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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 Council¹

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

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 LPWRI⁶ 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

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.

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

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

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

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 Condlln*, 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

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

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.

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 HUMAN RIGHTS 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.J. 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

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

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

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

require judges, lawyers, and prosecutors to undergo training.⁶¹ Above all, the Committee 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

⁶¹ *Id.*

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.

for women victims of sexual harassment in the workplace.⁶⁹ The Committee requested that the 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

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

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

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.

been made to draft enabling legislation to translate the Convention into national law, the LPWRI 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

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.

be interpreted to convey a notion of substantive equality as opposed to formal equality.⁸² The 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.

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.

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

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 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

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

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 5⁸⁸ 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

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.

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.

design, implementation, monitoring, and evaluation of the policies and programs ... so that women and men benefit equally and inequality is not perpetuated.”⁹⁰

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 caregiving 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

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).

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).

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 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*

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).

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 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

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

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

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

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

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

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-

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

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 Griffin, *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

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.

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

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.*

time, women have a cause of action for gender discrimination in employment practices.¹⁵⁶

However, Article 27 seems to undermine the overall effect of the law, as it permits the State to establish certain occupations as unsuitable for women.¹⁵⁷ This provision risks stereotyping and segregating women into low-paying career options.

In addition, gender provisions in the law that masquerade as protections for women in reality stereotype and subordinate women, and have the net result of undermining women's employment opportunities. As *Women's Watch—China* reports: “[t]he currently overdone protective policy could result in reducing women's employment opportunities. For example, the protectionist policy would prohibit women from doing night work as the social environment is not safe at night. The consequence of such protection is that the employers will not want to employ women.”¹⁵⁸ The better approach, *Women's Watch* argues, is for the government to provide support for women to cope with a potentially risky workplace.¹⁵⁹ Recently, Dalian Company's number two oil field has taken specific measures to provide safe environment for women who work on night work and in the field.¹⁶⁰

This argument is consistent with the ILO 1990 Convention, which sought to protect both men and women working at night.¹⁶¹ The 1990 Convention was more flexible than its predecessor, the 1938 Convention, and reversed the prohibition nighttime employment for men and women. While the 1990 convention aimed to improve conditions for both male and female night workers, it preserved the ban on women's working at night during pregnancy.¹⁶² As an example of a way of handling women who refuse to work at night is to adopt provisions similar

¹⁵⁶ *Id.* art. 26.

¹⁵⁷ *Id.* art. 27.

¹⁵⁸ Message from the Editor 2006, Vol. 14, *supra* note 130.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Int'l Labour Org, *supra* note 86.

¹⁶² *See 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

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

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.

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

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 Guangdong Province, 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

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.”

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,

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.

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

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 positions¹⁹⁷ 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

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

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

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

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

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

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 Israel²³⁸ 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

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

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.

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

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

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

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 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

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

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.

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.

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://vbqpl.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

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

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

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ Faigui Huibian [Taiwan Gender Equity Education Act] (2004) (Taiwan), *translated at* <http://www.wcwoonline.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.

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

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

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.

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

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 19³²³ 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

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

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

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

³³⁷ See *id.*

³³⁸ See *id.* at 78 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

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

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 violence 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

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 disposal 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

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

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.wewonline.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 life³⁸⁰ 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

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

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

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 emphasize 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

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.

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

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/pmttools.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

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

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

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

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.

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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 LPWRI⁴⁴² 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

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 LPWRI⁴⁴⁷ and the People's Congress in Shanghai draft regulation⁴⁴⁸ 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.

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

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

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 law⁴⁶⁷ 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

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

This 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

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.*

instances of sexual harassment or to pursue legal claims against the harassers or their employers. 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

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](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

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

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 complainant. 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

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

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

⁴⁸⁸ For example, Article 6.2 in the Ways for the Implementation by Shanghai promises to "participate in the institution of statutes, 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

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

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.

