* Ying, *supra* note 120.

[140] *Id.*

[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] *Id.*

Yet, even though public policy prohibits this type of behavior, it still continues unabated.[145]

Thus, anti-discrimination scholars and practitioners in China have urgently called upon the government to develop new anti-discrimination legislation. A draft law known as "The Expert's Draft on Anti-Discrimination" purports to outlaw discrimination based on "nationality, gender, status, religion, beliefs, disability, physical characteristics, age, health conditions, sexual orientation and other factors which impact treatment in employment opportunities."[146] The draft law also prohibits discrimination in recruitment and promotion on the basis of gender, and an article on equal pay for equal work.[147]

D. *New Developments in Employment Law*

China's existing laws and regulations are comparatively strong in terms of legislative aims and clear-cut objectives. However, as noted previously, the implementation of these laws is very weak. For example, the Labor Law provides that "[w]omen shall enjoy equal rights with men in employment."[148] Yet, the failure of the law to assign legal responsibility for enforcing the law greatly reduces the efficacy of this provision in practice. The following section discusses additional legislation which, like the Labor Law, appears to be strong in language, but weak in practice.

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[145] *Id.*

[146] Anti-Discrimination in Employment Law of the People's Republic of China (draft proposal by Study Group of Anti-Discrimination in Employment, Constitution Research Institute, and China University of Political Science and Law, drafted Jun. 2008, revised Feb. 20, 2009), *available at* http://www.equalityatworkinchina.org/latest-development-en-us/experts-proposed-draft-of-chinas-first-anti-discrimination-in-employment-law (giving proposed legislation by a panel of experts aimed at eliminating employment discrimination).

[147] *Id.*

[148] *See* Labor Law of the People's Republic of China (adopted at the Eighth Meeting of the Standing Comm. of the Eighth Nat'l People's Cong., July 5, 1994, promulgated by Order No.28 of the President of the People's Rep. of China, July 5, 1994, effective Jan. 1, 1995) (P.R.C.).

i. Outlawing Gender, Race, Religious Belief, Age and Disability Discrimination in Employment: The Law of Employment Promotion

After years of debate and advocacy, China's Employment Promotion Law came into force in 2007.[149] This breakthrough development proscribes that no employer should discriminate based on factors such as nationality, race, gender, religious belief, age, and physical disability.[150]

The Employment Promotion Law includes several notable provisions. Specifically, Article 27 states that women will enjoy equal labor rights with men.[151] In addition, Article 3 provides that "[l]aborers enjoy by law the right of equal employment and independent employment choices. The employment of labors shall not be discriminative due to ethical attribution, races, genders and religious faiths."[152] Article 27 requires that the State guarantee that women enjoy the rights of labor equal with men.[153] With the exception of certain occupations that the state has designated as unsuitable for women, the employer unit shall not take gender as an excuse so as to refuse the employment of women or increase its recruit standards for women.[154] In addition, employers cannot impose marriage or childbirth restrictions on female employees in their labor contract.[155] Article 62 provides that, for the first time,

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[149] Employment Promotion Law (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Jan. 1, 2008) (P.R.C.), *translated at* http://www.baliprocess.net/files/China/China_employment%20promotion%20law_2008-eng.pdf.

[150] *Id.* arts. 3 & 52; *see also* Xihua News Agency, *China's Legislature Deliberates Draft Law on Employment Promotion* (2007), *available at* http://news.xinhuanet.com/english/2007-02/26/content_5773336.html (discussing what China's Draft Law on Employment and Promotion proposes in order to increase employment opportunities and curb discrimination in the workplace).

[151] Employment Promotion Law, art. 27; *see also* Guo Jianmei and Li Ying, *Lawyer's Collective, Women's Rights Protection in China and our Practice* 9 (Center for Women's Law and Legal Service of Peking University, Working Paper) (on file with author).

[152] Employment Promotion Law, art. 3.

[153] *Id.* art. 27.

[154] *See id.*

[155] *Id.*

to those in the 1987 revisions to the Israel employment law.[163] This law does not prevent night work for women but instead mandates that: "[a]n employer may not refuse to hire a woman only because she, when accepted for work, announces that she will not agree to work at night due to family reasons."[164] Although this might be an option that China could consider, it might not be a strong enough measure to prevent discrimination in hiring women for employment.

ii. Mandating Employment Contracts

The All China Trade Federation's recent issuance of its Specific Suggestion on the Collective Contract to Protect Female Workers' Rights and Interests, which calls on all trade unions in China to sign collective contracts with enterprises and/or employers, is another high water mark in recent labor law reform.[165] Furthermore, certain provinces have integrated similar provisions into their Implementation Measures of the LPWRI. In the Shaanxi province, for example, its implementation of the LPWRI mandates that when recruiting female workers, employers must sign a contract with them.[166] In Nanjing, the capital city of Jiangsu province, the Trade Union has expanded its collective contract to the service industry.[167]

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[163] Employment of Women Law (Amendment No. 7), 5746-1986 (Isr.).

[164] *Id.*

[165] Message from the Editor 2006, Vol. 14, *supra* note 130.

[166] *See* Press Release, The People's Gov't of Shaanxi Province, Jan. 12, 2009, *available at* http://english.shaanxi.gov.cn/articleNews/news/governmentnews/200902/9739_1.html.

[167] *See* Labor Contract Law of the People's Republic of China (adopted at the 28th Session of the Standing Comm.of the 10th Nat'l People's Cong., June 29, 2007, promulgated by Order No. 65 of the President of the People's Republic of China, June 29, 2007, effective Jan. 1, 2008) (P.R.C.) , *translated at* http://www.lehmanlaw.com/resource-centre/laws-and-regulations/labor/labor-contract-law-of-the-peoples-republic-of-china.html.

iii. The New Labor Contract Law

The 2007 Labor Contract Law reflects a paradigm change in labor relations from the initial 1994 Labor Law. In particular, the draft of the law was made open for public comment, which is a manifestation of a more open and participatory system of lawmaking.[168] Article 3 states that "[t]he conclusion of a labor contract shall be based on the principles of lawfulness, fairness, equality, voluntariness, negotiated consensus and good faith. A lawfully concluded labor contract shall have binding force, both the Employer and the employee shall perform their respective obligations stipulated therein."[169] This law breaks new ground and is laudable in its intention – the 1994 Labor Law did not use language referencing fairness or honesty.[170]

The new law also provides a number of new requirements meant to protect the rights of workers. These requirements include requiring employers to provide reliable information, prohibiting withholding of identity documents, limiting probationary periods, and providing the right for workers to disobey orders which might be potentially harmful to the employee's life or health.[171] The law also calls for employers to "be democratic" in formulating management rules and allows trade unions to play a role in making and enforcing collective agreements.[172] This law also covers part-time workers, and therefore is especially relevant to women workers.[173]

Further, the law states that no employer should rescind its labor contracts with a woman worker if she is pregnant, or in a delivery or lactation period.[174] As for collective contracts, the

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[168] *See* Xueyun, *supra* note 19, at 9.

[169] Labor Contract Law, *supra* note 167, at art. 3.

[170] Compare *id.* with Labor Law of the People's Republic of China (adopted at the Eighth Meeting of the Standing Comm. of the Eighth Nat'l People's Cong., July 5, 1994, promulgated by Order No. 28 of the President of the People's Rep. of China, July 5, 1994, effective Jan. 1, 1995) (P.R.C.).

[171] *See* Labor Contract Law, *supra* note 167, at ch. VII, arts. 80-95 (setting forth an employer's legal liabilities).

[172] *Id.*

[173] *Id.* ch. V, § 3.

[174] *Id.* art. 42.

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[171] *See* Labor Contract Law, *supra* note 167, at ch. VII, arts. 80-95 (setting forth an employer's legal liabilities).

[172] *Id.*

[173] *Id.* ch. V, § 3.

[174] *Id.* art. 42.

law requires that the labor party in an enterprise sign with the employing unit some specific collective contracts concerning labor security, sanitation, protection for women workers' rights and interests, adjustment mechanism for wages, and so forth.[175] The 2007 Labor Contract Law, however, has few articles that are gender specific.[176]

iv. Positive Developments that Seek to Define Maternity as a Social Function

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.[177]

This provision is very important given that many employers sign short-term contracts with their staff members or employees that are sometimes no more than a year, and as a result, many women postpone child bearing in order to retain employment.[178]

In addition, although the newly revised LPWRI guarantees women social insurance, social welfare, and health care, the implementing provisions have only been fleshed out in provincial level regulations. For example, the Shaanxi Province regulations state that "[p]eople'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

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[175] *Id.* ch. V, § 1.

[176] Jianmei & Ying, *supra* note 151, at 9.

[177] Mingshun, *supra* note 18, at 28 (quoting the Ways for the Implementation of the LPWRI in the Guandong Provice, art. 18).

[178] *Id.*

reimburse the expenditures in accordance to provided criteria."[179] In fact, the regulations further ask that

> [p]eople's governments at city and county levels should arrange the diagnosis and examinations of gynecologic diseases and breast diseases for retired women and those in poverty at least once every two years. Social communities, corporate organizations and non-governmental public institutions units are encouraged to help the diagnosis and examination of gynecologic diseases and breast disease for women in poverty.[180]

As another example, Article 25 of the Shanghai regulations state that:

> in Shanghai, a bearing insurance system is carried out by law, and a healthy guarantee system concerning women's bearing matters is established. People's governments and related departments at levels should follow the pertinent provisions to deliver necessary bearing relieves to women in need; and social communities, corporate organization and non-governmental public institutions units are encouraged to offer aids to the bearing activities of women in need.[181]

In the Jiangxi Province, too, the Ways for the Implementation of the LPWRI includes provisions to ensure the reproductive and gynecological health of women workers. For example, in Article 28, the law calls upon the employer once every year or two years to offer free gynecological examinations for its women employees.[182]

The provincial levels have taken it upon themselves to fill in the specifics of the over-general hortatory provisions of the national laws. It is now up to those reforming the national

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[179] *Id.* (quoting the Ways for the Implementation of the LPWRI in the Shaanxi Province).

[180] *Id.* at 28-29 (quoting the Ways for the Implementation of the LPWRI in Shanghai, art. 24).

[181] *Id.* at 29 (quoting the Ways for the Implementation of the LPWRI in Shanghai, art. 25). Based on this provision, the Shanghai government has allocated a budget for this purpose. *Id.*

[182] *See id.* In particular, Mingshun notes that the Jiangxi Province's promulgation of the LPWRI states that

> "An employer unit should offer a free gynecologic health care examination for its women workers every one or two years. The administrative departments concerning medical matters should undertake effective measures to carry out general examinations of gynecologic diseases for rural women, deliver necessary medical and health care conditions to women in old revolutionary bases, rural minority-concentrated villages, remote areas, and prevent and cure common diseases, frequently-occurring diseases and infectious diseases."
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> *Id.*

laws to heed the lessons from the grassroots lawmaking efforts and create a model of a bottom-up approach to lawmaking.

E. *Unequal Retirement for Women*

In China, several laws and policies establish different retirement ages for men and women. Women retire five to ten years earlier than men according to their employment status. Under the relevant policies, women who work as professionals or in technical and management positions retire at fifty-five, as do cadres or government workers; alternatively, males in professional, technical, or management roles work until sixty-five.[183] Women workers who have do not have a professional, technical or management position retire at fifty, including many nurses, accountants, and teachers.[184] While these female laborers are called upon to retire at fifty, male laborers can work until sixty. The differential retirement policy dates back to the 1978 No. 104 Document, which decreed that men retire at the age of sixty, female cadres at fifty-five, and female workers at fifty.[185]

Although this may have had its roots in a system where lifetime employment was guaranteed, early retirement for women in a free market system has resulted in egregious discriminatory hiring and firing practices and reductions in wages and benefits.[186] In addition, although unemployed persons can file for unemployment benefits which provide the equivalent of a minimum standard of living, these benefits are only provided to the household head, and thus, women are not always the beneficiaries of such insurance policies. For this reason,

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[183] Message from the Editor, 25 E-NEWSLETTER OF WOMEN'S WATCH-CHINA (Sep. 2007) (on file with author).

[184] *Id.*

[185] Jianmei & Ying, *supra* note 151, at 12.

[186] *Id.*

legislative changes in the realm of employment rights and legal services for women are critical to the recognition and vindication of women's rights.

As a result of early retirement policies, women in China are unable to participate equally in insurance schemes with male employees. Thus, women by and large have lower pensions than men. The unequal retirement age for men and women is one of the most critical debates taking place in China today. Article 27 of the revised LPWRI attempts to address this by outlawing differential retirement policies that call for women to retire earlier than men.[187] This provision represents a milestone in women's rights advocacy in China, as women's rights proponents have long made impassioned appeals to outlaw such gendered retirement policies.[188]

Previously, the State Council had issued two temporary measures as well as a set of additional documents that clarify the retirement age of women.[189] In addition, the Ministry of Personnel, the Ministry of Labor, other government and Communist Party agencies have provided a set of documents to clarify the employees' retirement age and treatment they enjoy after retirement. Below is a review of national regulations and policies with regard to retirement.

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[187] Revised Law on the Protection of Women's Rights and Interests, art. 27 (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 28, 2005, effective Dec. 1, 2005) (P.R.C.).

[188] Memorandum from Rangita de Silva de Alwis, to the Ford Foundation (June 2003) (on file with author).

[189] 国务院关于工人退休退职的暂行办法 [*Temporary Measures on the Retirement and Resignation of Workers*] (issued by the State Council, June 2, 1978) [hereinafter Temporary Measures RRW], 国务院关于安置老弱病残干部的暂行办法 [*Temporary Measures on the Proper Arrangement of the Elderly, the Infirm and the Handicapped Cadres*] (issued by the State Council, June 2, 1978) (Document No. 104) [hereinafter Temporary Measures PAEIHC]. *See also* Zhuqing Wang & Daoxia Wu, *An Analysis on the Chinese Legislation and Policies Concerning the Retirement Age of Female Professionals and Technical Personnel,* WOMEN'S WATCH—CHINA, Jul. 6, 2007 (noting that it is common to see female professionals forcefully retire at age 50) (copy on file with author).

i. Temporary Measures Issued by the State Council

The State Council issued the Temporary Measures on the Retirement and Resignation of Workers [RRW] and the Temporary Measures on the Proper Arrangement of the Elderly, the Infirm and the Handicapped Cadres [PAEIHC] in June 1978.[190] Both measures were approved by the Standing Committee of the Fifth National People's Congress, and thus, has legal authority.[191] Article 1 of the Temporary Measures RRW provides that male and female workers who work in state-owned enterprises, non-profit public institutions, government and communist party departments, and mass organizations must retire at age of sixty and fifty, respectively.[192] In addition, Temporary Measures RRW Article 4 requires that female cadres retire at fifty-five, while female workers retire at fifty.[193]

The two Temporary Measures did not address the retirement age for female professionals, technical personnel, and workers who work at cadre positions (referred to in China as "contract cadres"). To fill this gap, the Ministry of Personnel and the Ministry of Labor issued several other documents to categorize these female professionals, technical personnel, and workers who work at cadres' positions as cadres. Certain local governments and employers, however, selectively apply these two Temporary Measures to justify their decisions to force female professionals, technical personnel, and workers who work at cadres' positions to retire at fifty.[194] Thus, despite the Division for Retirement of the Ministry of Personnel clearly stating that female professionals and technical personnel are grouped with cadres, if the local authorities

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[190] *See* Temporary Measures RRW, *supra* note 189; Temporary Measures PAEIHC, *supra* note 189.
[191] *See* Temporary Measures RRW, *supra* note 189; Temporary Measures PAEIHC, *supra* note 189.
[192] Temporary Measures PAEIHC, *supra* note 189, art. 1.
[193] *Id.* art. 4.
[194] *See* Women's Watch—China, *Case Studies of Early Retirement of Female Professional and Technical Personnel in China*, 37–38 (2008) (on file with author) [hereinafter Women's Watch, *Case Studies of Early Retirement*]; *see also* Kevin J. O'Brien & Lianjiang Li, *Selective Policy Implementation in Rural China*, 31 COMP. POL., Jan. 1999, at 173-76 (discussing China's selective policy implementation of the cadre responsibility system and its effects).

do not follow this policy, the Ministry of Personnel has limited power to supervise the actions of the local government.[195]

ii. Employment Reform Regulations for Enterprises

Since 1995, employment reforms have emphasized that job contracts should replace the administrative procedures of application and ratification by higher government offices. Regulations regarding state-owned enterprises include the Suggestions on the Implementation of the Labor Law, issued by the Ministry of Labor, and the Temporary Measures on the Management of Persons who are Promoted as Cadres in State-Owned Enterprises, issued by the Ministry of Personnel.[196]

Article 75 of the Suggestions on the Implementation of the Labor Law states that workers who are promoted to cadre positions[197] or cadres who worked at workers' positions before the contract system was instituted should enjoy the relevant retirement treatment, matching the position they work when they retire.[198] Similarly, professional and technical workers, as well as management personnel, enjoy the same treatment as cadres.[199]

Article 1 of the Interpretations of Temporary Measures on the Management of Persons who are Promoted as Cadres in State-Owned Enterprises clarifies the definition of persons who are promoted as cadres, and states that the position of cadres includes both management and professional or technical personnel. A female cadre retires at fifty-five and a female worker

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[195] *See* Women's Watch, *Case Studies of Early Retirement*, *supra* note 194, at 37.

[196] 关于贯彻执行《劳动法》若干问题的意见 (由劳动部颁布实施) [*Suggestions on the Implementation of the Labor Law*] (issued by the Ministry of Labor); 管理暂行办法 [*Temporary Measures on the Management of Persons who are Promoted as Cadres in State-Owned Enterprises*] (issued by the Ministry of Personnel).

[197] Women who work at professional, technical and management positions are grouped as "cadres." *See* Women's Watch *Case Studies of Early Retirement*, *supra* note 194, at 38.

[198] Suggestions on the Implementation of the Labor Law, *supra* note 196, art. 75.

[199] *Id.*

retires at fifty.[200] Although the Provisional Regulations of the State Council have extended the retirement age of some women to the same age as men, the implementation of these regulations remain weak and under-enforced.[201]

iii. Case Studies on Early Retirement

The number of early retirement cases has exploded in the Chinese media.[202] In one case, in July 2007, approximately two-hundred female healthcare staff members in Tangshan who were employed in professional or technical positions were forced to retire at the age of fifty.[203] In fact, some of the hospitals in Tangshan had completed the retirement procedures without these

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[200] *See* Temporary Measures on the Management of Persons who are Promoted as Cadres in State-Owned Enterprises, *supra* note 196, art. 1; Women's Watch, *Case Studies of Early Retirement, supra* note 194, at 39-40. In 2000, China implemented a personnel reform in non-profit public institutions. The government and the communist party issued several policies to regulate the retirement issue. According to the Suggestion on Improving the Reform of the Personnel System in Non-Profit Public Institution issued in 2000, the cadre system was to be changed and a system of cadres' appointment by contract was to be established. Furthermore, in 2004, the Ministry of Personnel released Document No. 63 on Suggestions on Salary and Other Welfare Treatment Related to the System of Employment in the Non-profit Public Institution. Article 5, item 1 establishes that "the retirement of the appointed person by contract will follow the relevant government regulations on the respective position," and item 2 states that "those who are originally workers but are appointed by contract to work as professional, technical personnel, or management staff for than ten years, should receive the same treatment as the typical treatment for the appointed position until retirement." Wang & Wu, *supra* note 189; *see also* Doc. 63: Suggestions on Salary and Other Welfare Treatment (2004) (on file with author).

[201] Jianmei and Ying note that several regulations have been passed to target policies relating to women and retirement, including: Retirement of Senior Experts (No. 141) Document Issued by the State Council (1983); Notice of the State Council on Extending the retirement Age of some Backbone Teachers, Doctors and Technological Professionals (No. 142) issued in 1983; Notice on the Issue of Retirement Age of Female Cadres jointly issued by the Organization department of CPC Central Committee and Ministry of Labor and Personnel, and Notice on the Issue of Retirement Age of Female cadres with the Title Above Township Division Head. *See* Jianmei & Ying, *supra* note 151, at 11.

[202] For example, on March 7, 2006, The Center for Law Studies and Legal Services at Peking University submitted a proposal on the men and women's retirement age to the Standing Committee of National People's Congress (NPC). The proposal recommended that the Standing Committee of the NPC review the current retirement policy (No. 104 Decree of 1978 by the State Council) for violation of the Constitution. The proposal also provided legislative alternatives. The proposal was based on 118 cases of early retirement that came before the Center. Out of the fifteen cases the Center took to court only three cases were won. The lawyers at the Center argue that unequal retirement policies have a negative impact not just on women's lives but on their families' lives. *See Proposal to the Standing Committee of China National People's Congress,* E-NEWSLETTER OF WOMEN'S WATCH-CHINA (2006) (copy on file with author).

[203] *See* Women's Watch, *Case Studies of Early Retirement, supra* note 194, at 60-67.

women's consent or signature.[204] The women were given no notice that they were to leave their jobs within the course of a few days.[205]

Similarly, in Zhejiang province, a majority of the teachers, doctors, anesthetists, engineers, accountants, journalists, and senior editors who were forced to retire at fifty refused to retire in such arbitrary fashion.[206] The women alleged that their employers completed all the retirement procedures and even illegally changed the employees' professional titles in order to provide them with a reduced pension.[207]

In North West University at Xian, many female "contract cadres" who work as teachers and doctors were forced to retire at age fifty simply because they were originally workers and were contracted to work in the position of cadres.[208] In one district of Shanghai, many healthcare professionals were forced into retirement at fifty.[209] Most of them were doctors, pharmacists, senior nurses, or accountants who worked in the hospital.[210] In such instances, the health department used the excuse that these women were merely workers in their personnel file to force them into early retirement.[211]

Although some of these cases have been taken to court, to date, no female has won her case in either arbitration commission or in court. This raises questions regarding the relevancy

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[204] *Id.*

[205] These women had all started out as workers with the hospital, and had been promoted to their current positions. They felt their retirement was unfair and complained to the government to no avail. Several took their cases to the courts. *See id.* 60-67.

[206] *See id.* at 67-73.

[207] *See id.*

[208] *See id.* at 49-51.

[209] In a particular district in Shanghai, hospitals were improperly calling for the early retirement of about one-hundred women ranging from doctors to accountants. According to the policy of the nation's Ministry of Personnel, these women should retire at fifty-five, the mandated retirement age for female cadres and professional or technical personnel, but the local health department claimed that they were officially workers and not professionals, and asked the women to retire at fifty. The local government has backed the health department at a public meeting, and has tried to force other departments to follow the same policy. The women affected have tried to raise awareness on the Internet, and some have tried to take the health department to court, but none have been successful. *Id.* at 54-60.

[210] *Id.*

[211] *Id.*

and effectiveness of the new revisions to the LPWRI, and underscores the fact that despite provisions that equalize retirement for both men and women, the law still cannot be invoked in court or in arbitration to challenge unequal retirement practices.

In December 2008, Beijing presented its Implementation Rule of the LPWRI for public opinion. In this proposal, Article 23 states that the working age of women cadres whose title "is above the head of division and senior women intellectual shall be extended so as to achieve equality between man and women."[212] This initiative presents a uniquely bottom-up approach to revising the law, where the initiative for reform is endogenous and where reform at the local level can inform and propel national changes.[213]

iv. Examining Comparative Law on the Gender Equality of Retirement Ages

China's greatest need for better protection requires a strong and enforceable equal protection clause that prohibits sex discrimination. This will be a potent weapon against general gender discrimination, and also against unequal retirement policies in China. For example, differential practices can be challenged legally with the inclusion of strong anti-discriminatory provisions in the LPWRI implementing provisions. In countries with such a constitutional protection, the equality provision of the Constitution has provided a legal basis for challenge discrimination in court.

For example, in *Air India*, a group of flight attendants challenged the different rules pertaining to the retirement of female flight attendants and male stewards on the grounds of sex discrimination.[214] There, the Indian Supreme Court struck down a regulation requiring flight

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[212] Jianmei & Ying, *supra* note 151, at 12-13.

[213] *See id.*

[214] *See* Air India v. Nargesh Mirza, (1981) 1 S.C.R. 438 (holding that a regulatory provision forcing flight attendants to retire upon pregnancy was unconstitutional and arbitrary).

attendants to terminate employment at the time of pregnancy, citing it as arbitrary and unconstitutionally unreasonable.[215] The Court felt that under the equal protection clause, this provision "shocked the conscience."[216] The Court held that the principle of reasonableness pervades Article 14--the equal protection clause--like a "brooding omnipresence."[217] The Court also took strong exception to Air India Corporation's regulation, and held that it was "grossly unethical" and showed a "deep rooted sense of utter selfishness at the cost of all human values."[218]

Around the Asian region, discriminatory retirement laws have been challenged in court, although not always successfully.[219] In the seminal *Sumitomo Cement Company* case,[220] the Tokyo District Court, for the first time in Japanese history, ruled against the mandatory dismissal of a woman upon her marriage.[221] In that case, Setsuko Suzuki, a clerk, alleged that Sumitomo Cement Company forced her, as well as other women, to sign an agreement to retire voluntarily upon her marriage or upon reaching the age of thirty-five.[222] Under this practice, eighty-eight

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[215] *Id.*

[216] *Id.*

[217] *Id.*

[218] *Id.* at 490.

[219] *See Houshasen Kenkyujo* Case, 1394 Roudou Keizai Hanrei Sokuhou 3 (Sup. Ct., May 28, 1990), *available at* http://www.apwld.org/pdf/final%20cedaw%20cisco%202.pdf (holding that the different retirement ages for men and women at 62 and 57 respectively, did not constitute sex discrimination); *Iwate Bank* Case, 1410 Hanreijihou 37 (Sendai High Ct., Jan. 10, 1992), *available at* http://www.apwld.org/pdf/final%20cedaw%20cisco%202.pdf (holding that a worker's wage agreement that refused to give female workers allowances if their husbands earned more than the maximum income for a tax deduction unlawful); Nurhatina Hasibuan v. Pt. Indonesia Toray Synthetics, Functionaries Bd. of Indonesian Labour Union Branch, Cent. Mgmt. Bd. of Indonesian Labour Union (Jakarta High Ct., July 2, 1988), *available at* http://www.apwld.org/pdf/final%20cedaw%20cisco%202.pdf (holding that the mandatory retirement age of women at 40 was sex discrimination); Korea Elec. Power Corp. v. Comm'r of the Cent. Labour Comm'n (Sup. Ct., Aug. 23, 1996), *available at* http://www.apwld.org/pdf/final%20cedaw%20cisco%202.pdf (holding that the company's policy requiring telephone operators to retire at age 53 was not gender discrimination).

[220] Suzuki v. Sumitomo Cement Co., 17 Roshu 1407 (Tokyo D. Ct., Dec. 20, 1966).

[221] *See* Kelly Barrett, *Women In The Workplace: Sexual Discrimination In Japan,* 11 HUM. RTS. BRIEF 5 (2004) *available at* http://www.wcl.american.edu/hrbrief/11/2barrett.cfm (recognizing that although there have been legal and political changes in Japanese society to favor gender equality, progress has been limited because of traditional social norms that remain unchanged in the minds of employers and legislators).

[222] *Sumitomo Cement,* 17 Roshu 1407; *see also* Bergeson & Oba, *supra* note 84, at 870 (recounting the facts of the *Sumitomo Cement* case).

women had already "voluntarily" retired.[223] When the company fired her immediately after she married, Suzuki sued.[224] Sumitomo defended its practice on the grounds that marriage decreases women workers' productivity, while increasing their domestic responsibility. [225] The company further argued that its retirement policy conformed to traditional Japanese custom, which was virtually universally practice across the nation.[226] The Tokyo District Court, finding that there was a lack of evidence supporting a showing of an actual decline of women's productivity after marriage.[227] The court, applying Article 90 of the Civil Code,[228] held that the marriage retirement provision was both unreasonable discrimination based on sex and an unreasonable restriction on the freedom to marry.[229] The court also ordered Sumitomo to pay Suzuki her back wages and to reinstate her in her former position.[230]

Under civil law systems, such as in Japan and China, the *Sumitomo* cement case has no precedential power, and does not establish a universal rule against dismissal upon marriage.[231] Nevertheless, the case is still significant because it marked the first time a woman confronted a gender-role stereotype that had remained unchallenged for decades.[232] In addition, Suzuki's victory has inspired many other women to come forward with their complaints about mandatory retirement.[233] As Kiyoko Knapp notes, over the last twenty years, women workers have

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[223] Kiyoko Kamio Knapp, *Still Office Flowers: Japanese Women Betrayed by the Equal Employment Opportunity Law*, 18 HARV. WOMEN'S L.J. 83, 103 (1995).

[224] *Sumitomo Cement*, 17 Roshu 1407; Knapp, *supra* note 223, at 103.

[225] *Id.*

[226] *Id.*

[227] *Id.*

[228] MINPŌ [CIVIL CODE], art. 90, Law No. 89 of 1896 and Law No. 9 of 1898 (nullifying an act contrary to public policy or good morals); *see also* Kikuo Ishida, *On Article 90 of the Civil Code of Japan*, *available at* http://ir.library.osaka-u.ac.jp/metadb/up/LIBOULRK01/oulr006-015.pdf.

[229] *Sumitomo Cement*, 17 Roshu at 1420; *see also* Barrett, *supra* note 221; Bergeson & Oba, *supra* note 84, at 870.

[230] *Sumitomo Cement*, 17 Roshu 1407.

[231] Knapp, *supra* note 223, at 104.

[232] *See id.*

[233] *See id.*

prevailed in more than twenty major cases relating to forced early retirement.[234] Furthermore, Knapp notes that judges hearing similar cases have often cited Sumitomo Cement Company as influencing their opinions.[235]

In addition to the judicial lawmaking, there have been reforms focusing on revising the law to ban differential retirement policies. For example, in 2006, the first draft of the Vietnam Law on Gender Equality addressed this dichotomy by proposing one retirement age for both men and women with a right to retire five years earlier by either men or women.[236] Although this provision was not retained in the final bill, this seems like a creative way to resolve a pernicious inequality that has plagued the legal landscape of many Asian countries.[237]

Given the contested nature of early retirement, one way of addressing the issues of unequal employment practice and women's own free choice to retire early is to give women that choice. For example, in 1987, the Knesset passed the Equal Retirement Age for Male and Female Employees Law in Israel[238] in response to the *Nevo* case pending before the Israel Supreme Court that challenged early retirement.[239] The Retirement Age Act requires that male and female workers be permitted to retire at the same age but grants women the option to retire five years earlier than men. Prior to the law's enactment, women had been forced to retire five years ahead of their male co-workers. The new law provided parity to some extent by granting women the right to work as many years as their male counterparts while maintaining the right to

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[234] *See id.* (noting that courts have deemed early retirement unreasonable and in violation of Article 90).

[235] *See id.* (citing ALICE H. COOK & HIROKO HAYASHI, WORKING WOMEN IN JAPAN: DISCRIMINATION, RESISTANCE, AND REFORM 49 (1980).

[236] Law on Gender Equality, No. 73/2006/QH11 (Vietnam).

[237] Although this provision was recommended by the Vietnam Women's Union and included in the second draft of the law, it was not included in the final version of the law. The Vietnam Women's Union hopes to continue to advocate for this in the proposed guidelines to implement the Vietnam Gender Equality law.

[238] Male and Female (Equal Retirement Age) Law, 5747-1987 (1987) (Isr.).

[239] H.C. 104/87 Nevo v. The Jewish Agency et. al. P.D. 44(4) 749 (1990); *see also* Leora F. Eisenstadt, *Privileged But Equal? A Comparison of U.S. and Israeli Notions of Sex Equality in Employment Law*, 40 VAND. J. TRANSNAT'L L. 357, 374-76 (2007) (describing the remarks of Nevo).

choose to retire earlier than men.[240] Although this is a creative way to leave both options open, the better choice would be to give both men and women the equal option to retire at an earlier age. Specifically, a retirement option that is available only to women can once again reinstate women's perceived vulnerabilities.

In accordance with the CEDAW, an anti-discrimination clause must cover both direct and indirect discrimination and prohibits discrimination against women by public and private actors.[241] The new generation of gender equality laws follows the norms of the CEDAW and provides an expanded notion of equality and anti discrimination in their laws. China also can rely on the experiences of these recent lawmaking initiatives in Eastern Europe and central Asia. For example, the Croatian Gender Equality Act of 2003 defines discrimination as "[a]ny normative or real, direct or indirect differential treatment, exclusion or limitation based on one's gender which renders more difficult or denies equal recognition, enjoyment or exercise of human rights of men and women in political, educational, economic, social, cultural, civil and any other sphere of life."[242] The law goes on to define direct and indirect discrimination broadly.

Similarly, the Lithuania Law of the Republic of Lithuania on Equal Opportunities, in Article 4, defines indirect gender discrimination as "action or inaction, legal norm or evaluation criterion which being formally equal to both men and women, when implemented or applied [has a] different factual impact on one of sexes in terms of restriction of rights or granting of privileges, preference or advantage."[243] In addition, the new Vietnam Gender Equality Law of

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[240] Male and Female (Equal Retirement Age) Law, 5747-1987 (1987) (Isr.); *see also* Eisenstadt, *supra* note 262, at 411-12.

[241] *See* CEDAW, *supra* note 29, art. 4, 5, & 12.

[242] Gender Equality Act, art, 6 (2003) (Croat.).

[243] Law of the Republic of Lithuania on Equal Opportunities, art. 2 (1998) (Lith.).

2006 and the Moldovan law on Ensuring Equal Opportunities for Women and Men of 2006 regulate both private and public acts of discrimination.[244]

Another hallmark of the new generation of gender equality legislation is the way they acknowledge the intersection of gender and other discriminatory grounds such as race, ethnicity, and disability.[245] The CEDAW also advances both formal and substantive equality and embraces temporary special measures as a way of achieving substantive equality. Kosovo law, for example, adopts the spirit of temporary special measures by mandating in its law on Gender Equality that affirmative measures must be established for equal participation of females in legislative, executive, and judicial bodies of all levels, and in public institutions in accordance with the female-to-male representation in the general population.[246]

Discrimination against women is one of the most pressing challenges in China and the pursuit of gender equality is one of the main hallmarks of the burgeoning women's rights movement in China. A gender equality law which establishes a positive duty on the State to achieve both formal and substantive equality of results, and addresses de jure, de facto, indirect, and direct discrimination should mark the next phase of the work of China's women's right advocacy.

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[244] *See* Law on Gender Equality, No. 73/2006/QH11, art. 2 (Vietnam) (defining that the subjects of regulation are Vietnamese state agencies, political organizations, socio-political organizations, socio-political professional organizations, social organizations, socio-professional organizations, economic organizations, non-business units, units of people's armed forces, families and citizens); *see also* Moldova Law on Ensuring Equal Opportunities for Women and Men, art. 3 (2006) (Mold.) (defining that the subject of legal relations aimed at ensuring equality between men and women are: the State, legal persons and natural persons).

[245] *See generally* UNIFEM, GENDER EQUALITY LAWS: GLOBAL GOOD PRACTICE AND A REVIEW OF FIVE SOUTHEAST ASIAN COUNTRIES 137 (2009) (explaining as an example, the South African law on the Promotion of Equality and Prevention of Unfair Discrimination Act (2000), art. 8 covers multiple grounds of discrimination including: (a) sex, (b) racial origin, (c) colour, (d) nationality, (e) national or ethnic origin, (f) mother tongue, (g) disability, (h) state of health, (i) religious or ideological conviction, (j) political or other opinion, (k) family status, (l) motherhood (pregnancy) or fatherhood, (m) sexual orientation, (n) sexual identity, (o) age, (p) social origin, (q) financial status, (r) the part-time nature or definite term of the employment relationship or other relationship related to employment, (s) the membership of an organization representing employees' interests, (t) other status, attribute or characteristic (hereinafter collectively: characteristics) are considered direct discrimination.)

[246] The Law on Gender Equality in Kosovo §3.1, Law No.2004/2 (2004) (Kosovo).

F. *Rural Women's Access to Land*

"The Committee urges the State party to further assess the reasons for the disproportionate representation of women among the rural landless and to take appropriate remedial action, including measures and steps to change customs that result in discrimination against women."[247]

- CEDAW Committee's Concluding Observations, 2006

The face of poverty in rural areas of China is often that of a woman. The State's use of rural land for urbanization has decreased the amount of farmland, which has had a disproportionate impact on women.[248] Rural women often become landless upon marriage or divorce, as frequently a woman who marries a man in another village moves to her husband's village and forgoes her land-use rights in the village of her birth.[249] Upon divorce, a woman finds it nearly impossible to claim a share of land in her ex-husband's village, thereby leaving her without support.[250] Despite the prevalence of de facto female-headed households in rural areas, there is no *de jure* recognition of this.[251] Furthermore, despite facially equal laws, not all members of a rural household enjoy equal land allocations.[252] Most village rules and "villager

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[247] *See* U.N. CEDAW 743rd to 744th mtg., *supra* note 43, at 6.

[248] 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*, *in* WELLESLEY CENTERS FOR WOMEN, *supra* note 126, at 120, 128.

[249] *See* Mo Wenxiu, *Rural Women's Land Rights and Interests Merit Close Attention,* HUMAN RTS. MAG. (2007), *available at* http://211.167.236.236/zt/magazine/20040200741992705.htm (discussing how pressures for women to move to their husband's village often results in the loss of a woman's land-rights).

[250] *See id.* (discussing various restrictions that villages place on married-in women, married-out women, divorced and widows that inhibits their ability to partake in a share of their husbands estate).

[251] *Id.*

[252] For examples of legislation discussing equal land rights for both sexes, see XIAN FA [Constitution of the People's Republic of China] art. 48 (1982) (P.R.C.) (guaranteeing that women in the People's Republic of China shall have equal rights as men politically, economically, culturally, socially and in family life); General Principles of the Civil Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 12, 1986, effective Jan 1, 1987) (P.R.C.) (defining that women shall have equal civil rights as men; these equal civil rights include equal rights in marriage and rural contracting of land).

Apart from these laws, the government has released circulars that safeguard women's land use rights. In May 2001, the Central Government issued a circular, "Safeguarding Rural Women's Land Contracting Rights." *See* Wenxiu, *supra* note 249. Currently, four provinces have adopted policies that aim to solve land related disputes and more than ten local governments and related departments have formulated policies that safeguard women's land

agreements" dealing with land allocation are inconsistent with the equal protection guarantees in China's Constitution and Civil Law.[253]

As Mo Wenxiu writes, in some villages, a woman is treated as half a man. She argues:

> Some localities make a forecast of the changing sizes of rural households in 30 years and then do the unthinkable. For households with more unmarried males, farmland is reserved in advance for future wives and their children; and for households with more unmarried females, farmland is deducted in advance from the 'women to be married off.'[254]

Women by and large face discrimination in land use rights. These women include married-off women (women who transfer to their husbands' villages), married-in women (women whose husbands transfer to their villages), divorced women, widows, and those whose husbands work in cities. In most villages, a married-off woman is considered "water thrown off."[255] On the other hand, male farmers who are registered in their wives' villages may lose their land rights in the village where they are from.[256]

The Land Contract law guarantees equal rights to women in rural land contracts, and more specifically, Article 30 guarantees that no organization may deprive women's rights to land contractual management during the term of contract; the article ensures that if a woman marries during her term of contract and does not enter into any contract for land in the place of new residence, the party issuing the contract may not reclaim her originally-contracted land.[257]

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contracting rights and interests. *See id.*

[253] *See* Wenxiu, *supra* note 249, at Part III. ("Using village rules and villagers' agreement to restrict and deprive of women's land contracting right and related economic interests has become a major form of encroaching upon rural women's land related rights and interests.")

[254] *Id.* at Part II.

[255] *Id.*

[256] *Id.*

[257] Rural Land Contract Law of the People's Republic of China, art. 30 (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 29, 2002, effective Mar. 1, 2003), *translated in* ISINOLAW (last visited Feb. 18, 2010).

Similarly, a divorced woman or widow has security of contract and a land contract may not be annulled upon divorce or widowhood.[258]

In a case brought before Anhui Province, "married out" women (women who married and left the village of birth) filed a lawsuit before the Tongchen Peoples Court demanding compensation for the land of which they were deprived.[259] On the day of the trial, over one-hundred villagers were present and attempted to use strong-arm tactics by shouting, "no land for married out women!" to try to prejudice the court.[260] Although the court ruled that compensation should be paid for five married out women, the villagers refused to comply with the judgment.[261] Eight months after receiving a favorable judgment, the women received compensation by requesting mandatory enforcement of the judgment.[262]

In China, *Wang Yulun and Li Erxian v. the Vegetable Village of Wujin Township* challenged discriminatory village rules that disentitled women to land allocation upon marriage.[263] The suit was based on the equal protection clause of the Chinese Constitution. In this case, the plaintiffs, Wang Yulun and Li Erxian, brought an action against the Wujin Township in Xinjing County in the court of Sichuan, alleging that their daughter had been discriminated against because of her gender. The plaintiffs challenged the village rules, which stipulated that a woman should transfer her census registration to her husband's village at the time of marriage. As a consequence of these rules, the daughter's farmlands were appropriated

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[258] Jianmei & Ying, *supra* note 151, at 5.
[259] *Id.* at 15.
[260] *Id.* at 15-16.
[261] *Id.* at 16.
[262] *Id.*
[263] *See generally,* Cause Lawyering and Public Interest Litigation, WOMEN'S WATCH-CHINA (2005), *available at* http://womenwatch-china.org/PageInfo/ShowNewsEN.aspx?ID=20091103000226 (describing the *Yulun* civil suit).

at the time of her marriage, and the village failed to pay her compensation.[264] The Court of Sichuan decided that the "village rules which are civil in nature must be in accordance with the Constitution."[265] Although the court did not go so far as to strike down the impugned village rules, the court mandated that the village pay the plaintiff five-thousand yuan as compensation for the misappropriated land.[266]

Due to the efforts of women's rights lawyers and advocates, many women who have been discriminated in the allocation of land use rights have also won their cases in court. Recently, twenty-eight married women won a class action case against the local Village Committee in Shaliang Village, Hohhot city in Inner Mongolia.[267] These women, after years of fighting, finally received the land compensation that they should have received seven years ago.[268] The Center for Women's Law Studies and Legal Services, which helped these women, reports that without the support of women's rights activists, this case might not have been a success.[269] There have been other advancements in the area of women's land rights. For example, a new type of gender culture where the husband joins the wife's village after marriage is being created in Yidu City in Hubei, Dingzhou County in Hebei, and Lueyang County in Shaanxi, to address the patriarchal land allocation rules.[270] The Zhoushan Village has made some groundbreaking changes in their village rules and villager conventions. One of the most interesting changes is the upgrading of women's role in their participation of community affairs.[271] The second

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[264] *Id.*
[265] *Id.*
[266] *Id.*
[267] Message from the Editor, 12 E-NEWSLETTER OF WOMEN'S WATCH CHINA (Aug. 2006) [hereinafter Message from the Editor 2006, Vol. 12].
[268] *Id.*
[269] *Id.* (noting the comments from Ms. Xu, a lawyer for the center of Women's Law Studies and Legal Services).
[270] Li Huiying, *Government Responsibility: Exploration to Protect Women's Land-Related Rights and Interests*, *in* WELLESLEY CENTERS FOR WOMEN, *supra* note 126, at 125, 126.
[271] *Id.* at 133

overarching change attempts to break the traditional pattern of virilocality of women.[272] The Property Law of 2007 provides for judicial review of discriminatory or unbalanced decisions by villager committees.[273] Though this article is not always implemented, it opens space for scrutiny over local rules especially when they conflict with state laws.[274]

Unfortunately, the lack of legal aid has impeded most women's access to justice. Women cannot vindicate their rights unless they are represented in court. The Ministry of Justice's 1996 "Notice on Protecting Women's Rights and Interests and Providing Legal Aid Services for Women" stipulates that legal aid institutes, law firms, notaries, and local legal services should not shift responsibility and delay cases concerning the violation of women's rights, and it requires reduced or no fees for female litigants who face economic difficulties.[275]

Furthermore, the Real Right Law, passed in 2007, calls for safeguards to women's rural land rights.[276] Although this law lacks specificity, it attempts to address women's unequal access to rural land tenure rights. In many cases, young women's potential matrimonial prospects were used as excuses to distribute less than their fair allocation of land. In other cases, women who are widowed or married into another village have their lands forcibly taken back. At the same time, the new Property Law requires all land to be registered. However, if land which is jointly owned by a married couple is registered in only the husband's name, the wife may lose control of that land. Furthermore, the requirement for land contracts to include signature lines for both spouses is absent from this law.

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[272] *Id.*

[273] Jianmei, *supra* note 248126, at 124.

[274] *Id.*

[275] ASIAN DEV. BANK, PEOPLE'S REP. OF CHINA: COUNTRY GENDER ASSESSMENT 43 (2006), *available at* http://www.adb.org/Documents/Reports/Country-Gender-Assessments/cga-prc.pdf.

[276] Real Right Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 16, 2007, effective Oct. 1, 2007) (P.R.C.).

Once again, provincial level regulations are far stronger than the national level laws. For example, Article 29 of Jiangxi Provinces regulations, which implements the local requirements under the LPWRI, mandates that spouses jointly sign for the registration of their community properties.[277] Furthermore, Article 30 forbids villager commissions, villager meetings, villagers' representative meetings, or villager groups from taking into account women's marital status in the allocation of land, and states that they should share equally with men the collective economic organizations of the community.[278] Joint registration of land and removing consideration of marital status are two pivotal ways to redress gender bias in distribution of land tenure rights.

In Vietnam, Land Tenure Certificates documenting a household's long-term use rights to land were originally provided only in the name of the head of the household, which was almost always a man.[279] To address this problem, the Vietnamese government recently mandated that all co-owned marital property must be registered in the names of both husband and wife.[280] China's property law is to be revised soon and these considerations should be a focus of its inquiry.

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[277] *See* Mingshun, *supra* note 18, at 29.

[278] *Id.* at 27.

[279] Jennifer Brown, *Rural Women's Land Rights in Java, Indonesia: Strengthened By Family Law, But Weakened By Land Registration,* 12 Pac. Rim. L. & Pol'y J. 631, 634 (2003).

[280] Government Decree No. 70/2001/ND-CP on the Implementation of the Law on Marriage and Family, art 5 (Oct. 3, 2001) (Vietnam), *translated at* http://vbqppl.moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=9350.

G. *Guaranteeing Equality in Women's Education*

"[E]nsure that all rural girls complete the nine years of compulsory education, free of all miscellaneous fees and tuition."[281]

- CEDAW Committee's Concluding Observations, 2006

Expanding access to education for the girl child is one of the most effective strategies for eliminating poverty on individual, communal, national, and regional levels.[282] Unequal access to education, especially for women, has been one of the most severe problems in China. Son preference, patrilocal marriage practices, and perceived opportunity costs for educating girls are some of the negative customary practices that militate against the girl child's access to school. Discrimination against women is often interconnected and overlapping, making it more insidious and pervasive. The cause and effect relationship of women's subordination is shown by the fact that the gender wage gap, disproportionate numbers of female layoffs. The impact of market reforms and migration on women indirectly hinders women's access to education in China.[283] In 2000, seventy percent of China's two-hundred-forty million illiterates were women.[284] The CEDAW Committee, both in 1999 and 2006, focused on the need for China to put in place a comprehensive approach to overcome traditional stereotypes regarding the role of women and men in society in accordance with Article 5 of the CEDAW. The Committee recommended that the State evaluate its curriculum for gender sensitivity to ensure that it concretely addresses the principles of equality between men and women.[285]

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[281] *See* U.N. CEDAW 743rd to 744th mtg., *supra* note 43, at 6.

[282] *Cf.* UNITED NATIONS, ECONOMIC AND SOCIAL SURVEY OF ASIA AND THE PACIFIC 2007 (2007) (noting that the Asian region loses between 16 to 430 billion dollars annually due to gender inequality in education).

[283] *See* Heidi Ross, *China Country Study*, UNESCO GLOBAL MONITORING REPORT 30 (2005), *available at* unesdoc.unesco.org/images/0014/001461/146108e.pdf.

[284] *Id.* at 5.

[285] *See* U.N. CEDAW 743rd to 744th mtg., *supra* note 43, at 7.

The newly revised LPWRI makes an effort to combat unequal access to education and gender stereotypes by guaranteeing that schools and departments concerned should implement the relevant regulations of the State.[286] Moreover, a new provision has been included in Article 16, which states that, "with the exception of special majors, no school is allowed to refuse female student enrollment or raise the standards of enrollment based on sex."[287] However, the ambiguity and general lack of clarity in this provision lends itself to be interpreted in a gender-biased manner. Article 16 is very important because it attempts to address the serious problem of inequality in girls' access to education, particularly in rural China.[288] But this provision must first be justiciable before it can truly prohibit direct and indirect discrimination in school enrollment and classification of female students based on their sex.[289]

The revisions to the LPWRI also attempt to create conditions to ensure that education is made compulsory for "migrant female school-age children or adolescents."[290] Since this class of students is the most vulnerable to discrimination in education, it is critical this group be given special attention in the implementation of the LPWRI. Before the revisions to the LPWRI, Article 17 stated if parents or guardians failed to send a girl to school, the local people's

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[286] *See* Carole J. Petersen, *Equality as a Human Right: the Development of Anti-Discrimination Law in Hong Kong*, 34 COLUM. J. TRANSNAT'L L. 335 (1996) (explaining one of the landmark cases establishing gender equality in education, *Equal Opportunities Commission v. Director of Education*, a case concerning gender discrimination in primary schooling in Hong Kong).

[287] Revised Law on the Protection of Women's Rights and Interests (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 28, 2005, effective Dec. 1, 2005) (P.R.C.), art. 16.

[288] Improving equal access to education is one of the goals laid out in the Ten-Year Program for the Development of Chinese Women. In the Chinese Women's Development Plan 2009-2010 (Program for the Development of Chinese Women, May 9, 2004, *available at* http://www.chinaembassy.org.pl/pol/wh/wh/t129196.htm), women and the economy was listed as a priority area.

[289] *See* U.N. Comm. on Econ., Soc., & Cultural Rights [CESCR], General Comment 3 (December 14, 1990) (stating that the CESCR wishes to be provided with information as to whether economic, social and cultural rights have been translated into legislative form and whether such laws are justiciable or create any "right of action" on behalf of individuals or groups who feel that their rights have not been realized). Further, General Comment 3.6 provides that where specific economic, social and cultural rights have been adopted directly into national law, "the Committee would wish to receive information as to the extent to which these rights are considered to be justiciable (i.e. able to be invoked before the courts)." *Id.*

[290] Revised Law on the Protection of Women's Rights and Interests (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 28, 2005, effective Dec. 1, 2005) (P.R.C.).

government would be advised to adopt "effective measures" to order parents to send the girl to school.[291] Here again, what constitutes "effective measures" was not explained and left to the discretion of the local authorities; without effective sanctions these provisions would fail to have the desired impact.[292] The revised LPWRI takes positive steps to encourage gender equity in education and training. Although the law calls for effective measures, these measures are more norm-creating and aspirational, and do not carry corresponding monitoring mechanisms or remedies. Much is left to the discretion of the pertinent departments of the people's governments to adopt measures as they see fit. Without a sound enforcement infrastructure, it will be difficult to effectuate these laws, and they may be subject to capricious and arbitrary interpretations.[293]

In contrast, the Taiwan Law on Gender Equity Education, passed in 2004, provides enforcement mechanisms and resources to implement the provisions on gender equity in education.[294] Article 6 of the Taiwanese law provides that "schools shall establish a gender equity education committee whose tasks among others is to include integrating resources in various departments to draft gender equity projects."[295] Article 7 goes on to make recommendations as to the composition of the gender equity committee, suggesting that "at least half of the committee members be women."[296] The provision also ensures a diverse group of independent members through the inclusion of experts, scholars, and NGO representatives and scholars on these committees.[297] To ensure compliance and appropriate action, Article 7 also

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[291] *Id.*
[292] *Id.*
[293] *Id.*
[294] Faigui Huibian [Taiwan Gender Equity Education Act] (2004) (Taiwan) , *translated at* http://www.wcwonline.org/pdf/lawcompilation/TaiwanGenderEquityEducation%20Act.pdf.
[295] *Id.* art. 6.
[296] *Id.*
[297] *Id.* art 7.

recommends that the committee shall hold at least one meeting every three months and a proper number of staff should handle related matters.[298]

Under the Taiwanese law, the municipal government is also required to appoint a gender education committee. According to Article 9, the gender equity education committee of the school must appoint "five to twenty-one members, who shall serve specific terms.[299] The school principal or president serves as the chair of the committee, and at least one half of the committee members are to be women.[300] Representatives of faculty, staff, parents, students, and experts with gender equity consciousness, as well as scholars from fields related to gender equity education are to be invited to be committee members.[301] Other laws such as the Lao PDR asks the State to advance education for marginalized women and affirms that "curricula and texts be free from sex- role stereotypes." [302] These guidelines will be instructive to China.

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[298] *Id.*
[299] *Id.*
[300] *Id.*
[301] *Id.*
[302] UNIFEM, GENDER EQUALITY LAWS, *supra* note 245, at 89.

H. *Equality in Political Participation*

"The Committee recommends the utilization of temporary special measures in accordance with Article 4, paragraph 1, of the Convention and the Committee's general recommendation 25 to accelerate the practical realization of the goal of de facto or substantive equality of women with men in all areas of the Convention. . . . The Committee recommends that the State party conduct training programmes on leadership and negotiation skills for current and future women leaders. . . . The Committee recommends that the State party take all measures to strengthen the active participation of rural women in the design, development, implementation and monitoring of rural development policies and programmes"[303]

- CEDAW Committee's Concluding Observations, 2006

Chinese women's rights advocacy leaders argue that the 4th World Conference triggered the Chinese government's adoption of the Program for the Development of Chinese Women (1995- 2000). Although the program is articulated in very general terms, advocates believe that this has helped to elect women into leading bodies of government at all levels.[304]

i. Revisions to the Election Law

Article 6 of the 2004 revisions to the Election Law of 1979 provides that women have the same rights as men to vote in and stand for elections.305 The same article provides for a reasonable number of women delegates in the NPC and the people's congresses at all levels; however, the number is not stipulated.306 Currently, twenty-one percent of the NPC deputies

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[303] U.N. CEDAW 743rd to 744th mtg., *supra* note 43.

[304] *See* Wang Yi, *Women's Political Participation in China*, 85 KAS-Schriftenreihe 1 (2008) (stating that in the aftermath of the 4th World Conference on Women in 1995, approximately 21 percent of National People's Congress deputies are women; this is a relatively high percentage, but still short of the goal of 30-50 percent set by the Government during the Conference).

[305] *See* UNIFEM, GENDER EQUALITY LAWS, *supra* note 245.

[306] *Id.* at 9 (stating that the laws of several Asian nations are ambiguous in providing for the number of women in politics. For example, Lao PDR asks an appropriate number of women be appointed to appropriate positions, while the Philippines requires political parties to "encourage" the recruitment of thirty-three percent of women in political parties, but stops short of mandating it).

are women and fifteen and a half percent of the current total Standing Committee members are women.[307]

ii. Local Legislation

Local regulations drafted to implement the LPWRI have made some laudable steps to establish concrete quotas for women political participants. For example, in October 2006, the Central China's Hunan Province implemented its measures under the LPWRI.[308] Two of the provisions provide that at least thirty percent of all candidates at all levels of the People's Congress must be women; additionally, the law calls for female candidates in official village meetings and residential meetings to make up at least thirty percent of the candidates—clearly establishing a baseline for participation by women in political life in Hunan Province.[309] Provinces such as Shaanxi, Heilongjiang, Guizhou, and Anhui have also provided that women should account for more than thirty percent of candidates standing for election.[310] Only in the Jiangxi Province have the implementing provisions provided that women shall account for not less than twenty percent of the representatives in the local people representatives at all levels.[311] Establishing a minimum number of candidates as a threshold requirement will create a critical mass of women in politics and bolster greater political participation by women.[312]

Certain provinces have also provided a minimum quota for the representation of women in village committees and trade union participation. For example, Article 9 of the implementation guidelines of the Anhui Province provides that "governmental institutions, social

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[307] *See* Yi, *supra* note 304, at 1.
[308] *See* Message from the Editor, 13 E-NEWSLETTER OF WOMEN'S WATCH-CHINA, (Sept. 2006).
[309] *See id.*
[310] *See* Mingshun, *supra* note 18, at 27.
[311] *Id.* at 27-28.
[312] *See id.* at 28.

groups, corporate organizations and non-governmental public institutions should be staffed with women leaders in accordance to relate provisions."[313] Within a villager commission or an urban neighborhood committee, there should be a certain quota for women. The quota of women in a corporate staff representative conference should be in line with the rate of women workers in the enterprise. Where there are more than ten female members in a corporate labor union, a woman worker commission should be set up under the labor union; and if there are less than ten female members, a women worker commission should be established.[314]

Similarly, Article 10 of the Shaanxi province regulations establish that "[i]n people's governments at or above townships level, or in the component departments and institutions directly under people's governments at or above county level, there should be a certain amount of women taking the office of chiefs."[315] A quota for women in labor union and village commission representation will provide a much needed women's perspective on decisions touching both women and men's lives.

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[313] *Id.*
[314] *Id.*
[315] *Id.*

IV. ADDRESSING GENDER VIOLENCE

" The committee urges the State party to adopt a comprehensive law on violence against women and to ensure that all forms of violence against women and girls, both in the public and private spheres, constitute a crime punishable under criminal law. It calls upon the State party to provide immediate means of redress and protection to women and girls who are victims of violence, in accordance with the Committee's general recommendation 19. It also encourages the State party to enhance victims' access to justice and redress, for example, through training aimed at judicial officers, including judges, lawyers and prosecutors, in order to enhance their capacity to deal with violence against women in a gender-sensitive manner and ensure that claims are investigated expeditiously, including incidents of violence against women in detention centres."[316]

- CEDAW Committee's Concluding Observations, 2006

According to a 2008 survey conducted by the ACWF, domestic violence affects approximately thirty percent of Chinese households today.[317] The prevalence rate for domestic violence in China is estimated at approximately thirty to thirty-six percent, and more than ninety percent of the victims are women.[318] Although domestic violence is now clearly prohibited by the revisions to the LPWRI, as well as by provisions of the revised Marriage Law, which addresses the protection of women's rights to file for divorce and use domestic violence as a ground for divorce, China still lacks national legislation on domestic violence.[319] Anticipating revisions to the LPWRI, women's groups in China argued for a strong provision outlawing domestic violence.[320] They called for a broad and clear definition of domestic violence in

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[316] *See* U.N. CEDAW 743rd to 744th mtg., *supra* note 43.

[317] *See* BUREAU OF DEMOCRACY, HUMAN RTS. AND LABOR, U.S. STATE DEP'T., COUNTRY REPORTS ON HUMAN RTS. PRACTICES – 2007, at 747 (Aug. 2008), *available at* http://beijing.usembassy-china.org.cn/hr_report2006.html.

[318] *See* Message from the Editor, 36 E-NEWSLETTER OF WOMEN'S WATCH-CHINA (2008) (on file with author) [hereinafter Message from the Editor 2008, Vol. 36].

[319] *See* Xiaoling, *supra* note 23.

[320] *Id.*

compliance with the international conventions to which China is a member.[321] Additionally, they urged that the scope and coverage of the law be clearly specified.[322] These recommendations were inspired by CEDAW's Recommendation 19[323] and the Declaration on the Elimination of Violence against Women (DEVAW).[324]

These efforts have yielded a revised LPWRI, which for the first time prohibits domestic violence.[325] Article 2 of the revised law classifies violence against women as a form of discrimination and prohibits such conduct, and Article 46 outlaws domestic violence and requires the state take all measures to prevent and stop such abuse.[326] And although domestic violence is now a legally accepted ground for divorce, along with civil liability for compensation of losses incurred from the divorce, criminal liability can only arise if the violence constitutes "severe harm."[327] Furthermore, although the law provides differing levels of punishment for the various grades of domestic violence, Chinese lawyers believe these punishments are rarely issued. Despite vigorous advocacy by women's groups, impassioned appeals for corrections to

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[321] *Id.*

[322] *Id.*

[323] *See* U.N. CEDAW 743rd to 744th mtg., *supra* note 43 (urging the "State party to adopt a comprehensive law on violence against women and to ensure that all forms of violence against women and girls, both in the public and private spheres, constitute a crime punishable under criminal law;" provide protection and redress to women and girls who are victims of domestic violence; and provide training to judges, prosecutors, and other members of the legal community on the issue of violence against women); *see also* CEDAW General Recommendation, *supra* note 66 (announcing that domestic violence is a violation of women's fundamental human rights, and defining violence against women as: "acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivation of liberty," but there is no clear definition of domestic violence in Chinese law).

[324] *See* Declaration on the Elimination of Violence Against Women [DEVAW], G.A. Res 48/104, art. 1-2, U. N. Doc. A/RES/48/104 (Feb. 23, 1994) (defining violence against women as "any act of gender-based violence that results in, or is likely to result in, physical, sexual, or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life," and specifying select forms of violence occurring in the family, such as "battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related exploitation").

[325] When the Chinese marriage laws were revised, Article 46 of the marriage laws set out domestic violence as a ground for divorce but did not prohibit domestic violence. *See* Revised Law on the Protection of Women's Rights and Interests (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 28, 2005, effective Dec. 1, 2005) (P.R.C.), art. 46

[326] *Id.*

[327] *Id.* art. 56

the law, and comments from CEDAW to "enhance victims' access to justice and redress," no legal remedies, civil or criminal, were provided in the revised LPWRI.[328]

In many countries around the world, including the United States, there was an epidemic problem of domestic violence due to the under-enforcement of crimes involving family members.[329] Domestic batterers were exempt from the law, and there was hardly any public discussion of wife- or childbeating.[330] In fact, domestic violence did not have a name until the 1970s.[331] Furthermore, despite the pervasiveness of domestic violence, it was not considered an actionable offense until the early 1990s.[332]

Domestic violence became a global epidemic problem that threatened women and children largely due to an explosion of activism by global women's rights activists and the 1989 U.N. Commission on the Status of Women Report on Domestic Violence, which reviewed over two-hundred-fifty articles, books, and studies on various aspects of domestic violence.[333] Emerging data increasingly showed the pervasiveness of domestic violence, and created further momentum for both international and domestic action on domestic violence.[334]
In 2000, the World Health Organization (WHO) stated that violence against women caused more death and disabilities among women of reproductive age than cancer, malaria, and traffic accidents.[335] Bolstered by increasing pressure from international women's human rights

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[328] U.N. CEDAW 743rd to 744th mtg., *supra* note 43.

[329] Charles J. Ogletree, Jr. & Rangita de Silva-de Alwis, *The Recently Revised Marriage Law of China: The Promise and the Reality*, 13 TEX. J. WOMEN & L. 251, 272 (2004) (noting the problem in the United States lasted through the 1970s).

[330] *See id.*

[331] *See id.*

[332] *See id.*

[333] *See* de Silva de Alwis, *supra* note 122, at 78.

[334] *See id.*

[335] *See id.*, World Health Organization [WHO], *Violence Against Women: Definition and Scope of the Problem* (Jul. 1997), *available at* http://www.who.int/gender/violence/en/v4.pdf

advocates, NGOs made domestic violence central to their human rights advocacy.[336] Domestic violence as human rights abuse was pointed to as a systematic failure of states to afford women equal protection of the law against that violence.[337] The positive responsibility of the state inherent in human rights treaties therefore required states to take positive measures to end domestic violence.[338] This concept of state responsibility, which includes accountability for acts of private individuals, is an integral part of the definition of domestic violence as a human rights violation. In fact, this concept of state responsibility has been expanded to apply to a states' systematic failure to act,[339] in addition to state directed action.

In response to CEDAW's question regarding the lack of a clear definition of domestic violence, the Chinese State party cites to the interpretation of the Supreme People's Court and states that this provision regulates behavior between family members.[340] The term "family," however, has yet to be defined and it is unclear whether it includes grandparents, grandchildren, ex-spouses, and intimate partners. Additionally, questions remain as to whether the law covers only women who are married at the time of the incident. Domestic violence laws in other jurisdictions have extended the protection of the law to former spouses, those in an intimate relationship, tenants,[341] domestic employees,[342] and to even those who share or recently shared a

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[336] *See* de Silva de Alwis, *supra* note 122, at 78.

[337] *See id.*

[338] *See id.* at78 n. 133.

[339] *See Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn.1984) (victim of domestic violence was awarded 2.3 million dollars as damages on the basis that the police breached their duty to protect her from her violent husband); *see also Velásquez Rodríguez Case*, Inter-American Court of Human Rights (IACrtHR),10 Sept. 1996, *available at* http://www.unhcr.org/refworld/docid/3ae6b66d18.html (establishing state responsibility where the state has abdicated its responsibility to protect and has been found guilty of inaction).

[340] The Interpretation by the Supreme People's Court on Several Issues Regarding the Marriage Law of China, sought to clarify some provisions of the revised marriage law and define domestic violence as acts of violence that limit women's freedom and cause bodily or mental damage. *See* Yuhong Zhao, *Domestic Violence in China: In Search of Legal and Social Responses*, 18 UCLA PAC. BASIN L.J. 211 (Spring 2002).

[341] *See* Domestic Violence Act 116 of 1998 s. 1 (S. Afr.).

[342] *See* Law of Republic of Indonesia, No 23/2004 regarding Elimination of Violence in Household, art. 2 (Indonesia), *available at*

residence,[343] and provides a model for other countries to follow. Violence, as defined by the Interpretation of the Supreme People's Court includes, in a broad sense, acts which limit women's freedoms.[344] In a more specific context, this would include beating, binding, maiming, forcible deprivation of personal liberty and other means of physical or psychological injury to a family member. Although this interpretation covers physical and psychological injury, it does not define psychological harm or how it can be proved.[345] Thus there is no clear understanding of the scope of the prohibition in the revised law.

A. *The Current Laws and Regulations Referencing Domestic Violence*

The 2001 amendments to China's marriage law first introduced domestic violence as grounds for divorce.[346] Article 46 of the LPWRI expressly outlaws domestic violence against women and explicitly regards the prevention and control of domestic violence as a state responsibility.[347] Additionally, the General Principles of Civil Law of the People's Republic of China regulates the issue in its protection for personal rights, providing that citizens are entitled to the "rights of life and health."[348] Similarly, Article 98 of the criminal law provides that severe domestic violence is a criminal offence subject to criminal punishments.[349] Other Criminal Code

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http://indonesia.unfpa.org/publications/2008/Law%20No%2023%202004_Elimination%20on%20Violence%20in%20Household.pdf.

[343] *See* Domestic Violence Act 116 of 1998, § 1 (S. Afr.).

[344] *See* Lin Jianjun, *Violence Against Women: Anti-Domestic Violence Law in China*, *in* WELLESLEY CENTERS FOR WOMEN, *supra* note 126, at 5, 14–16 (explaining the arguments for recognizing mental versus physical domestic violence).

[345] *Id.*

[346] *Id.* at 6.

[347] *See* Revised Law on the Protection of Women's Rights and Interests, art. 46 (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 28, 2005, effective Dec. 1, 2005) (P.R.C.).

[348] General Principles of the Civil Law of the People's Republic of China, art. 98 (adopted at the Fourth Session of the Sixth Nat'l People's Cong., promulgated by Order No. 37 of the President of the People's Rep. of China, Apr. 12, 1986, effective Jan. 1, 1987).

[349] *See* Criminal Law of the People's Republic of China, art. 98 (adopted at the Second Session of the Fifth Nat'l People's Cong., July 1, 1979, revised at the Fifth Session of the Eighth Nat'l People's Cong., Mar. 14, 1997); *see also* Jianjun, *supra* note 344, at 8-9 (explaining the criminal procedures available for domestic violence victims).

articles include Article 232 for intentional murder, Article 234 for intentional injury, Article 236 for rape, and Article 260 for abuse.[350]

Domestic violence victims are entitled to file lawsuits directly in the People's Courts.[351] Despite these general regulations in different parts of the legal system, however, there is no national law that can be used in an operational manner. The Supreme Court's guide to interpretation of marriage law defined acts of violence as those limit women's freedom and cause bodily or mental damage.[352] According to the Judicial Interpretation issued by the Supreme People's Court, domestic violence does not cover psychological damage.[353] This is contrary to the CEDAW and the DEVAW, and offers a victim limited protection in cases that involve psychological abuse, e.g., when the husband prevents the wife from making friends and visiting her family, verbally abusing the wife, and even withholding intimacy.[354]

The Applied Legal Institute of the Supreme People's Court published its Trial Guide to Domestic Violence Related Cases in March 2008 to provide general principles of domestic violence cases and the *habeas corpus* protection order.[355] Under this order, alleged victims can seek an emergency restraining order for fifteen days, or a long-term protection order for three to six months.[356] The court is called upon to supervise this order. [357]

In August 2008, the All China Women's Federation, the Ministry of CPC, The Supreme People's Court, the Ministry of Public Security, the Ministry of Civil Affairs, the Ministry of Justice, and the Ministry of Health jointly issued the Several Opinions on Prevention and

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[350] Criminal Law of the People's Republic of China, arts. 232, 234, 236, 260.
[351] *See* Revised Law on the Protection of Women's Rights and Interests.
[352] *See* Jianjun, *supra* note 344, at 13.
[353] *Id.* at 14.
[354] *See* Jianmei & Ying, *supra* note 151, at 14-15 (detailing the limits of domestic violence laws for non-physical conduct).
[355] *Id.*
[356] *Id.*
[357] *Id.*

Prohibition from Domestic Violence.[358] This document provides an interdepartmental collaboration for addressing and handling domestic violence cases. The departments include the Ministry of Public Security, Ministry of Civil Affairs, the Ministry of Health and the Ministry of Justice.

Around the world, law enforcement officials still refuse to interfere in acts of violence in the family, often deeming domestic violent as private and outside the ambit of the law.[359] Protection orders, therefore, are often the cornerstone of legal remedies for domestic violence. As a result of decade of advocacy by the women's groups, nine courts in China introduced protection orders in 2008.[360] Chinese advocates considered this a legal breakthrough.[361] Chinese women's rights lawyers, through their concerted efforts, sparked the pilot project on protection orders in a limited number of courts across China.[362] Though enormously important as a first step, these protection orders are not far reaching in their scope. The current pilot protection orders are limited to couples in the process of divorcing or within six months of divorce. As of November, 2009, over 12 cases of protective orders have been made across China. In a recent case in Hunan, the perpetrator was asked to stay two-hundred meters away from the victims and family.[363]

Researchers have hailed the Trial Guidance as a forward-looking guide that breaks new ground. Chen Min, one of the architects of the Guide notes that the guide is a small step in law

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[358] Li Ying, *New Development in Prevention and Prohibition of Domestic Violence in China, in* WELLESLEY CENTERS FOR WOMEN, *supra* note 126, at 17, 22.

[359] Ogletree & de Silva-de Alwis, *supra* note 329 , at 292–93 (noting that law officials commonly refuse to authenticate injuries suffered from domestic violence).

[360] Ying, *supra* note 358, at 17–21.

[361] *Id.*

[362] Ying, *supra* note 358, at 20–21.

[363] Conversation between author and Li Ying, a senior lawyer at the Beijing University, Beijing University Women's Research and Legal Aid Center (Jul 7, 2009) (notes on file with author).

theory but a big step in judicial practice.[364] The Guideline prohibited the accused from a 200 meters radius and prohibited the disposable of valuable property, amongst other provisions.[365] In what was the first property related protection order in May 2009, the Zhuhai Xiaozhou District Court issued an order prohibiting the disposal of valuable property shared by the couple.[366] But, as noted previously, the Guide, although progressive, is only limited to a couple divorcing or about to divorce.

In broadening the ambit of the protection orders, it will be important for China to examine protection orders in other countries. In some countries and autonomous regions in China, the victim, a relative, a welfare worker or a person assisting the victim of domestic violence may make applications for a protection order. For example, under Taiwan's Domestic Violence Prevention Act of Taiwan of 1989, local governments can apply for protection orders on behalf of victims.[367] Applications for protection orders may be made by fax or other means of expedited communication in cases that involve imminent danger, and the law requires each central government and each local government to set up domestic violence prevention committees to develop strategies for eliminating domestic violence and supervise the implementation of the Act.

In contrast, protection orders are a critical component of India's 2005 Domestic Violence Act.[368] The law provides for a protection order prohibiting the respondent from committing any act of domestic violence;[369] aiding or abetting the commission of acts of domestic violence;[370]

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[364] Ying, *supra* note 358, at 18.
[365] *Id.* at 20-21.
[366] *Id.* at 20.
[367] *See* Jim Hwang, *Protecting the Young* (Aug. 2005), *available at* http://taiwanreview.nat.gov.tw/fp.asp?xItem=1109&ctNode=205 (discussing the Taiwanese Domestic Violence Prevention Act).
[368] Protection of Women from Domestic Violence Act, No. 43, Acts of Parliament, 2005 (India).
[369] *Id.* at 18.a.

entering the place of employment of the aggrieved person or any other place frequented by the aggrieved person;[371] attempting to communicate in any form whatsoever;[372] alienating any assets, operating bank lockers or bank accounts used or held or enjoyed by both parties, jointly by the aggrieved person and the respondent or singly by the respondent any property held jointly or separately by them.[373] The protection order includes a residence order directing the respondent to remove himself from the shared household;[374] restraining the respondent or any of his relatives from entering the shared household;[375] or restraining the respondent from alienating the shared household.[376]

These comparative case studies are useful indicators for China's emerging developments in domestic violence lawmaking. In this effort, China's gender and law experts are focusing on several vital issues apart from the protection orders. One of the questions that animate their inquiry relate to the need to develop community-based domestic violence initiatives. The integration of local government agencies in the control of domestic violence is an important feature of several Asian laws on domestic violence. For example, in the Philippines, a *Barangay* Protection Order is a protection order issued by the local government.[377] In a *Barangay* proceeding, the parties may be accompanied by a non-lawyer advocate.[378] As another example, a distinctive feature of the Taiwanese domestic violence law is the way in which all local governments are authorized to create a Domestic Violence Prevention Committee and to

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[370] *Id.* at 18.b.
[371] *Id.* at 18.c.
[372] *Id.* at 18.d.
[373] *Id.* at 18.e.
[374] *Id.* at 19.b.
[375] *Id.* at 19.c.
[376] *Id.* at 19.d.
[377] An Act Defining Violence Against Women and Their Children, Providing for Protective Measures for Victims, Prescribing Penalties Therefore, and for Other Purposes, Rep. Act No. 9262, § 14 (2003) (Phil.), *available at* http://www.wcwonline.org/pdf/lawcompilation/Phillipines-domestic%20violence.pdf.
[378] *See id.*

maintain a Domestic Violence Prevention Center, and to establish among other services a 24-hour hotline; psychological support, housing, counseling, etc.[379] The engagement of local communities in combating domestic violence is a thread that runs through this law.

Another important inquiry revolves around the scope of the Chinese law. While the current protection orders in China only cover parties to the marriage, Chinese advocates would like to see a broader coverage in a national domestic violence law. An analysis of the Asian regional domestic violence reveals that most laws protect a wide range of family members (with Japan being the only exception in that it covers only spousal abuse), and that most laws are gender neutral (although the Philippines covers only women in the family).

B. *Local Chinese Legislation*

Women's rights advocates in China are now putting forth fresh energy to draft domestic violence legislation at the provincial level. The newly-introduced language prohibiting domestic violence and guaranteeing women's right to life[380] in national laws provides the entry point to develop guidelines at the provincial level in a more meaningful and expansive manner. The next steps will be to draft meaningful and operative mechanisms to provide remedies for abused

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[379] Domestic Violence Prevention and Treatment Act, art. 8 (1998) (Taiwan). A translation of the law can be found at http://dspc.moi.gov.tw/lp.asp?CtNode=605&CtUnit=115&BaseDSD=7&mp=5&xq_xCat=1. For a discussion of the history of the Taiwanese law, see *Pushing for Social Change: The Domestic Violence Movement in Taiwan*, at 10-12, *available at* http://www.stanford.edu/group/beagle2/student_reports/ChaoReport.pdf.

[380] Revised Law on the Protection of Women's Rights and Interests, art. 38 (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 28, 2005, effective Dec. 1, 2005) (P.R.C.). The Law on the People's Republic of China on Maternal Health and Infant Health Care and the Population and Family Planning Law of the People's Republic of China provide for penalizing those involved, confiscating the equipment used and suspending the operation of the business involved However, the Chinese government does not give details or numbers of claims made under these laws. The delegation does state that China is currently researching the legislative experiences of India and Korea. *See* U.N. CEDAW Comm., Combined 5th and 6th Periodic Reports of the States Parties-China, U.N. Doc. CEDAW/C.CHN/5-6, *available at* http://daccessdds.un.org/doc/UNDOC/GEN/N04/403/05/PDF/N0440305.pdf?OpenElement.

In 2006, the CEDAW Committee urged the State to strengthen the monitoring of the implementation of existing laws against selective abortion and female infanticide. *See* U.N. CEDAW 743rd to 744th mtg., *supra* note 43 (recommending that the State party introduce mandatory gender sensitivity training for family planning officials).

women, and specific implementing measures to control and prevent domestic violence in China. The need for domestic violence legislation at the national level cannot be underestimated and was raised by the CEDAW Committee in examining China's country reports in 1999 and 2006.[381] The language on the right to life is doubly pivotal and takes on enormous significance in the context of national mandatory population policies that have indirectly resulted in son-preference as an important determinant of sex-selective abortion in China.[382] As is now well documented, this has sparked a severe shortage of girls and triggered an increase in trafficking and sexual exploitation of women and girls. A recent report in the China Daily estimated that there will be 30 million more men than women of marriageable age in China by 2020, spawning possible social unrest.[383]

Drawing on Article 46 of the LPWRI, local regulations have filled in the flesh and blood of the rather general framework of the LPWRI.[384] Some of these local regulations call for strong intervention of public security at the initial stages of the violence and for the public prosecution of domestic violence cases. In the last two years, many provinces, autonomous regions, and municipalities, including Zhejiang,[385] Heilongjiang, Gansu, Shaanxi, Guizhou, Anhui, Ningxia, Tianjin, Jilin, Guangdong, and Shanghai passed legislation on implementing the LPWRI.[386] As another example, in 2006, the Standing Committee of the National People's Congress of the

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[381] In 2006, the Committee called upon China to address violence against women both in the private and public sphere both in the home and in detention centers. *See* U.N. CEDAW 743rd to 744th mtg., *supra* note 43.

[382] Shuzhuo Li et al., *Son Preference and Induced Abortions in Rural China: Findings from the 2001 National Reproductive Health Survey* 1 (2004) (based on data from the 2001 National Family Planning/Reproductive Health Survey, finding that son preference and sex-selective abortion have existed for a long time in rural China, and have also become more prevalent under the national population policy).

[383] Wang Shanshan, *30 Million Men Face Bleak Future as Singles*, CHINA DAILY, Jan. 12, 2007, *available at* http://www.chinadaily.com.cn/china/2007-01/12/content_781804.htm.

[384] Revised Law on the Protection of Women's Rights and Interests, art. 46.

[385] A domestic violence shelter center was recently set up recently in Shijiazhuang, Hebei Province to provide assistance including counseling and legal education. *See A Domestic Violence Shelter Was Set Up at Shijiazhuang*, 40 E-NEWSLETTER OF WOMEN'S WATCH-CHINA (2008) (copy on file with author).

[386] Mingshun, *supra* note 18, at 27.

Inner Mongolia Autonomous Region issued its Regulation of the Inner Mongolia Autonomous Region on Defending and Preventing Domestic Violence.[387] This policy is the first domestic violence regulation in a minority autonomous region.[388]

These regulations include implementation mechanisms and are far more comprehensive and effective than the LPWRI. For example, Hebei Province's Rules on the Prevention and Interdiction of Family Violence provide a definition of domestic violence, which is lacking in the national law.[389] Similarly, Article 38.2 of the Anhui Province regulations state that "[w]hen dealing with family violence, public security institutions should collect and preserve by law the evidences related to the family violence."[390] Further, Article 39 states that "[o]n a request by woman victims of family violence, the urban or rural basic non-governmental organizations or related units that deliver reliefs should offer evidences concerning the related events; and the medical institutions that have treated the victims should offer the records of diagnosis and treatment."[391] These detailed enumerations on collecting evidence are especially effective in a legal landscape where proving domestic violence is often very hard.[392]

C. *Emerging Developments in the Prevention of Domestic Violence*

Several new developments that are incubating in the area of action against domestic violence constitute a new high-water mark of women's rights advocacy in China, following

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[387] Message from the Editor, 9 E-NEWSLETTER OF WOMEN'S WATCH-CHINA (2006) (on file with author) [hereinafter Message from the Editor 2006, Vol. 9].

[388] *Id.*

[389] *Id.* Under the Hebei Province rules, domestic violence is defined as "the behaviors causing physical and/or spiritual injuries to other family members through beating, binding, and cruelly injuring them, or coercively constraining their personal freedom, or any other means." *Id.*

[390] *Id.*

[391] *Id.*

[392] *See* Ogletree & de Silva-de Alwis, *supra* note 329, at 288–90 (discussing the challenges in collecting and presenting evidence of domestic violence).

international guarantees to prevent and address domestic violence such as the CEDAW and the DEVAW.

The model framework prepared by the first U.N. Special Rapporteur on violence against women sets out the general standards for a domestic violence law in compliance with international standards.[393] The framework first urges states to adopt the broadest possible definition of domestic violence which makes clear that domestic violence can be either physical, sexual or psychological and can include threats, intimidation, coercion, stalking, and humiliating verbal abuse.[394] The Special Rapporteur's guidelines also emphasis the need to establish departments, programs, services, protocols and duties, including but not limited to shelters, counseling programs, and job-training programs to aid victims of domestic violence.[395] The guidelines also highlight the need to provide speedy and flexible remedies, holistic and comprehensive support, and emergency services for victims of abuse and their families.[396] Further, the guidelines focus on the need to train law enforcement officials on how to respond to calls of domestic violence and gender sensitivity training for judges on issues relating to child custody, economic support and security for the victims in cases of domestic violence.[397]

The suggested guidelines for protection orders include the issuing of *ex parte* restraining orders and protection orders.[398] *Ex parte* temporary restraining orders can include a preliminary injunction against further violence and/or prevent the abuser/defendant from disturbing the

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[393] *Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights Resolution 1995/85: A framework for model legislation on domestic violence*, Comm. On Human Rights, 52nd Sess., Provisional Agenda Item 9(a), U.N. Doc. E/CN.4/1996/53/Add.2 (1996), *available at* http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/0a7aa1c3f8de6f9a802566d700530914.

[394] *See id.*

[395] *Id.*

[396] *Id.*

[397] *Id.*

[398] *Id.*, at § IV(A).

victim/plaintiff's use of property, including the common home.[399] The law should also provide for mandatory restraining orders, access to safe shelters, social service agencies, legal and medical clinics, counseling services, maintenance orders, compensation, and other services.[400]

Despite the lack of a national law, several provinces in China have set up some provision for addressing domestic violence. Given the enormous challenge of making changes at the national level, women's groups in China are informing change at the local level. By the end of 2004, twenty-four provinces had established regulations, measures, or opinions against domestic violence,[401] and the ACWF had set up one-hundred-ten domestic violence hot lines, complaint stations, and first aid stations including psychological help and legal aid stations.[402] Services for victims and families afflicted by domestic violence have been set up in sixteen provinces and at local levels. In 2003, the Tieying Hospital was established in Beijing, and in the same year in Tianjing, the ACWF created a service to provide abused women with asylum, legal advice and medical service.[403] However, these services are the exception rather than the norm in China. Although women's groups continue to argue for a national domestic violence law, innovative provincial-level lawmaking in the area of domestic violence has, for some time, taken priority.[404] The urgent charge to any national domestic violence law is to set out concrete implementation guidelines that breathe life into the largely symbolic provisions on the existing prohibitions on domestic violence in the LPWRI.

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[399] *Id.*

[400] *Id.*

[401] *White Paper on China's Progress in Human Rights,* 2004 (P.R.C.), at Part IV, *available at* http://china.org.cn/e-white/20050418/IV.htm; *see also* Xiaoling, *supra* note 23, at Part II(1)(1).

[402] Xiaoling, *supra* note 23, at 48.

[403] *Id.*

[404] Similarly, provinces and autonomous regions have set up women's development plans. Currently, eleven provinces and autonomous regions have developed implementing regulations for the Rural Land Contracting Law. Moreover, several local governments are in the process of establishing policies to protect women's land contracting rights. *See* Wenxiu, *supra* note 249.

D. *Trafficking in Women*

"The Committee recommends that the State party increase its efforts to combat all forms of trafficking in women and girls. It urges the State party to bring its domestic legislation in line with international standards and to speedily complete, adopt and implement the draft national programme of action against human trafficking. It requests the State party to enhance enforcement of the law against trafficking so as to ensure that those who traffic and sexually exploit women and girls are prosecuted and punished, and to provide all necessary assistance to the victims of trafficking."[405]

- CEDAW Committee's Concluding Observations, 2006

The trafficking of women and children in China remains pervasive and has been exacerbated by the imbalance in the male-female sex ratio at birth and migration of women to urban areas for employment.[406] The shortage of marriageable brides has fueled an increase in trafficking of both Chinese and foreign women.[407] Although the Ministry of Public Security states that approximately three-thousand cases of trafficked women and children are reported to the police, the unreported numbers remain much higher.[408] In response to the CEDAW Committee's reference to the issue of internal trafficking in women in China, the State party responded that there was "[n]o involvement by government official[s] in criminal activities . . . to

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[405] Committee on the Elimination of Discrimination Against Women [CEDAW], *Concluding comments of the Committee on the Elimination of Discrimination against Women—Advance Unedited Version*, ¶ 20, CEDAW/C/CHC/CO/6 (Aug. 25, 2006), *available at* www.un.org/womenwatch/daw/cedaw/cedaw36/cc/CHINA_advance%20unedited.pdf.

[406] Chinese officials have worked with the Mekong Sub-Regional Project to Combat Trafficking in Children and Women, founded by the International Labor Organization, to reinforce the anti-trafficking provisions of the ILO Worst Forms of Forced Labor Convention. *See* ILO, *Tools for Prevention: Participatory Monitoring--Guidelines for practitioners in the fight against human trafficking* (2005), *available at* http://www.ilo.org/public/english/region/asro/bangkok/child/trafficking/downloads/pmtools.pdf. The 1997 revision of the Criminal Law abolished an older provision on "Trafficking in People" and replaced it with one on "Trafficking in Women and Children." *See* PRC Criminal Code Ch. IV (1997), *available at* http://www.com-law.net/findlaw/crime/criminallaw1.html.

[407] U.S. STATE DEP'T., 2005 COUNTRY REPORTS ON HUMAN RTS. PRACTICES, TRAFFICKING IN PERSONS (2006), *available at* http://www.state.gov/g/drl/rls/hrrpt/2005/61605.htm.

[408] Wang Zhuoqiong, *Panel set to target human trafficking*, CHINA DAILY (Sept. 4, 2007), *available at* http://www.chinadaily.com.cn/china/2007-09/04/content_6077823.htm.

date," and that the Law of the People's Republic of China on Administrative Penalties for Public Security was implemented on March 1, 2006.[409]

However, the CEDAW Committee was concerned that the definition of trafficking in the Penal Code was too restrictive and only covered exploitation of prostitution, and therefore, failed to comply with international standards.[410] The Committee was also concerned that sex workers and trafficked women would be kept in administrative detention without the due process of law.[411] The Committee urged the State to address the criminalization of prostitution which disproportionately punished sex workers rather than traffickers.[412] The Committee also requested that the State party enforce the law against trafficking so as to ensure that those who traffic and exploit women are punished.[413] Detailed data on cross border and internal trafficking was also requested in China's next state party report.[414]

In the 2005 revisions to the LPWRI, Article 39 was amended to direct various officials at all levels to take "measures to rescue the abducted and trafficked women according to their responsibilities timely, and actively coordinate to settle the problems arising thereafter."[415] However, the ambiguity of the provision results in a lack of specific guidelines on how to carry out such measures, leaving interpretation of the provision open to the whims of local authorities. Thus, the Chinese government would do well to take note of the Philippines' act on anti-trafficking. The Philippines Anti Trafficking in Persons Act calls for comprehensive gender

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[409] CEDAW Committee, Pre-Session working group for the 36th Sess., *Responses to the list of issues and questions for consideration of the Fifth and Sixth Periodic Reports of China*, U.N. Doc. CEDAW/C/CHN/Q/6/Add.1 (Jun. 8, 2006), *available at* http://daccess-ods.un.org/access.nsf/Get?Open&DS=CEDAW/C/CHN/Q/6/Add.1&Lang=E.

[410] U.N. CEDAW 743rd to 744th mtg., *supra* note 43.

[411] *See id.*

[412] *Id.*

[413] *Id.*

[414] *Id.*

[415] Revised Law on the Protection of Women's Rights and Interests (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 28, 2005, effective Dec. 1, 2005) (P.R.C.).

sensitive and child friendly programs for the recovery, rehabilitation and reintegration of victims and survivors of trafficking.[416] The law also provides for the implementation of residential care, child placement, educational assistance, livelihood and skills training, and other community-based services which are responsive to the specific needs and problems of the victims and survivors and their families.[417] The law also recommends the active involvement and participation of the victims/survivors in the rehabilitation and reintegration process in order to prevent their re-victimization, as well as the active cooperation and coordination with NGO's and other members of the civil society including the business community, tourism-related industries, and the media in the rehabilitation process.[418]

The Philippines law that addresses trafficking in persons set up practical intergovernmental agencies. These agency interventions include rehabilitative programs by the Department of Social Welfare and Development and the monitoring of cases of trafficked women by the department of labor.[419] The Department of Justice is directed to train special prosecutors to handle and prosecute cases of trafficking and establish a mechanism for free legal assistance for trafficked persons,[420] and further, the National Commission on the Role of Filipino Women was asked to monitor the policies addressing the issue of trafficking in persons in coordination with relevant government agencies.[421] The Philippine National Police are designated as the primary law enforcement agency to undertake surveillance, investigations, and

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[416] Anti-Trafficking in Persons Act of 2003, Rep. Act No. 9208, (2003) (Phil.) , *translated at* http://www.chanrobles.com/republicactno9208.html.

[417] *Id.*

[418] *Id.*

[419] *Id.* § 16(b).

[420] *Id.* § 16(d).

[421] *Id.* § 16(e). The National Commission on the Role of Filipino Women was established in January 1975 through a presidential decree. See Nat'l Comm. on the Role of Filipino Women: About Us, *available at* http://www.ncftw.gov.ph/index.php/ncrfw-profile (last visited May 7, 2010).

arrests of individuals or persons suspected to be engaged in trafficking.[422] The Department of the Interior and Local Government is asked, among other things, to set up systematic information and prevention campaigns and maintain a databank for the effective monitoring, documentation and prosecution of cases on trafficking in persons.[423] Lastly, local government units are asked to monitor and document cases of trafficking in persons in their areas of jurisdiction in conjunction with NGOs and other concerned agencies to encourage and support community based initiatives which address the trafficking in persons. [424] The law also provides for the capability building of service providers, such as frontline agencies to enhance knowledge and skills in handling cases of trafficking. These enforcement mechanisms are key to the success of the implementation of the law.

Further, the Filipino law provides for the development of gender responsive documentation of data and the accreditation of NGOs that provide such assistance to the Department of Social Welfare and Development and the National Commission on the Role of Filipino Women.[425] This is particularly critical in the context of China where women's rights advocates and the CEDAW Committee have called for rigorous data collection when the lack of sex disaggregated data undermines a proper analysis of the problem.

The Chinese government recently announced that it plans to set up the first national mechanism for combating trafficking as a measure to protect women and children from forced labor and prostitution.[426] The highlight of this new measure is a multi-agency response to trafficking that will involve joint efforts by twenty-one ministries, including the Ministries of

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[422] Anti-Trafficking in Persons Act of 2003, § 16(g).
[423] *Id.* § 16(i).
[424] *Id.* §§ 16(j), 20.
[425] *Id.* § 20.
[426] Women's Watch, *Case Studies of Early Retirement*, *supra* note 194, at 49.

Public Security, Labor and Social Security, Education, and Supervision.[427] This cross-disciplinary and multi-agency perspective is a positive change, especially as women and children in China face a growing threat of being trafficked and sold into marriage or sex work.[428] Growing gender imbalance and mass scale migration have spurred further fears of exploitation of women and children. In December 2007, the State unveiled the National Plan of Action on Anti-trafficking of Women and Children.[429] These new developments in the law were extremely urgent given that mass migration in China has heightened concerns of forced labor and sexual exploitation of trafficked women.

E. *Prohibiting Sexual Harassment*

"It also encourages the State party to enhance victims' access to justice and redress, for example, through training aimed at judicial officers, including judges, lawyers and prosecutors, in order to enhance their capacity to deal with violence against women in a gender sensitive manner and ensure that claims are investigated expeditiously, including incidents of violence against women in detention centers."[430]

- CEDAW Committee's Concluding Observations, 2006

The recent Deng Yujiao case has shined a spotlight on sexual harassment in unanticipated ways and has made lawmaking on sexual harassment one of the most pressing imperatives in China.[431] The newly revised LPWRI includes a groundbreaking provision outlawing sexual

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[427] *Id.*

[428] *See id.*

[429] STATE COUNCIL OF CHINA, CHINA NATIONAL PLAN OF ACTION ON COMBATING TRAFFICKING IN WOMEN AND CHILDREN (2003), *available at* http://www.humantrafficking.org/uploads/publications/China_National_Plan_of_Action_on_Combating_Trafficking_in_Women_and_Children_December_2007.pdf.

[430] CEDAW Closing Comments, *supra* note 405, at 5.

[431] MS. DENG YUJIAO, A WAITRESS IN HUBEI PROVINCE, FATALLY STABBED A COMMUNIST PARTY OFFICIAL WHO DEMANDED SEXUAL FAVORS FROM HER AND THREATENED TO RAPE HER. FOLLOWING AN UNPRECEDENTED PUBLIC OUTCRY OF SUPPORT FOR MS. DENG, IN JUNE 2009, THE COURT FREED HER ON THE GROUND THAT A MOOD DISORDER ABSOLVED HER OF CRIMINAL RESPONSIBILITY. *SEE* JANE MACARTNEY, *WAITRESS DENG YUJIAO WHO*

harassment.[432] Despite the fact that several claims of sexual harassment had been made in court, the LPWRI revisions, for the first time, provided a legal basis for rulings against it.[433] The revisions embodied in the LPWRI's Article 40 prohibit sexual harassment,[434] recommending the right to lodge complaints and seek remedies through public security organs or by bringing a civil suit in a People's Court.[435] Unfortunately, these remedies have not been explicitly provided for. Moreover, in Article 44 of the Law on Public Security Administration Punishment, "anyone who acts indecently towards any person or deliberately expose his body at a public place shall be detained for not less than five days but not more than ten days if the circumstances are absolutely vile.[436]

The CEDAW Committee reviewing China's last State party report requested that China describe any laws and regulations that are aimed to prevent and punish sexual harassment in the workplace.[437] The Chinese delegation listed the many provisions that can be used indirectly to prevent sexual harassment, but noted that the major landmark revision to the LPWRI had, for the first time, directly outlawed sexual harassment.[438] Although Article 40 of the newly revised LPWRI prohibits sexual harassment against women, China still has no specific stand-alone law on anti-sexual harassment. The law also lacks a clear legal definition of sexual harassment.

STABBED TO DEATH COMMUNIST OFFICIAL WALKS FREE, TIMES ONLINE, JUNE 17, 2009, *AVAILABLE AT* HTTP://WWW.TIMESONLINE.CO.UK/TOL/NEWS/WORLD/ASIA/ARTICLE6513750.ECE.

[432] *See* Revised Law on the Protection of Women's Rights and Interests, art. 40 (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 28, 2005, effective Dec. 1, 2005) (P.R.C.) ("Sexual harassment against women is prohibited. The victims have the right to lodge complaints to unit or organ concerned.").

[433] *Id.*

[434] *Id.*

[435] *Id.* art. 58 ("Any violation of a stipulation prescribed in this law, results in sexual harassment to a woman, and constitutes a violation of public order of administration, the victim can ask the public security organs to impose administrative punishment, and also bring civil litigation to the People's Court.")

[436] *See* Jianmei & Ying, *supra* note 151, at 8.

[437] U.N. CEDAW 743rd to 744th mtg., *supra* note 43.

[438] *See id; see also* Revised Law on the Protection of Women's Rights and Interests, art. 40 (stating that "no person may engage in sexual harassment of women" and that "at the request of the woman who has been sexually harassed, the organs of public security will apply the appropriate punishment in respect to management of public security in accordance with the law for those who have behaved unlawfully.").

Because of this gap in the law, many victims have no idea about how to collect evidence on sexual harassment, and lack a clear knowledge of the remedies that are available to them when their rights are violated in the workplace. In many cases, victims choose to keep silent for different reasons.[439] Despite good faith efforts to outlaw sexual harassment, the national law is too vague to be enforced and lacks a clear definition of sexual harassment and or an explicit cause of action. There are also no clear remedies or punitive elements in the law.[440] However, experts have prepared a draft for the Supreme People's Court on Judicial Interpretation of Sexual Harassment.[441]

F. *Local Laws*

Despite the absence of national laws, the recent reform of the LPWRI has spawned a number of regulations in cities and provinces. Nineteen of the thirty-one provinces, municipalities, and autonomous regions have promulgated regulations based on the LPWRI[442] Most of the local regulations are meant to be more concrete and are easier to operate than the national law.[443] Almost all of the provincial regulations define sexual harassment to include verbal abuse, written words, pictures, electronic messages and physical contacts of a sexual or pornographic nature that are not welcome by the woman victim.[444] Most of them place a burden on employers to take reasonable measures to prevent and end sexual harassment in the

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[439] *See* Xue Ninglan, *Prevention and Prohibition of Sexual Harassment in Employment: Legal Reform in China, in* WELLESLEY CENTERS FOR WOMEN, *supra* note 126, at 103, 104.

[440] *Id.*

[441] *See Employers Should Also Bear Responsibility for Workplace Sexual Harassment,* XINHUA, May 3, 2003, *available at* http://news.xinhuanet.com/english/2008-03/03/content_7709583.htm (describing the advisory report submitted to the National People's Congress).

[442] *See* Ann Hoffman & Hai-Ching Yang, *Sexual Harassment: The Time for Prevention Has Come,* 33 E-NEWSLETTER OF WOMEN'S WATCH CHINA (May 2008).

[443] *Id.*

[444] *Id.*

workplace.[445] Eight regulations provide for a civil action in cases of sexual harassment.[446] The Hunan Province's regulation for implementing the LPWRI[447] and the People's Congress in Shanghai draft regulation[448] has a relatively clear definition of sexual harassment. The regulation has also included the employer's liability to take necessary measures to prevent and prohibit sexual harassment against women in the workplace.

Most of the Ways for the Implementation of the LPWRI at the provincial level have modeled their definition of sexual harassment based on international experience. For example, the Ways for the Implementation in Guangdong Province has offered a relatively detailed description about forms of sexual harassment:

> The sexual harassment in any forms such as behaviors, speeches, letters, pictures, images and electronic information, which goes against the will of a woman and contains sexual contents or involves sex, shall be forbidden. The employer unit and the management unit in a public site should undertake measures such as creating a proper environment or setting up a necessary investigation and complaint system to prevent and hold out the sexual harassment against women. A woman annoyed by sexual harassment is entitled to complain to related organizations.[449]

This clear definition of sexual harassment enables people to know what sexual harassment is and what legal liability sexual harassment might bring. In addition, most of the Ways for the Implementation have stipulated legal responsibilities for employer units to prevent sexual harassment.

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[445] *Id.*

[446] *Id.*

[447] *See Anti-Sexual Harassment Legislation Has Been Passed in Hunan Provinces,* 15 E-NEWSLETTER OF WOMEN'S WATCH CHINA (Nov. 2006).

[448] *See Shanghai Legislature Specifies Forms of Sexual Harassment,* 13 E-NEWSLETTER OF WOMEN'S WATCH CHINA (Sept. 2006) (copy on file with author).

[449] Mingshun, *supra* note 18, at 29.

G. *Sexual Harassment Litigation*

Sexual harassment lawsuits have been filed in China as early as 2001, even before Chinese law explicitly outlawed sexual harassment. The first case involved Ms. Tong, who alleged a form of "quid pro quo" sexual harassment.[450] The plaintiff claimed that the company manager had, for many years, "inappropriately touched her at work and asked her for sexual favors, while offering her a better job."[451] During the proceedings, a co-worker testified that she heard Ms. Tong say "Don't do that" from behind the general manager's closed door.[452] Ms. Tong alleged that when she refused the manager's advances, she lost her work-related benefits.[453] She also claimed that she suffered poor health because of these advances.[454] She filed a suit, seeking only an apology from her alleged perpetrator.[455] The court, however, rejected her claim in closed session, on grounds of insufficient evidence.[456] Four other cases were reportedly filed in the two years after Ms. Tong's case. One case was successful, and resulted in an apology and the award of 2000 RMB in compensatory damages for psychological harm.[457] The harasser was fired for "improper behavior" before the trial.[458]

In a recent sexual harassment case, the plaintiff, Ms. Wei Jing, not only lost her first lawsuit at the local court level, but her husband filed for a divorce.[459] Moreover, Ms. Jing's alleged harasser had been reinstated to his original position by the local Education Bureau and

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[450] *See* Zheng Ming, *China's First Sexual Harassment Lawsuit,* CHINA TODAY, Mar. 2002, *available at* http://www.chinatoday.com.cn/English/20023/lawsuit.htm.

[451] *See* Hoffman & Yang, *supra* note 442.

[452] *Id.*

[453] *Id.*

[454] *Id.*

[455] *Id.*

[456] *Id.*

[457] *Id.*

[458] *Id.*

[459] *See* Message from the Editor, 11 E-NEWSLETTER OF WOMEN'S WATCH CHINA (Jul. 2006) (on file with author) [hereinafter Message from the Editor 2006, Vol. 11].

was even promoted to School Party Leader.[460] As these cases demonstrate, retaliation against the victims of sexual harassment is one of the main reasons why women are reluctant to come forward with such claims.

Despite the legislative prohibitions introduced in the revisited LPWRI represent a significant step forward, much remains to be accomplished. Questions regarding the definition and the elements of sexual harassment as an offense remain unanswered. The law leaves open the question of whether sexual harassment covers physical, verbal, or non-verbal conduct and whether it is limited to employment relationships or if it extends to schools, universities, and fiduciary relations. Additionally, although the LPWRI bans sexual harassment, it does not provide remedies for the offense. In drafting guidelines at the provincial level, women's rights groups in China are focusing on employers' liability and how to shift the burden of proof once a prima facie case of sexual harassment has been made. In many jurisdictions, once a sexual harassment claimant establishes a case of sexual harassment that meets the legal standards for "hostile work environment" sexual harassment, employers generally have the burden of proving that the harassment did not occur.[461] What the revisions have achieved, however, is to provide Chinese advocates with the opportunity to address sexual harassment in employment at the

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[460] *Id.*

[461] *See, e.g.*, Barriers to Effective Enforcement of Sexual Harassment Law, Stop Violence Against Women, *available at* http://www.stopvaw.org/Barriers_to_Effective_Enforcement_of_Sexual_Harassment_Law.html (pointing out that "in the United States, if a plaintiff is able to establish a prima facie case of quid pro quo sexual harassment, the burden of proof then shifts to the employer to articulate a legitimate non-discriminatory reason for its action"). The European Union has required its member states to make a similar reversal of the burden of proof in civil sex discrimination cases. *See* Denise A. Julien, *Leg. Dev.: Burden of Proof in Cases of Sex Discrimination*, 5 Coloum. J. Eur. L. 153, 153 (1998). The need for proof of injury has discouraged victims to come forward with sexual harassment claims. The United States does not require proof of psychological or physical injuries to recover damages from an employer under civil sexual harassment law. *See* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ENFORCEMENT GUIDANCE ON *HARRIS V. FORKLIFT SYS., INC.*, NO. 92–1168 SLIP OP., *available at* http://www.eeoc.gov/policy/docs/harris.html (describing which elements are necessary for proving hostile environment sexual harassment in the United States and explicitly rejecting the notion that in order to prove a violation, the plaintiff must necessarily prove that his/her psychological well-being has been affected).

provincial level and to draft workplace guidelines. In this effort, they are guided by international and comparative sources of law.[462]

For example, the South African Employment Equity Act (EEA) is a groundbreaking piece of legislation for battling sexual harassment, as it has adopted a comprehensive approach by defining prohibited conduct, providing detailed procedures to address the problem and prevent its recurrence.[463] The EEA requires that all designated employers prepare and implement an "employment equity plan which will achieve reasonable progress toward employment equity in that employer's workforce."[464] This plan must state, among other things, "the objectives to be achieved for each year of the plan."[465] The gaps in the EEA are filled by the "Code of Good Practice on the Handling of Sexual Harassment Cases," which includes a definition of sexual harassment. The Promotion of Equality and Prevention of Unfair Discrimination Act supplements the Code. In effect, the triumvirate of the Employment Equity Act and the accompanying Code, together with the Equality Act, form the basis for prosecuting sexual harassment.[466]

The Indian draft law[467] is an outgrowth of the famous *Visakha* judgment in which the Supreme Court set out detailed a group of provisions aimed to outlaw sexual harassment.[468] This

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[462] *See, e.g.*, DEVAW, *supra* note 324, art. 2b (providing that sexual harassment is a form of discrimination in employment against women); *see also* CEDAW General Recommendation, *supra* note 66 (defining sexual harassment as "such unwelcome sexually determined behavior as physical contacts and advances, sexually colored remarks, showing pornography and sexual demands, whether by words or actions.").

[463] Employment Equity Act, No. 55 of 1998 (S. Afr.), *available at* http://www.labour.gov.za/downloads/legislation/acts/employment-equity/Act%20-%20Employment%20Equity.pdf.

[464] Deborah Zalesne, *Sexual Harassment in the U.S. and South Africa: Facilitating the Transition from Legal Standards to Social Norms*, 25 HARV. WOMEN'S L.J. 143, 164 (2002).

[465] *Id.*

[466] *Id.*

[467] *See* Mihir Desai, *India Together: Starting the battle against sexual harassment*, COMBAT L. VOL. 4, ISSUE 1 (2005), *available at* http://www.indiatogether.org/combatlaw/vol3/issue5/visakha.htm (discussing the draft Indian law and its provisions).

[468] *See* Supreme Court (India), *Visakha v. State of Rajasthan*, 1997 VII AD S.C. 53 (setting out detailed guidelines defining both quid pro quo and hostile environment harassment as sex discrimination). The Court also

draft law is a product of civil society activism and is still a work in progress; the process will be of some interest to China's own lawmaking process. The draft Indian law prohibits sexual harassment in numerous environments, including informal sectors, schools, universities, and custodial situations.[469] The first question the bill deals with is, very broadly, which categories of women should be protected and covered by a proposed bill.[470] The proposed categories include women accessing a service; women in educational institutions; women in employment, both in the formal and informal sector; women in custodial situations, such as those in a police station, jail, juvenile home, women's shelter, or mental health facility; women accessing government bodies and local authorities (such as municipal corporations or other public sector organizations); domestic servants in employment, women vendors, etc; women seeking the professional service of lawyers and doctors etc.; women working in Parliaments and other legislative bodies.[471]

This provision is particularly salient to China, where a large number of women are clustered in the informal sector. In the light of the recent economic downturn women's concentration in the informal sector is a harsh reality. Given such factors, future provisions of sexual harassment legislation covering both the formal and the informal sectors, including custodial situations where women are most vulnerable and powerless, will be particularly meaningful. Furthermore, in China, there are many barriers to the effective enforcement of sexual harassment law. The most major impediment is the reluctance of victims to report instances of sexual harassment or to pursue legal claims against the harassers or their employers.

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outlined preventive mechanisms and complaint committees to be set up both in the public and private sector. Further, internal complaint mechanisms were to be set up and headed by a woman, and at least half of the committee members were to be women. *See id.* at 9-10.

[469] *See* Neeta Raymond, *Workplace sexual harassment*, COMBAT L. VOL. 2, ISSUE 3 (2003), *available at* http://www.indiatogether.org/combatlaw/vol2/issue3/harass.htm (detailing the provisions of the Indian Sexual Harassment draft law).

[470] *See id.*

[471] *See id.*

In addition, there are procedural and evidentiary obstacles for claims in the courts of sexual harassment in the workplace; these barriers include the difficulty of fulfilling the burden of proof and requirements of proof of injury. Sexual harassment is also often not identified and reported because of the lack of a clear definition of what constitutes sexual harassment and the lack of knowledge of its prohibition. Several gender equality laws provide that if the complainant makes out a *prima facie* case of discrimination, the burden of proof shifts to the respondent who must prove that it was not unfair discrimination.[472] Finally, the future path of sexual harassment lawmaking in China must not be only limited to the workplace but should cover educational institutions as well.

V. AN URGENT CALL FOR A REDRESS MECHANISM

"*It encourages the State party to monitor the results of such efforts and to include in its next periodic report detailed statistics on the use by women of the legal system to obtain redress for discrimination in all fields covered by the Convention, and trends over time.*"[473]

- CEDAW Committee's Concluding Observations, 2006

An effective redress mechanism is vitally important for the implementation of China's gender sensitive laws. Without such a mechanism, these laws will remain in the realm of rhetoric. An institutional mechanism for the advancement of women was one of the twelve critical areas in the Beijing Platform of Action, which added a new and additional focus on the

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[472] THE EUROPEAN UNION'S SEXUAL HARASSMENT LAW PUTS THE BURDEN OF PROOF ON EMPLOYERS. *SEE* AMBROSE EVANS-PRITCHARD, *EU HARASSMENT LAW PUTS THE BURDEN OF PROOF ON EMPLOYERS*, UK TEL., APR. 19, 2002, *AVAILABLE AT* HTTP://WWW.TELEGRAPH.CO.UK/FINANCE/2760285/EU-HARASSMENT-LAW-PUTS-THE-BURDEN-OF-PROOF-ON-EMPLOYERS.HTML.

The burden of proof has also shifted in the United Kingdom, the Netherlands, and South Africa. *See* HUMAN RESOURCES AND SKILLS DEVELOPMENT CANADA, THE SCOPE OF FEDERAL LABOR STANDARDS AND NON-TRADITIONAL EMPLOYMENT RELATIONSHIPS, TOWARDS A STRATEGY THAT PROMOTES INCLUSION (D) (2008), *available at* http://www.hrsdc.gc.ca/eng/labour/employment_standards/fls/research/research07/page05.shtml.

[473] CEDAW Concluding Comments, *supra* note 405, at 3.

role of national machineries in promoting the status of women.[474] Although Article 48 of the Chinese Constitution guarantees equality of the sexes, and the newly revised LPWRI enshrines this same concept, these remain normative exhortations that are rarely invoked in a court of law.[475] Although the revised LPWRI and the newly promulgated Law of Employment Promotion contain an equality clause, without an effective redress mechanism these provisions will remain largely dormant.[476]

A. *The LPWRI's Gap in Providing Effective Mechanisms for Redressability*

The initial promulgation of the LPWRI in 1992 was meant to be an educational tool more than a legal guarantor of women's rights. Thus, when revising the LPWRI, one of the main recommendations made by the women's groups in China was for a mechanism by which to assert women's rights. Unfortunately, the relaxed language of the revised LPWRI remained silent on remedies for the violation of the law. In short, although the revised LPWRI has made an attempt to include anti-discriminatory language, it has stopped short of providing implementation mechanisms or remedies.

The need for effective means of redress against the violation of laws has been unequivocally emphasized by the CEDAW Committee in the review of the 3rd and 4th state party report in 1999 and the 5th and 6th State party report in 2006.[477] The CESCR also recommended that the State party adopt a national human rights plan of action, and report back

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[474] Following the United Nations' Fourth World Conference on Women in Beijing, China, the Beijing Platform for Action has been established. *See* CEDAW, Platform for Action, *available at* http://www.un.org/womenwatch/daw/beijing/platform/institu.htm.

[475] Author's conversations with Guo Jian Mei, leading women's rights lawyer.

[476] Zhou Huyong & Xu Yue, *Public Interest Litigation: New Way of Protecting Women's Rights*, HUMAN RTS. MAG. 31, 32 (Nov. 2008).

[477] *See* CEDAW 743rd to 744th mtg., *supra* note 43, at 29–31 (calling upon the State to take further measures to improve the effective enforcement of the legislative framework including the Law on the Rights and Interests of Women and to ensure that women have effective means of redress against the violation of laws. *See also* CEDAW Concluding Comments, *supra* note 405 (requesting the State party to enhance enforcement of the law against trafficking in women and girls).

on how the plan promotes and protects economic, social, and cultural rights in the State party.[478] In addition, the Committee recommended that the State party consider establishing a national commission for human rights on the basis of the Paris Principles.[479]

Just as in 1999, the CEDAW Committee in 2006 continued to search for answers about the content and number of complaints dealt with by courts and tribunals relating to the violation of women's rights since the consideration of the previous report. The response by the China State party referred to the fact that the CEDAW had been effectively translated into the national laws and therefore the adjudication of cases reflected the requirements of the Convention.

Although Article 53 of the LPWRI maintains that when a woman's lawful rights and interests are infringed upon, she may file a complaint with a woman's organization, no particular mechanism or organization has been clearly identified.[480] Nonetheless, it is interesting that the revised provision has elevated this guarantee to a "right" and has stipulated that the department or unit concerned should conduct an investigation and give a response.[481]

The critical question is how state agencies and private actors can be held accountable for inaction concerning the implementation of women's right under the LPWRI. Although Article

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[478] *See* U.N. Econ. & Soc. Council [ECOSOC], Concluding observations of the Committee on Economic, Social and Cultural Rights: People's Republic of China (including Hong Kong and Macao), ¶ 41, Thirty-fourth session, 25 April-13 May 2005, U.N. Doc E/C.12/1/Add.107, *available at* http://www.unhcr.org/refworld/publisher,CESCR,CONCOBSERVATIONS,CHN,43f306770,0.html (recommending that "the State party adopt a national human rights plan of action, and report back in its next periodic report on how the plan promotes and protects economic, social and cultural rights in the State party).

[479] A fundamental aspect of the credibility of national institutions is their full compliance with a set of minimum standards contained in the 'Principles relating to the status of national institutions' (commonly known as the *Paris Principles*). *See* Office of the U.N. High Commissioner for Human Rights [OHCHR], Principles relating to the Status of National Institutions (Paris Principles), *available at* http://www2.ohchr.org/english/law/parisprinciples.htm

[480] *See* Revised Law on the Protection of Women's Rights and Interests, art. 53 (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 28, 2005, effective Dec. 1, 2005) (P.R.C.).

[481] *Id.* ("When a woman's lawful rights and interests are infringed upon, she may file a complaint with a women's organization, *women's organization should maintain woman victim's rights and interests* and *has right* to request and assist the department or unit concerned to investigate and deal with the cases so as to protect the lawful rights and interests of the complaint. The department or unit concerned should conduct investigation and deal with and *give reply.*" (revisions italicized)).

50 states that a government official's failure to investigate a woman's complaint can be subject to administrative sanctions,[482] this decision itself is subject to bureaucratic discretion. Article 48 also introduces the Women's Federation as an advocate, but the Women's Federation only has persuasive powers to direct a government bureaucracy to take action.[483]

In the questions submitted to the Chinese State Party, the CEDAW Committee asked what steps have been taken to implement the previous recommendations and to enhance the structure, authority and resources of the Chinese national machinery. The response to this question mentioned in very general terms the continuous improvement of the organizational structure of the Working Committees on Women and Children (NWCCW). However, only minor changes to the adjudicative powers of the NWCCW have been made, if any. Further, there lacks a discussion about the complaint process, fact-finding, investigation, hearings, or remedies.[484]

Additionally, the ACWF does not have powers of investigation or inquiry and it is not set up as a formal complaint mechanism. For the proper enforcement of women's rights and guarantees, it is necessary to set up a body with the power to conduct investigation upon receipt of complaints or of its own accord and sue on behalf of plaintiffs. It should also have the capacity to rule on remedies and penalties. The drafters of the new experts law on Anti-Discrimination in Employment in China calls for an Equal Opportunity Commission that has quasi-adjudicatory powers.[485] Some of the provincial level regulations for the implementation of

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[482] *See id.* art. 50

[483] *See id.* art. 48

[484] Currently, the National Working Committee on Children and Women (NWCCW), created in 1992 under the State Council to coordinate work related to women and children under the State Council and the ACWF formed in 1949, are responsible for advancing laws and regulations concerning women and children. Information regarding the NWCCW can be found at http://www.women.org.cn/english/duomeiti/english/zzjg/zfbm01.htm.

[485] Liu Xiaonan, *Experts Draft of Anti-Discrimination in Employment Law*, *in* WELLESLEY CENTERS FOR WOMEN, *supra* note 126, at 80, 84–86.

the LPWRI have included some administrative measures and relief approaches for the infringement of women's rights. For example, Heilongjiang Province provides for concrete penalties for dealing with the infringement of women's rights and interests.

At the same time, many provinces have also provided the accountability of responsible personnel. For instance, the Shanghai regulations state:

> The pertinent departments should fulfill by law a notice of supervising and urging execution within 15 workdays from on the day they receive the notice of supervising and urging execution. Where neither reply is made nor the case is dealt with within the limit of the term, a women and children's service commission may suggest the people's government at the same level demanding the pertinent departments to rectify their defaults, and may advise the pertinent departments to condemn the executives who are directly responsible with administrative punishment.[486]

In 2002, the ACWF noted that thirty-one provinces, autonomous regions, and municipalities had formulated regulations for operation of the LPWRI. At the same time, even ten years after the LPWRI promulgation, agencies have little awareness about the law. The lack of a grievance procedure not only undermines the application of the law, but renders it invisible to those who were meant to be protected by it. By 2009, twenty-seven provinces, municipalities, and autonomous provinces had introduced the Implementation Measures of the LPWRI.[487]

The implementing regulations of Shanghai have made a good faith effort to strengthen the functions of the institutions for women and children at and above county levels. These documents make the work of institutions more authoritative and more operable, making some provisions mandatory. Unfortunately, these regulations are still weak in certain areas. For example, the Shanghai province regulation states that women's and children's institutions can only intervene in "significant" matters concerning women and children rather than all matters

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[486] Mingshun, *supra* note 18, at 30.

[487] ACWF & Chinese Women's Research Soc'y, CHINESE WOMEN'S NGOS REPORT ON "BEIJING +15," at 21 (Oct. 2009).

concerning women and children.[488] This vague and amorphous language restricts the scope of these institutions' power to monitor all matters affecting women and children.

B. *Advancing Public Interest Litigation for Women*

Chinese women's rights lawyers have argued for a vibrant public interest litigation agenda in China to advance the rights of women. Leading Chinese women's rights lawyers argue that traditional litigation based on the Constitution, LPWRI, Marriage Law, and Inheritance Law can be challenging given the vague and ambiguous provisions in those laws. As two authors have pointed out "there are some drawbacks in Chinese laws. The provisions are too principled, lacking operability. Many laws contain declaring articles and slogans, not litigable. There are no corresponding organizations for oversight and the prepositions for law enforcement, lacking corresponding relief channels, let alone corresponding procedure protection."[489] Public interest litigation is especially problematic given that under Chinese laws such as the Civil Procedure Law (Article 108), the Administrative Procedure Law (Articles 2 and 41) and the Criminal Procedure Law (Article 107), cases can only be brought by persons with a direct interest in the litigation.[490] Friends of the court or amicus curiae briefs cannot be brought. Nor can a third party such as a public interest or organization or person acting in the public interest bring suit on behalf of a class of persons as in India or the United States.[491]

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[488] For example, Article 6.2 in the Ways for the Implementation by Shanghai promises to "participate in the institution of statues, regulations, and public policies concerning the significant issues involved in the guarantee of women's rights and interests"; Article 4 in the Ways for the Implementation by Jiangxi Province promises to "determine the significant matters involved in the guarantee of women's legitimate rights and interests, and supervise and urge related departments to investigation and deal with by law the significant case. *See* Mingshun, *supra* note 18, at 27 (highlighting some weaknesses that still characterize these regulations).

[489] Huyong & Yue, *supra* note 476, at 32.

[490] *Id.* (pointing out that public interest litigation in China is particularly problematic given that under Chinese laws cases can only be brought by persons with a direct interest in the litigation).

[491] *Id.* (comparing the development of public interest litigation in China, India and the U.S).

A positive feature of the revised LPWRI is that Article 10 recognizes the role of women's organizations in protecting women's rights and ensuring that their voices are heard.[492] Article 10 explicitly states that women and women's organizations have the right to express opinions and suggestions to the State organs concerned with the protection of women's rights and interests.[493] The ACWF has been given priority among women's organizations to inform and shape laws.[494]

The changes to the LPWRI also include articles on legal aid and judicial relief. Article 53 of the law states:

> "When a woman's lawful rights and interests are infringed upon, she may file a complaint with a women's organization, which shall require the relevant department or entity to investigate and deal with the case. The relevant department or entity shall do so in accordance with the law and give the woman a reply."[495]

Likewise, Article 54 provides:

> "A woman's organization shall support the women victims who need help in litigation. With regard to an act infringing upon the interests of a particular group of women, the women's federations or the relevant women's organizations may expose and criticize it through the public media and may be entitled to require the relevant department to investigate and punish it."[496]

Furthermore, revised Article 54 of the LPWRI appears to guarantee the possibility of "friends of the court briefs" when it provides that women's federations or women's organizations should help in litigation and "expose and criticize the violations of women's rights through the mass media and request that the department concerned should investigate and address the violation according to the law."[497] Thus, although these two articles have provided for the right to file

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[492] *See* Revised Law on the Protection of Women's Rights and Interests, art. 10 (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 28, 2005, effective Dec. 1, 2005) (P.R.C.).

[493] *Id.*

[494] *Id.* (stating that "Women's Federations opinions should be heard and considered in the making of law, regulations, and public policies concerning important issues of women's rights and interests.").

[495] *Id.* art. 53.

[496] *Id.* art. 54.

[497] *Id.*

complaints, there is an absence of legal services providers specialized in gender and the law. Moreover, while the law provides that the ACWF may support that action, the law has not provided for the specific role of the ACWF in this field.[498]

In designing a vibrant public interest litigation jurisprudence, Chinese women's rights lawyers argue that PIL jurisprudence should be expanded to cover employment discrimination, sexual harassment, domestic violence, and other women's rights violations. Furthermore, interested persons other than the direct victim such as the procuratorates, individuals, and social groups such as women's federations should be allowed to bring suit. Finally, complaints should be allowed to be brought to administrative organs first, then to the courts if they are not resolved.[499] Although this provision opens the door for women's watchdog organizations to monitor and report on women's rights, it remains to be seen what kind of a role women's rights organizations will be allowed to play. Especially since the provisions do not clearly delineate the role of women's organizations or provide a clear process for the submission of these opinions, the impact of this provision may be diluted.

VI. CONCLUSION

Although China's endeavors in women's rights lawmaking have not been a complete success, these less than effective law reform efforts should not be viewed as an overall failure either. Platforms and alliances created during rights-based law reform processes, the strengthening of legal analysis, the experience gained through interaction with the political and law-making structures, and the numerous interrelated social issues raised may well lead the way

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[498] *See* Huyong & Yue, *supra* note 476, at 32 (noticing that "although [the two articles] provide that women's federation may help take action, which is the most effective means to protect women's rights, they have not provided for the means of help and the status of women's federations in action").

[499] *See* Huyong & Yue, *supra* note 476, at 32-33 (pointing out some measures that should be adopted in order to foster public interest litigation in China).

to deeper, wider processes of change. Women's groups have played a significant role in shaping public policy and mobilizing public opinion. In fact, as seen in the Chinese context, "expert's drafts" on anti- discrimination, domestic violence and sexual harassment are the building blocks of national legislation. When national legislation fails to address in meaningful and effective ways the issues highlighted in the expert's drafts, rights advocates turn to provincial level lawmaking with greater success.

Some of the new legislative developments in China merely pay lip service to international human rights norms. These changes nonetheless may be symbolic of changes to come. The fact that women's groups have used these international and transnational norms as catalysts for change illustrates that international norms can, in fact, be localized. This has opened new opportunities for advocacy and mobilization in what Sally Engle Merry calls, "re-making human rights in the vernacular."[500] Only when international human rights norms are embedded in national and local laws, as well as social practices, they can realize their full transformative and constitutive potential. In China what we see is that international women's rights law has been an important organizing tool for women's groups. Thus reform in laws, processes, and methodologies remains linked to transformation in the women activists who serve as interlocutors between the State and the international processes.

Ideally a bottom up and top down approach should converge, but in the absence of this convergence, a bottom up approach to lawmaking that looks first at making legislative and policy changes at the provincial level will in fact promote community participation and empower grassroots groups. While international human rights norms have had little effect on the State, these norms have shaped the advocacy efforts of Chinese women's rights groups and will

[500] MERRY, *supra* note 41, at 219.

continue to have enormous transformative potential locally as women's rights advocates in China continue their campaign to draft implementing legislation at the provincial levels in the absence of strong national legislation.

While globalization and state transformation in China have spawned a whole new economic structure, they have also spurred a new wave of activism by women's groups. The pivotal role of Chinese women's groups in strengthening the rule of law and human rights must be recognized and validated. These organizations have already catalyzed the creation of an exciting array of advocacy efforts, locally and nationally. The maturation of this process will allow this rhetoric to be translated into concrete action.