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FIGHTING GENDER DISCRIMINATION IN THE CHINESE WORKPLACE

CHRISTINE M. BULGER*

This Note analyzes the avenues available to Chinese women in their struggle for workplace equality. While China has enacted a number of laws that appear to afford women equal opportunity in employment, the ineffectiveness of these laws is quite apparent. There are many reasons for this, including the inherent inadequacies of many of China's statutes and of its Constitution, barriers and failures within the legal and court systems, and the traditional inferior status of women in Chinese society. However, as young Chinese citizens are becoming less dependent upon their government, they are also becoming more willing than earlier generations to challenge the inequalities and failings of the Chinese government and its legal system. This readiness of the new generation in China, coupled with the suggestions and strategies described in this Note, should serve to bring about gradual improvement for women in the Chinese workplace, and eventually in the whole of Chinese society, government, and politics.

Over the past decade, the People's Republic of China (PRC or China) has attempted to correct its history of human rights violations in the wake of increasing economic and social reform.¹ These new laws and policies have had mixed results, especially in the area of combating discrimination against women in the workplace.² Such gender discrimination has taken the form of preferences in hiring men, excessive fines based on alleged violations of family planning regulations, unfair dismissals, periodic employment plans,³ earlier re-

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¹ See, e.g., White Paper, *Progress in China's Human Rights Cause in 1996*, Information Office of the State Council of the P.R.C., (Mar. 1997), translated at <<http://www.china.org.cn/English/WhitePapers/96HumanRights/96HumanRights.html>> (visited May 19, 2000) [hereinafter 1996 Human Rights White Paper]; Human Rights in China (HRIC), *Caught Between Tradition and the State: Violations of the Human Rights of Chinese Women*, 17 WOMEN'S RTS. L. REP. 285, 287 (1996); Hilary K. Josephs, *Labor Law in a "Socialist Market Economy": The Case of China*, 33 COLUM. J. TRANSNAT'L L. 559, 560–61 (1995).

² See Elisabeth Rosenthal, *A Day in Court, and Justice, Sometimes, for the Chinese*, N.Y. TIMES, Apr. 27, 1998, at A1.

³ In 1980, China instituted a "basic national policy" of limiting each couple to one child to curtail population growth. See HRIC, *supra* note 1, at 294–95. The policy is enforced on a local level and it generally involves numerous restrictions on a woman's repro-

tirement ages for women, wage discrepancies, and outright sexual harassment.⁴

Although gender discrimination is present in employment worldwide, certain Chinese practices go beyond discrimination to the point of being violations of human rights.⁵ This is particularly true in the case of outright prohibitions on a woman's opportunity to work at all and employer sanctions based on infringements of family planning regulations.⁶ The on-going case of Sun Lili, a former banquet assistant at the Worker's Family Hotel, a state-operated enterprise (SOE or work unit) in Beijing, is a prime illustration of the gender discrimination regularly practiced by Chinese work units.⁷

Sun Lili became pregnant with her first child in October, 1996, due to the failure of contraceptives that she and her husband, Zhang Zhuan, had been using.⁸ Although this pregnancy would be in line with China's one-child policy, Sun had not received the requisite permission of her employer's family planning office for the pregnancy prior to conceiving.⁹ Sun had become pregnant twice previously, also due to the failure of contraceptives, and had aborted both times because she and her husband felt they had no chance of having the pregnancies approved by Sun's work unit.¹⁰ After the second abortion, Sun's doctor told her that it would be unsafe to have any more abortions if she wanted to have children in the future.¹¹ In response to the doctor's warning, Sun and Zhang, who stress that they accept the

ductive rights, including the requirement of authorization of even a first pregnancy by the local government, which can consist of both a "work unit," or government employer, and a neighborhood planning committee. See Dele Olojede, *China Upholds Firing for Pregnancy*, BOSTON GLOBE, Nov. 22, 1998, at A21; Rosenthal, *supra* note 2.

The Chinese government has proposed that women stop working for a period of time after their marriage or the birth of a child and then be allowed to work again several years later when their children have grown up. See *Delegates to Women's Congress Object to "Periodic Employment"*, Xinhua News Agency, Sept. 5, 1998, available in LEXIS, ASIAPC Library, CURNWS File [hereinafter *Delegates Object to "Periodic Employment"*].

⁴ See HRIC, *supra* note 1, at 286; see generally U.S. Dep't of State, *1999 Country Reports on Human Rights Practices*, Bureau of Democracy, Human Rights and Labor (Feb. 25, 2000), available at <http://www.state.gov/www/global/human_rights/1999_hrp_report/china.html> (visited May 17, 2000) [hereinafter U.S. State Dep't Report]; Ann D. Jordan, *Women's Rights in the People's Republic of China: Patriarchal Wine Poured From a Socialist Bottle*, 8 J. CHINESE L. 47, 59-66 (1994).

⁵ See HRIC, *supra* note 1, at 285-86.

⁶ See *id.*

⁷ See generally Olojede, *supra* note 3; Rosenthal, *supra* note 2.

⁸ See Rosenthal, *supra* note 2.

⁹ See Olojede, *supra* note 3; see also *supra* note 3.

¹⁰ See *id.*

¹¹ See *id.*

PRC's one-child policy, decided to go through with the pregnancy despite the outcome of Sun's requests for approval.¹²

While the neighborhood planning committee approved the pregnancy, Sun's work unit refused permission, stating that the timing of the pregnancy was inconvenient, and it ordered that Sun terminate her pregnancy if she wanted to keep her position.¹³ Sun expected that she would be sanctioned and anticipated a modest fine.¹⁴ However, when Sun did not comply with her employer's demand, she was fined heavily: 3,100 yuan, or about \$400, the equivalent to nearly a third of her yearly wages.¹⁵ Her employer also refused to pay her or her daughter's medical expenses, and Sun was eventually dismissed.¹⁶

Sun and Zhang then sought to challenge the decision on the basis that the fine was excessive and in violation of the 1996 Beijing Family Planning Regulations.¹⁷ The couple and the employer first entered into arbitration, but the work unit's decision was upheld.¹⁸ Sun and Zhang then filed suit under the 1990 Administrative Litigation Law (ALL), which provides individuals with a direct route to challenging actions of governmental agencies in the courts.¹⁹ Sun's case was heard at the district and intermediate levels of the People's Court, but both courts ruled in her employer's favor.²⁰ Sun plans to further appeal the court's rulings with the assistance of the Center for Women's Law Studies and Legal Services of Beijing University.²¹

Sun's case is especially significant because it is the first family planning challenge that has progressed so far through the judicial system.²² Usually such cases go no farther than an administrative appeal.²³ Although the courts have ruled against Sun, her case hopefully will force work units to reconsider their family planning regulations

¹² See *id.*

¹³ See *id.*

¹⁴ See Rosenthal, *supra* note 2.

¹⁵ See *id.*

¹⁶ See *id.*; Olojede, *supra* note 3.

¹⁷ See Rosenthal, *supra* note 2. A clause in the Beijing Family Planning Regulations stipulates that a childless woman who gives birth without permission should be fined 200 yuan, or about \$25. See *id.*

¹⁸ See Olojede, *supra* note 3.

¹⁹ See Rosenthal, *supra* note 2; Zhonghua Renmin Gongheguo Xingzheng Susong Fa [Administrative Litigation Law of the P.R.C.] (Oct. 1, 1990), reported in Renmin Ribao [People's Daily], Apr. 10, 1989, at 2, translated in 3 CHINA L. & PRAC. 37 (1989) [hereinafter ALL].

²⁰ See Olojede, *supra* note 3.

²¹ See *id.*

²² See *id.*

²³ See *id.*

and to recognize the ways in which these policies unfairly discriminate against female employees.²⁴

The central government of the PRC enacted several laws during the late 1980s and the 1990s in an attempt to establish and protect the individual rights of its citizens.²⁵ In terms of fighting gender discrimination in employment, the 1993 Constitution of the People's Republic of China (Constitution),²⁶ the Women Workers and Employees' Labor Protection Regulations (Labor Protection Regulations),²⁷ the Labor Law,²⁸ the Law for the Protection of Women's Rights and Interests (LPWRI),²⁹ and the ALL all provide foundations for challenging the discriminatory actions of employers.³⁰

While the Constitution and national legislation mandate equal rights for men and women, the implementation of these policies, in practice, has proved ineffective in securing equal employment status for women. Chinese law emphasizes protective legislation premised on biological differences between men and women.³¹ Legislation provides benefits that women workers need but, ironically, also results in a preference for hiring men in the first place. Such protective legislation has its roots in traditional patriarchal and hierarchical Confucian principles that define a woman's primary obligation as the perpetua-

²⁴ See *id.*

²⁵ See *infra* notes 26–29 and accompanying text.

²⁶ Zhonghua Renmin Gongheguo Xianfa [Constitution of the P.R.C.] (1993), reported in Renmin Ribao [People's Daily], Apr. 10, 1992, at 3, translated at Chinalaw Web (visited May 17, 2000) <<http://www.qis.net/chinalaw/prcon5.htm>> [hereinafter Constitution].

²⁷ Nüzigong Laodong Baohu Guiding [Regulations Governing Labor Protection for Women Staff Members and Workers], art. 1 (Sept. 1, 1988), translated in F.B.I.S., DAILY REP.: CHINA, July 27, 1988, at 42–43 [hereinafter Labor Protection Regulations].

²⁸ The Labor Law is reported in 16 GUOWUYUAN GONGBAO [STATE COUNCIL GAZETTE] 678 (1994), translated in 7 CHINA L. & PRAC. 21 (1994) [hereinafter Labor Law].

²⁹ Funü Quanyi Baozhangfa [Law for the Protection of Women's Rights and Interests] (Oct. 1, 1992) [hereinafter LPWRI], reported in Renmin Ribao [People's Daily], Apr. 10, 1992, at 3, translated at Chinalaw Web (visited May 17, 2000) <<http://www.qis.net/chinalaw/prclaw49.htm>>.

³⁰ Article 48 of the Constitution provides that women enjoy equal rights with men in all spheres of economic life. See Constitution, *supra* note 26. Article 3 of the Labor Protection Regulations prohibits work units from refusing to hire women if they have jobs suitable for women. See Labor Protection Regulations, *supra* note 27, at 42. Article 13 of the Labor Law states that females shall enjoy equal rights as males in employment. See Labor Law, *supra* note 28, at 22. Article 21 of the LPWRI ensures that women and men enjoy the same right to work. See LPWRI, *supra* note 29. Article 2 of the ALL allows citizens to institute proceedings in the People's Courts when they feel that specific acts of administrative authorities have infringed their lawful interests. See ALL, *supra* note 19, at 37.

³¹ See Margaret Y.K. Woo, *Biology and Equality: Challenge for Feminism in the Socialist and the Liberal State*, 42 EMORY L.J. 143, 144 (1993).

tion of the family, or more specifically, producing and wisely raising a male descendent.³² As a result, while positive law states that the sexes are equal, actual practice demonstrates the continuing pervasiveness of inequality between men and women in the whole of Chinese society.³³

Successfully challenging discriminatory practices is also difficult for numerous other reasons. The scope of these laws can be very narrow, and there is simply a lack of enforcement of national law on the local level.³⁴ Also, work unit and local government regulations often conflict, and there is debate over which law should govern.³⁵

The actual structure of the government also poses problems. Even if a court rules against an administrative action, it may be impossible to enforce judgments because the courts are at the same level as the local governments.³⁶ Other difficulties arise within the court system, where judges often are poorly trained and are afraid to rule against the local governments that pay their salaries, and corruption is "firmly entrenched."³⁷

This Note analyzes the current methods of legal recourse available to fight workplace gender discrimination in China and the effectiveness of these laws. Part I discusses the status of women in Chinese society and then examines the types of gender discrimination that arise in employment and the rationales that employers provide for these actions. Part II describes and critiques the laws that should assist Chinese women in fighting employment discrimination and then discusses the reasons why more governmental actions are being challenged in China in the late 1990s. The barriers within China's current legal system that cause many of these challenges to fail is discussed in

³² See *id.* at 177–78.

³³ See *supra* notes 30–32 and accompanying text.

³⁴ See Pitman B. Potter, *The Administrative Litigation Law of the PRC: Judicial Review and Bureaucratic Reform*, in BASIC CONCEPTS OF CHINESE LAW 372, 384–86 (Tahirah V. Lee ed., 1997); HRIC, *supra* note 1, at 287; Allison J. Wells, Comment, *Chinese Women Experience a Negative Side Effect of the Growing Private Sector in Gender-Based Employment Discrimination*, 6 IND. INT'L & COMP. L. REV. 517, 532 (1996); Rosenthal, *supra* note 2.

³⁵ See ALBERT H.Y. CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 88 (1992); Donald C. Clarke, *What's Law Got to Do With It? Legal Institutions and Economic Reform in China*, 10 UCLA PAC. BASIN L.J. 1, 26–30 (1991); Rosenthal, *supra* note 2.

³⁶ See Stanley Lubman, *Making China a Nation of Laws, Not Whims*, L.A. TIMES, Sept. 6, 1998, at M2; Rosenthal, *supra* note 2.

³⁷ See Clarke, *supra* note 35, at 57–64; Lubman, *supra* note 36; John Pomfret, *Chinese Officials Bare Flaws of Legal System: Reports to Legislature Cite Growing Number of Corruption and Official Abuse Cases*, WASH. POST, Mar. 11, 1999, at A24; Rosenthal, *supra* note 2.

Part III. Part IV proposes strategies for increasing the probability of success in gender discrimination in the workplace cases, which should also result in further improvement of human rights conditions in China.

I. GENDER DISCRIMINATION IN THE WORKPLACE

A. *Status of Women in the Chinese Workplace*

A historical overview of women's employment opportunities in China will foster a better appreciation of the current status of the female members of the Chinese workforce. Prior to 1949 when the new Communist government took control of China, women had begun working in light industry for low wages, and some women were even "sold" to factory owners and received no pay.³⁸ All working women labored for long hours in unsanitary and dangerous conditions, and they shared the same status as prostitutes.³⁹

With the takeover by the Communist party in 1949, the Chinese government developed programs to bring women out of the home and into the workforce.⁴⁰ Equal status for women in Chinese society in general was addressed by the government, which promoted the slogan that "women hold up half the sky."⁴¹ By 1953, the percentage of women in the urban labor force had increased from 7.5% to 11%.⁴²

From 1953 to 1957, during which the government's "First Five Year Plan" emphasized heavy industry over agriculture and light industry, urban unemployment was high and "women were encouraged to stay home and contribute to the socialist cause through their housework."⁴³ Although the number of employed women increased by less than 2% during this period, "The Great Leap Forward," from 1958 to 1960, brought about a more significant increase in the percentage of working women.⁴⁴ The government focused on the mass mobilization of the Chinese workforce to develop the economy and established facilities such as nurseries and laundries to alleviate

³⁸ See Woo, *supra* note 31, at 148.

³⁹ See *id.*

⁴⁰ See *id.*

⁴¹ See *id.*

⁴² See *id.* at 148-49.

⁴³ See Woo, *supra* note 31, at 149.

⁴⁴ See *id.*

women's domestic responsibilities.⁴⁵ By 1963, women came to represent 25% of the country's workforce.⁴⁶

Women's employment opportunities also increased during the "Cultural Revolution" of the 1960s and 1970s.⁴⁷ During this period, the Communist Party focused on equality, and women were allowed to enter areas of employment, such as truck driving, mining, and construction, from which they previously had been excluded.⁴⁸ However, the social services introduced during "The Great Leap Forward" were also being taken away during this time.⁴⁹

Since the 1950s, women with jobs classified as "permanent" have benefited from the "iron rice bowl" system.⁵⁰ Under this policy, the state guaranteed every permanent worker a job at a state-determined salary, subsidized medical care, housing, education, and a retirement pension.⁵¹ However, since permanent workers had only minimal fear of being fired and government job allocation officials failed to match positions with workers' interests, skills, and abilities, the system ended up promoting inefficiency due to insufficient work incentives.⁵²

Under Deng Xiaoping's leadership, China began to move away from the "iron rice bowl" system.⁵³ Beginning in 1979, new economic policies "revamped the nation's centrally-planned economy by encouraging decentralization, private enterprise, and foreign investment."⁵⁴ During the 1980s, 38% of the Chinese workforce consisted of women.⁵⁵ Unfortunately, this economic reform that emphasized privatization and economic efficiency has produced high unemployment, especially for women.⁵⁶ Women have also increasingly been segregated to the service, textile, and food-processing industries.⁵⁷ As a result of the economic reforms instituted in the 1980s, gender discrimination plagues Chinese women into 2000.

⁴⁵ See *id.*

⁴⁶ See *id.*

⁴⁷ See *id.*

⁴⁸ See Woo, *supra* note 31, at 150.

⁴⁹ See *id.*

⁵⁰ See *id.*

⁵¹ See *id.*

⁵² See *id.* at 150-51.

⁵³ See Woo, *supra* note 31, at 151.

⁵⁴ See *id.*

⁵⁵ See *id.*

⁵⁶ See *id.* at 151-52.

⁵⁷ See *id.* at 152.

B. *The Chinese Government's Characterization of Discrimination*

The official PRC position on the status of women in the whole of Chinese society is that they enjoy equal political, economic, social, and cultural rights with men.⁵⁸ A 1994 White Paper⁵⁹ reporting on "The Situation of Chinese Women" states that women and men enjoy equal working rights, which were secured by the passage of the LPWRI in 1992.⁶⁰ The Chinese government includes the rights to equal pay for equal work, time off, medical care, and special protection during menstruation, pregnancy, childbirth, and baby nursing periods amongst a list of many guarantees for women.⁶¹ The dismissal of women on the pretext of marriage, pregnancy, maternity leave, or baby nursing period is prohibited, as is the refusal to hire women in the first place or to assign them to tasks that are "not suitable for women."⁶²

The White Paper does mention some of the discrimination problems that exist.⁶³ The PRC acknowledges that women are experiencing difficulty in securing employment because some work units refuse to hire women.⁶⁴ The report then claims that the Chinese government is taking "active measures to tackle these problems."⁶⁵ The explanations offered for income discrepancies between men and women are the "current differences in cultural and professional competence as well as occupational composition."⁶⁶

In a 1994 report on the implementation of the Nairobi Forward-Looking Strategies for the Advancement of Women,⁶⁷ the result of the

⁵⁸ See 1996 Human Rights White Paper, *supra* note 1.

⁵⁹ "White Papers" are produced by China's Information Office of the State Council and reflect the official PRC position on a variety of issues. See Diane F. Orentlicher & Timothy A. Gelatt, *Public Law, Private Actors: The Impact of Human Rights on Business Investors in China*, 14 Nw. J. INT'L L. & Bus. 66, 72 (1993). The documents have been criticized as being propagandistic and biased. See *id.*

⁶⁰ See *White Paper, The Situation of Chinese Women*, BBC Summary of World Broadcasts, June 11, 1994, available in LEXIS, ASIAPC Library, BBCSWB File [hereinafter *Situation of Chinese Women*].

⁶¹ See *id.*

⁶² See *id.*

⁶³ See *id.*

⁶⁴ See *id.*

⁶⁵ See *Situation of Chinese Women*, *supra* note 60.

⁶⁶ See *id.*

⁶⁷ This document outlines tactics for women's advancement worldwide until the year 2000. See Elaine Sciolino, *U.N. Urged to Promote Women*, N.Y. TIMES, Nov. 6, 1985, at C13. It was adopted by the United Nations General Assembly on December 13, 1985. See *Nairobi Forward-looking Strategies for the Advancement of Women*, G.A. Res. 108, U.N. GAOR, 40th Sess. (1985).

Third World Conference on Women held in 1985, China also acknowledged instances of employment discrimination after recounting the many advances of Chinese women.⁶⁸ The report stated that China is now mainly confronted with the following problems: "Some departments, regions and units, to varying degrees, still prefer men to women while enrolling students, recruiting workers or making choices of promotion. Some enterprises, especially privately-owned enterprise [sic], individual businesses and some overseas-funded firms still fail to provide proper labour protection for women workers."⁶⁹ The Chinese government planned to solve these problems by publicizing and fully implementing the LPWRI and urging local levels of government to enforce the law.⁷⁰ Relying solely on the official reports of the PRC, it would seem that the Chinese government is committed to ending employment discrimination against women.

C. *Outside Observers' Reports on Discrimination*

However, non-Chinese government sources report differently. In February, 2000, the U.S. Department of State found that despite the equal rights promised by the Constitution and the LPWRI, Chinese women have continued to report discrimination, sexual harassment, unfair dismissal, demotion, and wage discrepancies in employment.⁷¹ Under economic reform of state-owned enterprises, a disproportionate percentage of the millions of workers laid off have been women, and female employees also have been more likely to be chosen to take pay cuts when a plant or company is in financial trouble.⁷² As unemployment rates have risen, the use of unfair hiring practices, such as discrimination on the basis of sex and age, also has increased.⁷³

The State Department report also found that employers often hire men rather than women to avoid maternity leave and child care

⁶⁸ See generally *Government Publishes Report on Plans for Women's Advancement*, BBC Summary of World Broadcasts, Oct. 13, 1994, available in LEXIS, ASIAPC Library, ALLNWS File.

⁶⁹ See *id.*

⁷⁰ See *Chinese Women's Legal Position Enhanced*, Xinhua News Agency, Oct. 10, 1994, available in LEXIS, ASIAPC Library, ALLNWS File.

⁷¹ See U.S. State Dep't Report, *supra* note 4.

⁷² See *id.* A December, 1998, Asian Development Bank report noted that almost 70% of the 23 million workers who could lose their jobs as a result of SOE reform were women, although they constitute only 36.4% of the workforce. See *id.* A 1998 All-China Federation of Trade Unions report estimated that 80% of those laid off from SOEs in Heilongjiang province were women. See *id.*

⁷³ See *id.*

expenses.⁷⁴ Some employers have even lowered the mandatory retirement age for women to forty years old.⁷⁵ Women's salaries average eighty to ninety percent of men's, and most women are employed in lower-skilled and lower-paid jobs.⁷⁶

Human Rights in China⁷⁷ (HRIC) also disputed the central Chinese government's official statements on women's rights.⁷⁸ HRIC points out that women have borne the brunt of China's economic reform policies,⁷⁹ which have included improving the efficiency of the economy through massive layoffs in SOEs which primarily targeted women.⁸⁰ The HRIC also criticized the Chinese government's 1994 report on the implementation of the Nairobi Forward-Looking Strategies.⁸¹ The group found that many figures were presented without necessary comparisons, while significant negative numbers went unexplained.⁸² Other statements, such as the declaration that women universally have ninety days of paid maternity leave, were untrue, as many women are not covered by such protections.⁸³

As examples of workplace discrimination, HRIC cited that women are the last hired and the first fired, that women increasingly work in lower-paid, less-valued jobs, and that the laws enacted to protect women in employment situations contain no enforcement mechanisms.⁸⁴ The state also intrudes upon women's reproductive freedom by telling them when they may have children and causing women to disproportionately bear the burden of population control policies.⁸⁵ HRIC identified the Chinese government's overwhelming focus on rapid economic growth as the reason for the government's failure to address open discrimination.⁸⁶

⁷⁴ See *id.*

⁷⁵ See *id.* The official retirement age is 60 years for men and 55 years for women. See *id.*

⁷⁶ See *id.*

⁷⁷ HRIC is an international non-governmental organization that "monitors the implementation of international human rights standards in . . . China and carries out human rights advocacy and education among Chinese people inside and outside the country." See *Human Rights in China* (visited May 17, 2000) <<http://www.hrchina.org/hrinfo/about.html>>.

⁷⁸ See HRIC, *supra* note 1, at 299.

⁷⁹ See *id.* at 285.

⁸⁰ See Elizabeth Spahn, *Shattered Jade, Broken Shoe: Foreign Economic Development and the Sexual Exploitation of Women in China*, 50 ME. L. REV. 255, 265 (1998).

⁸¹ See HRIC, *supra* note 1, at 299.

⁸² See *id.*

⁸³ See *id.*

⁸⁴ See *id.* at 286.

⁸⁵ See *id.*

⁸⁶ See HRIC, *supra* note 1, at 286.

In 1996, the *China Business Review* reported that gender discrimination was cited as the main reason for the lower representation of Chinese women in high-paying jobs.⁸⁷ Employers offered various reasons why they prefer hiring men: women do not make good leaders; male employees will resist having to report to a female boss; and women are not as “capable” as men in terms of physical strength or intellectual ability.⁸⁸ In addition, employment agencies denied that discrimination was involved in the decision of companies to hire only men: “This is not discrimination, women really can’t do these kinds of jobs.”⁸⁹

Traditional Chinese attitudes holding that a woman’s primary responsibility is to her family likely account for most forms of gender discrimination.⁹⁰ Since most women who work full-time also shoulder the bulk of responsibility for household chores and child care, employers would rather hire, promote, and pay higher wages to men because male employees’ work performances will be less affected by the demands of home and children.⁹¹ A section head at a government agency clearly demonstrates this discriminatory attitude:

I don’t advocate hiring women, they are too much trouble. They get married, get pregnant and have children, and after that it’s an endless round of domestic responsibilities. You can’t expect them to deal with any work matters at all. Anyone who is a leader doesn’t wish to have too many women working under him.⁹²

D. Discrimination in Education

Chinese women are confronted by these discriminatory attitudes from the time they are young girls. Many parents consider spending money on educating daughters a poor investment because daughters usually leave their parents’ home after marrying, and they continue to

⁸⁷ See Nancy E. Riley, *Holding Up Half the Economy: Chinese Women*, CHINA BUS. REV., Jan. 1996, available in LEXIS, ASIAPC Library, ALLNWS File.

⁸⁸ See *id.*

⁸⁹ See HRIC, *supra* note 1, at 303.

⁹⁰ See Riley, *supra* note 87.

⁹¹ See *id.*; see also PRC Feminist Scholar Urges Combating Sex Discrimination, Jan. 3, 1999, HONG KONG SUNDAY STANDARD, in FBIS Daily Report: China, Jan. 4, 1999, available in <<http://wnc.fedworld.gov>> (citing Prof. Li Yinhe as stating that employers normally consider female employees more troublesome, as they might apply for maternity leave and time for nursing, resulting in preference in hiring men whenever possible).

⁹² See HRIC, *supra* note 1, at 303.

receive lower wages and salaries than men.⁹³ In addition, the Chinese government has no incentive to step in and make sure that girls and boys receive equal educational opportunities.⁹⁴ With high unemployment rates and low demand for educated female workers, women's education is viewed as being much less important than a man's and of too high a cost.⁹⁵

Chinese women also have unequal access to higher education and training, further impeding workplace equality.⁹⁶ In 1990, twice as many men as women were enrolled in post-secondary schools.⁹⁷ The *China Business Review* also reported that it is rumored that women must score higher than men on entrance exams to gain admission.⁹⁸ Female college graduates frequently experience discrimination in job assignments and interviews, and they are often encouraged to seek jobs traditionally considered suitable for women, such as teaching.⁹⁹ For example, a female university graduate interviewed for a government job and was offered the position on the condition that she agree not to marry or have children for three years; she rejected the offer.¹⁰⁰ Another university graduate with a degree in economics decided to teach aerobics classes because only her male peers received decent job offers; she complained that she was only offered secretarial positions.¹⁰¹

E. Job Creation Programs that Favor Men

The Coalition on Women's Employment Rights (CWER) has criticized the job-creation programs that were enacted by the Chinese government in response to unemployment caused by economic reform.¹⁰² According to Chan Po-Ying, spokeswoman for the CWER, "[t]he Government has put forward lots of employment proposals, but none benefits women directly."¹⁰³ Most positions are tailored for

⁹³ See Riley, *supra* note 87.

⁹⁴ See Jordan, *supra* note 5, at 69.

⁹⁵ See *id.*

⁹⁶ See Riley, *supra* note 87.

⁹⁷ See *id.*

⁹⁸ See *id.*

⁹⁹ See *id.*

¹⁰⁰ See Sheryl WuDunn, *Profit and Loss: China's Affection for Capitalism Erodes Gains in Equal Rights*, CHI. TRIB., Sept. 27, 1992, at A1.

¹⁰¹ See *id.*

¹⁰² See Yulanda Chung, "Sexist" Job Moves Attacked, S. CHINA MORNING POST LTD., Dec. 22, 1998, available in LEXIS, ASIAPC Library, CURNWS File.

¹⁰³ *Id.*

men in the construction industry.¹⁰⁴ Jobs that were recommended to women by employment centers tended to be along the lines of domestic helpers and usually were only temporary.¹⁰⁵

F. Periodic Employment

The All-China Women's Federation (ACWF)¹⁰⁶ objected to another government proposal, "periodic employment," which would require women to stop working for several years after their marriage or the birth of a child and then be allowed to return to the workplace several years later after their children have grown up.¹⁰⁷ The ACWF argued that such a plan violates the legal principle that men and women have equal rights to work and degrades women's social and family status.¹⁰⁸ The Chinese government claimed that periodic employment would help relieve competition for jobs and reduce underemployment.¹⁰⁹ The ACWF disagreed, finding that the major cause of unemployment and underemployment has been social and economic reform, not the large population of female employees.¹¹⁰ Forcing women to remain unemployed for long periods of time may cause financial difficulties for many families and can weaken the competitiveness of both female skilled laborers and intellectual workers, resulting in increased difficulty in securing positions when they are allowed to return to the workforce.¹¹¹

¹⁰⁴ See *id.*

¹⁰⁵ See *id.*

¹⁰⁶ The ACWF is the PRC's national government-sponsored women's organization. See Tanya S.J. Selvaratnam, *Backseat Driver: Steering Chinese Women's Voices Through the 1990s*, 12 J.L. & POL. 93, 109 (1995). Although the organization acts as a representative of and advocate for women, its agenda depends ultimately on current government policy. See *id.* at 110-11; see also HRIC, *supra* note 1, at 305 (stating that "[a]lthough the ACWF has been able to speak out on many issues that concern women, . . . its primary function is to transmit the Party's policies to women and to mobilize them to implement those policies").

¹⁰⁷ See *Delegates Object to "Periodic Employment," supra* note 3; Vivien Pi-Kwan Chan, *Stay-at-Home Plan for Mothers Condemned*, S. CHINA MORNING POST, Sept. 6, 1998, available in LEXIS, ASIAPC Library, ALLNWS File.

¹⁰⁸ See *Delegates Object to "Periodic Employment," supra* note 3. Article 13 of the Labor Law states that females shall enjoy equal rights as males in employment. See Labor Law, art. 13, *supra* note 28, at 22.

¹⁰⁹ See *Delegates Object to "Periodic Employment," supra* note 4.

¹¹⁰ See *id.*

¹¹¹ See *id.*

G. Age Discrimination

The CWER also urged legislation prohibiting age discrimination.¹¹² Job opportunities "for women are mostly in the service industry, which blatantly discriminates on the basis of age and appearance."¹¹³ For example, the job postings displayed in a reemployment center demonstrated that the positions that paid the best were reserved for young women.¹¹⁴ Every ad stated age requirements: "Saleswoman: less than 30," "Waitress: 18 to 25," "English-speaking secretary: less than 25."¹¹⁵ Middle-aged women are regularly told that they are too old, too fat, too ugly and too short for service positions such as waitress or salesperson.¹¹⁶

Chinese law sanctions age discrimination in the form of earlier retirement ages, some as early as forty,¹¹⁷ for women than for men.¹¹⁸ For instance, the mandatory retirement age for female laborers is fifty while male laborers do not have to retire until age sixty.¹¹⁹ Certain female teachers, doctors, and scientific and technical personnel can retire at age sixty, but men in the same positions may work until age sixty-five.¹²⁰ Some work units use this age differential as an excuse for not hiring women so that they can avoid making pension payments for five or ten years longer to women than men.¹²¹ Earlier retirement

¹¹² See *id.* The Democratic Party of China agrees that the government should pass laws prohibiting age discrimination. See *Laws Needed to Improve Women's Working Rights*, S. CHINA MORNING POST, Mar. 9, 1998, available in LEXIS, ASIAPC Library, CURNWS File.

¹¹³ See Jennifer Lin, *Women No Longer Wanted to Hold Up the Sky in China*, AAP Newsfeed, Mar. 24, 1998, available in LEXIS, ASIAPC Library, ALLNWS File.

¹¹⁴ See *id.*

¹¹⁵ See *id.*

¹¹⁶ See *id.*

¹¹⁷ See HRIC, *supra* note 1, at 304.

¹¹⁸ See Jordan, *supra* note 4, at 61.

¹¹⁹ See *id.* at 61 & n.48 (citing Guowuyuan Guanyu Gongren Tuixiu, Tuizide Zanzing Banfa [State Council Interim Procedures Concerning Retirement or Resignation of Workers], art. 1(1) (June 3, 1978), reprinted in *Zhonghua Renmin Gongheguo Falü Quanshu* [Collection of the Laws of the PRC] 1393 (1990)).

¹²⁰ See *id.* at 61 & n.50 (citing Guowuyuan Guanyu Yanchang Bufen Gudan Laoshi, Yisheng, Kejirenyuan Tuixiu Nianlingde Tongzhi [State Council Circular Extending the Retirement Age of Some Essential Teachers, Doctors, Scientists and Technicians] (Sept. 12, 1983), reprinted in *Zhonghua Renmin Gongheguo Falü Quanshu* [Collection of the Laws of the PRC] 1389 (1990)).

¹²¹ See *id.* at 61 & n.57 (citing *Equal Rights to Education Should Be Guaranteed*, CHINA DAILY, Dec. 4, 1990, at 4).

ages for women have also resulted in work units failing to train or promote women because they will work for fewer years than men.¹²²

In July, 1992, a group of nine women engineers initiated the first challenge to this type of sex discrimination.¹²³ They formally protested to Shanghai's women's federation, charging their employer, the Shanghai Astronautics Bureau, with forcing them to retire based on their sex.¹²⁴ The women alleged that the Astronautics Bureau violated the spirit of the LPWRI, which would go into effect on October 1, 1992, by ignoring a clause that allows female specialists to continue working past the normal retirement age of fifty-five.¹²⁵ The women ranged in age from fifty-five to fifty-seven and, despite the fact that they were fully capable of continuing their research work, the Astronautics Bureau ordered them all to retire.¹²⁶ The Bureau rejected the gender discrimination charge.¹²⁷ The employer felt that this was a case of different interpretations of the rules and argued that the regulation cited by the female engineers only *allows* employers to keep women on past the age of fifty-five, but *does not require* them to do so.¹²⁸

In a more recent retirement age discrimination case, three female engineers sued the China National Fisheries Group after it forced them to retire at age fifty-four.¹²⁹ Because Personnel Ministry regulations set the retirement age for men and women with expert qualifications at sixty, the women have won two court judgments against the employer.¹³⁰ However, as of April, 1998, the fisheries group had refused to reinstate the women or give them back pay.¹³¹ Guo Jianmei, executive director of the Center for Women's Law Studies and Legal Services of Beijing University, which represents the women, is trying to enforce the decision by relentlessly pressuring the company's president and complaining to government ministers.¹³²

¹²² See *id.* at 61-62 & n.52 (citing *Working Women*, 1334 CHINA NEWS ANALYSIS 1, 3 (May 1, 1987)).

¹²³ See *Women Launch China's First Sex Bias Challenge*, Reuter Library Report, July 9, 1992, available in LEXIS, ASIAPC Library, ALLNWS File [hereinafter *First Sex Bias Challenge*].

¹²⁴ See *id.*

¹²⁵ See *id.*

¹²⁶ See *id.*

¹²⁷ See *id.*

¹²⁸ See *First Sex Bias Challenge*, *supra* note 123.

¹²⁹ See Rosenthal, *supra* note 2.

¹³⁰ See *id.*

¹³¹ See *id.*

¹³² See *id.*

Chinese working women are suffering from serious gender discrimination that is entrenched in traditional Chinese attitudes about the role of women and is perpetuated by government-sanctioned employment discrimination.¹³³ Economic reform has exacerbated gender discrimination in its attempt to attract foreign investment and compete in a capitalist economy.¹³⁴ The Chinese government has recognized the resultant unequal treatment of women in the workplace by passing laws that should protect women's rights.¹³⁵ But laws and regulations enacted to protect female employees have often proven ineffective in fighting, or have even aggravated, the gender discrimination problem.¹³⁶

II. USE OF STATUTORY LAW TO FIGHT DISCRIMINATION

A. *Constitution of the People's Republic of China (1993)*

The Constitution guarantees women "equal rights with men in all spheres of life, in political, economic, cultural, social, and family life."¹³⁷ Article 48 expressly "applies the principle of equal pay for equal work to men and women alike."¹³⁸ However, the Chinese Constitution is more a declaration of policy than actionable law, and it does not provide the same amount of protection that Western constitutions do.¹³⁹

Unlike Western legal tradition, rights are implemented according to current Chinese policy and are not derived from any universal theory of natural rights.¹⁴⁰ Chinese constitutional rights are also granted, modified, suspended, and withdrawn for the sole purpose of implementing particular policies.¹⁴¹ Additionally, any right listed in the constitution is only a "theoretical possibility of a right," and one must look to individual laws for actual effective government policy.¹⁴² One commentator explains this situation: "That the act of some governmental body may have been in violation of the Constitution is not an

¹³³ See *supra* Part I.C-G.

¹³⁴ See Woo, *supra* note 31, at 151-52.

¹³⁵ See *supra* notes 26-30 and accompanying text.

¹³⁶ See *infra* Part II.A-C.

¹³⁷ See Constitution, art. 48, *supra* note 26.

¹³⁸ See *id.*

¹³⁹ See Jordan, *supra* note 4, at 57-58.

¹⁴⁰ See *id.* at 58.

¹⁴¹ See *id.*

¹⁴² See *id.*

argument against the act's legal validity. The courts do not have power to base decisions on constitutional provisions, and constitutional rights are not protected except by statute."¹⁴³

Even if a given right is supported in laws or regulations, the exercise of such freedoms or rights "may not infringe upon the interests of the state, or society or of the collective. . . ."¹⁴⁴ Therefore, if an individual's exercise of a right conflicts with the larger objectives of the state, any alleged violation of that stated right may not be actionable.¹⁴⁵ Under these circumstances, the current political climate dictates whether enforcement of a particular right would be subversive, immoral, unworthy or otherwise deemed inappropriate for any reason.¹⁴⁶ In contrast to the Western interpretation of constitutional rights as legally enforceable and derived from a theory of "natural rights," the Chinese definition of rights, especially those of women, can be both highly-restricted and flexible, depending upon current government policy.¹⁴⁷ Therefore, actions based solely on an infringement of constitutional rights theory would likely have no merit, and Chinese women must turn to other laws and regulations for redress.

B. *The Labor Protection Regulations (1988) and the Labor Law (1994)*

1. The Labor Protection Regulations

Implemented in 1988, the Labor Protection Regulations were intended "to protect legitimate rights of female. . . workers, reduce and solve special difficulties encountered in labor and work. . . by female. . . workers due to their physiological characteristics, protect their health, and contribute to the building of socialist modernization."¹⁴⁸ For instance, reduction of wages or cancellation of the labor contracts of female workers during the period of time spanning pregnancy, delivery, and breast-feeding is prohibited.¹⁴⁹ Female workers are also guaranteed ninety days of maternity leave and time to breast-feed their children during their work shifts.¹⁵⁰ The Labor Protection Regulations also mandate that units with a "relatively large number"

¹⁴³ See Clarke, *supra* note 35, at 33.

¹⁴⁴ See Constitution, art. 51, *supra* note 26; Jordan, *supra* note 4, at 58.

¹⁴⁵ See Jordan, *supra* note 4, at 58-59.

¹⁴⁶ See *id.*

¹⁴⁷ See *id.*

¹⁴⁸ See Labor Protection Regulations, art. 1, *supra* note 27, at 42.

¹⁴⁹ See *id.*, art. 4.

¹⁵⁰ See *id.*, art. 8-9.

of female workers should "gradually establish health clinics, restrooms for pregnant women, breast-feeding rooms, child care centers, and kindergartens run by themselves or jointly."¹⁵¹ On the surface, the regulations seem to sincerely address the important concerns of working mothers.

However, many provisions restrict the work that women are allowed to perform. Article 5 bans women from engaging in underground mining or work of a high "labor intensity."¹⁵² During menstruation, women are not allowed "to work at high altitude, in places with low temperature, in cold water," or on other jobs with a high "labor intensity."¹⁵³ While a woman is pregnant or breast-feeding, she cannot work on jobs "which should not be done during pregnancy" or "during the breast-feeding period."¹⁵⁴

If a female worker "legitimate[ly]" feels that these rights have been violated, she can appeal to the responsible department of her work unit or to the local labor department.¹⁵⁵ The Labor Protection Regulations provide for economic compensation and allow women to appeal these administrative decisions to the people's courts, the local lower-level Chinese courts.¹⁵⁶ However, the regulations lose all effect if the female is found to have violated state family planning regulations, as in Sun Lili's case.¹⁵⁷ The fact that these rights are tied to China's restrictive family planning scheme is troubling.¹⁵⁸ Essentially, these laws provide only contingent rights.¹⁵⁹

It has been contended that the Labor Protection Regulations may be the major legal source of discriminatory treatment of female workers.¹⁶⁰ The drafters of the regulations appear to believe that the nature of women's "special characteristics" is understood, and that no description of these characteristics or the connection between these characteristics and a presumed inability to work on certain jobs is required.¹⁶¹ While men are assumed suitable for all types of work, these

¹⁵¹ See *id.*, art. 11.

¹⁵² See *id.*, art. 5.

¹⁵³ See Labor Protection Regulations, art. 6, *supra* note 27, at 42.

¹⁵⁴ See *id.*, art. 7, 10.

¹⁵⁵ See *id.*, art. 12 at 42.

¹⁵⁶ See *id.*, art. 12-13, at 43.

¹⁵⁷ See *id.*, art. 15.

¹⁵⁸ See Paul D. McKenzie, *China and the Women's Convention: Prospects for the Implementation of an International Norm*, 7 CHINA L. REP. 23, 49 (1991).

¹⁵⁹ See *id.* at 48-49.

¹⁶⁰ See Jordan, *supra* note 4, at 62.

¹⁶¹ See *id.*

regulations subordinate women to a second-class status, perpetuating the traditional "Chinese belief that women are physically inferior to men."¹⁶²

The regulations also promote a presumption of the intellectual inferiority of women.¹⁶³ Female workers are not able to decide for themselves whether they want to assume certain risks in their jobs or whether they are able to work during pregnancy or menstruation.¹⁶⁴ It has been argued that the "best explanation for the existence of paternalistic laws applicable only to women is the belief among many Chinese people that women are simply inferior to men and, as such, men . . . have a right, perhaps even a duty, to make certain decisions for women."¹⁶⁵

In addition, the costs of all of the benefits bestowed by the regulations are imposed on the mother's work unit, not the father's.¹⁶⁶ This supports the view that the mothers are solely responsible for taking care of their children,¹⁶⁷ and it may also result in work units hiring men over women to avoid the costs of child-bearing and childcare.¹⁶⁸ The Labor Protection Regulations therefore provide a convenient excuse for employers to discriminate against women.¹⁶⁹

2. The Labor Law

On January 1, 1995, the PRC enacted the Labor Law after almost forty years of debate and revision.¹⁷⁰ This law's stated purpose is "to protect the lawful rights and interests of workers, readjust labor relationships, establish and safeguard a labor system that suits the socialist market economy and promote economic development and social advancement."¹⁷¹ The Labor Law summarizes the basic principles already embodied in existing administrative regulations,¹⁷² including the Labor Protection Regulations. An important element of the Labor

¹⁶² See *id.* at 62–63.

¹⁶³ See *id.* at 64.

¹⁶⁴ See *id.*

¹⁶⁵ Jordan, *supra* note 4, at 64.

¹⁶⁶ See *id.* at 63.

¹⁶⁷ See *id.* at 63–64.

¹⁶⁸ See Michael Palmer, *China, People's Republic of: Reacting to Rapid Social Change*, 12 J. FAM. L. 438, 453 (1989–1990).

¹⁶⁹ See HRIC, *supra* note 1, at 302.

¹⁷⁰ See Josephs, *supra* note 1, at 559.

¹⁷¹ Labor Law, art. 1, *supra* note 28, at 21.

¹⁷² See Josephs, *supra* note 1, at 559.

Law is that it explicitly covers all workers, including employees of foreign-owned businesses.¹⁷³

In terms of addressing gender discrimination, Article 13 of the Labor Law states that “[w]omen shall enjoy the right of employment equal to that of men.”¹⁷⁴ Also, “women may not be refused employment because of their sex and recruitment standards may not be raised for women.”¹⁷⁵ However, this prohibition is qualified. Standards may be raised when the nature of the job “has been determined unsuitable for women by the State.”¹⁷⁶ The Labor Law further requires that “[e]qual pay shall be given for equal work.”¹⁷⁷ Also provided for is “[s]pecial [p]rotection for [f]emale staff and workers,” which echoes the Labor Protection Regulations in terms of working in mines, working during pregnancy and breast-feeding, and providing for maternity leave.¹⁷⁸ This situation also perpetuates the problems associated with protective legislation as discussed in regards to the Labor Protection Regulations.

Regarding the Labor Law’s direct attention to the subject of gender discrimination, Professor Hilary K. Josephs, an expert on Chinese labor law, finds that the law is consistent with official PRC efforts to remedy the problem, as envisioned by the Constitution and the LPWRI.¹⁷⁹ Workers whose rights have been infringed can continue to seek remedies through administrative sanctions, as under older labor rules.¹⁸⁰ There has been a subtle shift, however, toward an emphasis on civil liability for breach of contract to encourage compliance with contractual obligations between the employer and workers.¹⁸¹ It is still unclear, however, if the Labor Law will effectively improve the status of women in the workplace, since there have been only a small number of decisions on Labor Law claims from China’s highest court, the Supreme People’s Court, and none of them involved women’s issues.¹⁸²

¹⁷³ See Labor Law, art. 2, *supra* note 28, at 21.

¹⁷⁴ See *id.*, art. 13, at 22.

¹⁷⁵ *Id.*

¹⁷⁶ See *id.*

¹⁷⁷ *Id.*, art. 46, at 28.

¹⁷⁸ See Labor Law, art. 58–63, *supra* note 28, at 29–30.

¹⁷⁹ See Josephs, *supra* note 1, at 568 & n.42.

¹⁸⁰ See Labor Law, art. 89, *supra* note 28, at 34.

¹⁸¹ See *id.*, art. 89–105, at 34–36; Josephs, *supra* note 1, at 569.

¹⁸² See Spahn, *supra* note 80, at 272.

C. *Law Protecting Women's Rights and Interests (1992)*

In April, 1992, the PRC enacted the LPWRI, which addresses women's political, educational, cultural, employment, property, marriage, and family rights, as well as "rights of the person," which embody rights of personal freedom, bodily integrity, dignity, honor, and reputation.¹⁸³ The LPWRI was intended "to give concrete expression to the guarantee of gender equality contained in the Chinese Constitution and to implement China's obligations as a party to the Convention of the Elimination of All Forms of Discrimination Against Women (CEDAW)."¹⁸⁴

Chapter IV of the LPWRI specifically addresses a woman's right to work.¹⁸⁵ Men and women enjoy the same right to work, and should be paid equally for equal labor.¹⁸⁶ Women should also receive equal housing assignments and material benefits.¹⁸⁷ Discrimination in promotions and evaluations is also prohibited, as is dismissal or termination of a labor contract based on marriage, pregnancy, maternity leave, or lactation.¹⁸⁸

The LPWRI also requires that work units maintain the same hiring criteria for men and women and not refuse to hire women.¹⁸⁹ However, an employer can refuse to hire a woman if the position is "unfit" for females.¹⁹⁰ Other protectionist legislation is provided in Article 25, which states that employers "should not assign women any work or labor that is unsuitable for them" and that "[w]omen should be given special protection during menstruation, pregnancy, . . . and lactation."¹⁹¹

¹⁸³ See generally, LPWRI, *supra* note 29; Jonathan Hecht, *The Legal Protection of Women's Rights in China*, CHINA RTS. F. (Human Rights in China, New York, N.Y.), Fall 1995, available in *Human Rights in China* (visited May 17, 2000) <<http://www.hrichina.org/crf/english/95fall/e4.html>>.

¹⁸⁴ See Hecht, *supra* note 183. Article 11 of CEDAW addresses the elimination of discrimination against women in employment to ensure equal rights for men and women. See Convention on the Elimination of All Forms of Discrimination Against Women, Sept. 3, 1981, art. 11, 1249 U.N.T.S. 13, 18-19. In addition to requiring equality in hiring criteria, benefits, promotions, and training, CEDAW also provides that member countries take appropriate measures to prevent employment discrimination based on pregnancy and the taking of maternity leave and to provide special protections for pregnant women in the workforce. See *id.*

¹⁸⁵ See LPWRI, ch. IV, *supra* note 29.

¹⁸⁶ See *id.*, art. 21, 23.

¹⁸⁷ See *id.*, art. 23.

¹⁸⁸ See *id.*, art. 24, 26.

¹⁸⁹ See *id.*, art. 22.

¹⁹⁰ See LPWRI, art. 22, *supra* note 29.

¹⁹¹ See *id.*, art. 25.

Professor Ann D. Jordan argues that the LPWRI "could have marked the beginning of an aggressive campaign to enforce a more egalitarian, non-sexist policy towards women, could have recognized the sexist assumptions implicitly and explicitly given expression in the law and could have proclaimed a new intolerance for sexual discrimination."¹⁹² However, the Chinese government failed to go this far, reaffirming "its existing sexist policies."¹⁹³ Most of the LPWRI's provisions regarding employment were drawn directly from pre-existing laws, such as the Constitution and the Labor Protection Regulations.¹⁹⁴

Another problem is that the LPWRI does not provide an independent enforcement mechanism.¹⁹⁵ A victim of employment discrimination can report her situation to the relevant government department or the ACWF and request investigation of the matter, which will ultimately be dealt with by the government department.¹⁹⁶ A woman can only file a lawsuit if there is a substantive and procedural basis for it in *another* law.¹⁹⁷ Some commentators have suggested that a suit against an administrative agency that fails to act upon a woman's request to perform its legal duty to protect her personal or property rights be filed under the ALL.¹⁹⁸ As such, the LPWRI becomes more of an official statement of policy and principles "to be inculcated through education and propaganda," rather than a new avenue for seeking redress of gender discrimination.¹⁹⁹

D. *Administrative Litigation Law (1990)*

1. Introduction to the ALL

The ALL, which went into effect on October 1, 1990, "establishes general principles and a procedural framework for the exercise of judicial review over administrative action."²⁰⁰ Individual "citizens and legal persons" are now able to bring lawsuits against state administrative organs for "specific acts" that infringe upon their "lawful inter-

¹⁹² Jordan, *supra* note 4, at 95.

¹⁹³ *See id.*

¹⁹⁴ *See id.* at 96; HRIC, *supra* note 1, at 303.

¹⁹⁵ *See* LPWRI, art. 48-52, *supra* note 29; Hecht, *supra* note 184.

¹⁹⁶ *See* LPWRI, art. 48, *supra* note 29.

¹⁹⁷ *See id.*, art. 52; Hecht, *supra* note 183.

¹⁹⁸ *See* Hecht, *supra* note 183; *see also* discussion *infra* Part III.D.

¹⁹⁹ *See* Hecht, *supra* note 183; HRIC, *supra* note 1, at 303.

²⁰⁰ *See* Potter, *supra* note 34, at 372.

ests.”²⁰¹ Therefore, the ALL reflects an effort by the Chinese government to hold administrative agencies more accountable for their actions.²⁰²

The ALL, enables courts to overrule unlawful administrative decisions and to revise unfair administrative sanctions.²⁰³ The ALL is applicable in a broad range of situations²⁰⁴ and can go far in curbing bureaucratism and preventing abuses of power by officials who regularly disregard the limits of the power bestowed on them by controlling regulations.²⁰⁵ The procedural provisions of the ALL also aim to protect plaintiffs against procedural abuses by administrative authorities, acknowledging the great difference in political power between individuals and administrative organs.²⁰⁶ Taken together, the provisions supporting effective judicial review, the scope of parties subject to the ALL, and the procedures for the review process itself suggest that individuals “have a chance to receive fair treatment and effective redress” under the ALL.²⁰⁷

2. Obstacles to Legal Redress Based on ALL Claims

a. *Limited Scope of Review*

However, many difficulties remain in challenging administrative actions under the ALL. First, limits on the scope of review undermine the court’s discretion to reconsider decisions of administrative organs.²⁰⁸ The courts are only authorized to reassess the *legality* of an administrative action; whether the decision was proper is not reviewable.²⁰⁹ Chinese courts must also defer to the administrative agencies’ interpretations of their rules.²¹⁰ Since Chinese regulations often are intentionally vague and drafted to give officials wide discretion, usu-

²⁰¹ See ALL, art. 2, *supra* note 19, at 37.

²⁰² See Potter, *supra* note 34, at 376.

²⁰³ See *id.* at 379.

²⁰⁴ Actionable circumstances include dissatisfaction with administrative sanctions or restrictions on personal freedom or property, an administrative authority’s refusal to protect personal rights or property, failure to allocate pensions, and administrative authority demands for performance of illegal actions by the individual. See ALL, art. 11, *supra* note 19, at 38–39.

²⁰⁵ See Potter, *supra* note 34, at 380.

²⁰⁶ See *id.* at 380–81; ALL, art. 31–64, *supra* note 19, at 43–52.

²⁰⁷ See Potter, *supra* note 34, at 383.

²⁰⁸ See *id.* at 384.

²⁰⁹ See *id.*; ALL, art. 5, *supra* note 19, at 37.

²¹⁰ See Lubman, *supra* note 36.

ally it will be extremely difficult to prove that any actions other than the most egregious conduct actually violate the applicable regulations.²¹¹ However, the courts have been able to review the legality of administrative rules when the rules at issue conflict with national law and administrative regulations.²¹² Still, courts do not have the power to strike down a regulation; they can only refuse to apply the inconsistent rule.²¹³

The courts are also limited as to the types of administrative decisions they can hear.²¹⁴ State acts involving national defense or diplomacy, validity of administrative laws and regulations, orders of universal application, validity of personnel decisions, and specific acts subjected by law only to final administrative authority adjudication are all exempted from review under the ALL.²¹⁵ In addition, Communist Party (Party) organizations are exempted from lawsuits under the ALL.²¹⁶ Despite the fact that Party organizations often formulate administrative decisions, relief cannot be sought against the Party under the ALL.²¹⁷ Thus, politics also limit judicial review of administrative conduct.²¹⁸ Accordingly, the administrative bureaucracy remains effectively insulated from outside review and interpretation of their regulations.²¹⁹

b. *Administrative Officials as Defendants*

Even when individuals are able to bring suits against administrative organs under the ALL, the "officials are often hostile to the idea that they may end up as defendants in court."²²⁰ Prior to the enactment of the ALL, only superiors and Party discipline committees could challenge lower officials' actions.²²¹ Studies have found that it was not unusual for government officials to refuse to appear in court and that "officials did not want to 'condescend' to go to court on an

²¹¹ See Potter, *supra* note 34, at 384.

²¹² See Song Bing, *Assessing China's System of Judicial Review of Administrative Actions*, 8 CHINA L. REP. 1, 6 (1994).

²¹³ See *id.*

²¹⁴ See Potter, *supra* note 34, at 385.

²¹⁵ See ALL, art. 12, *supra* note 19, at 39.

²¹⁶ See *id.*, art. 25, at 42; Susan Finder, *Like Throwing an Egg Against a Stone? Administrative Litigation in the People's Republic of China*, 3 J. CHINESE L. 1, 18 (1989).

²¹⁷ See Finder, *supra* note 216, at 18.

²¹⁸ See Potter, *supra* note 34, at 385.

²¹⁹ See *id.* at 385-86.

²²⁰ See Finder, *supra* note 216, at 10.

²²¹ See *id.* at 18.

equal basis with ordinary citizens."²²² Some officials refused to answer lawsuits or to deliver files to the court, and some have even destroyed incriminating evidence.²²³

A 1987 survey of Shanghai government agency officials showed that many possessed deficient knowledge of administrative law.²²⁴ This report also found that the basis for administrative actions was often questionable.²²⁵ Administrative decisions had been made where there was no law on which to rely and where the available law is difficult to apply, and in other instances it was found that the law was not applied strictly.²²⁶ The enactment of the ALL in 1990 would not instantly solve these problems with administrative officials. In fact, this situation has only erected yet another barrier to legal redress under the ALL.

c. *Willingness of Citizens to Bring Actions Under the ALL*

At the time the ALL went into effect, commentators questioned whether ordinary citizens would become aware of the existence of the law.²²⁷ Even if individuals were informed about the ALL, there was also concern that they would refrain from filing valid claims because of the general belief that officials protect one another.²²⁸ Citizens were also afraid that it would be dangerous to win such a lawsuit, fearing reprisals upon winning vindication for an ALL claim.²²⁹

3. Results of the Implementation of the ALL

However, it seems that these fears have not been a major stumbling block to the ALL. Some positive steps have been taken to inform Chinese citizens of their rights. In December, 1995, Beijing publisher Guangming Daily released an important booklet entitled "Chinese Citizen's Handbook."²³⁰ It aims to raise the "citizenship consciousness of readers by explaining the rights and obligations of being a citi-

²²² See *id.*

²²³ See *id.*

²²⁴ See *id.* at 18-19.

²²⁵ See Finder, *supra* note 216, at 19.

²²⁶ See *id.*

²²⁷ See *id.* at 10; Ann Scott Tyson, *Chinese Reformer Stays the Course*, CHRISTIAN SCI. MONITOR, June 4, 1990, available in LEXIS, NEWS Library, CSM File.

²²⁸ See Finder, *supra* note 216, at 10.

²²⁹ See *id.*; Tyson, *supra* note 227.

²³⁰ See Todd Crowell & David Hsieh, *People Power: As Economic Change Erodes the State's Authority, the Chinese are Free to Sue Companies, Elect Some Officials and Speak Out as Never Before*, ASIAWEEK, Oct. 18, 1996, at 28.

zen."²³¹ The booklet, which uses a question-and-answer format and has sold six million copies as of October, 1996, "is widely seen as the first comprehensive statement by any government of China on the rights of citizens."²³²

In addition, China's rapidly changing economic and social order has produced a new generation of Chinese citizens who have become accustomed to greater freedom in their personal lives than their parents ever had.²³³ They are not as dependent on the local government or their work units to provide them with housing, health care, and permanent employment.²³⁴ Sun Lili and her husband Zhang are members of this new generation.²³⁵ They live in an apartment provided by Zhang's father's work unit.²³⁶ Sun had never been a permanent employee of the Workers Family Hotel.²³⁷ She had been working under a series of two-year contracts that included health care, but not housing.²³⁸ Sun's husband acknowledges that many people are scared to challenge their work units' illegal actions because they think their employers will retaliate in some way.²³⁹ However, Zhang's sentiment, more typical of the younger Chinese who are less financially dependent on the government, about this situation is that "[t]here are other jobs."²⁴⁰

Legal experts have also been more vocal about urging the Chinese government to more clearly define an "administrative act."²⁴¹ Such a clarification by the government would aid potential plaintiffs in evaluating the validity of their claims in the wake of a surge of cases filed against administrative officials.²⁴²

These efforts to inform Chinese citizens of their rights and to clarify the ALL have resulted in an ever-increasing number of cases being filed against administrative officials.²⁴³ At the end of the 1980s,

²³¹ *Id.*

²³² *See id.*

²³³ *See* Rosenthal, *supra* note 2.

²³⁴ *See id.*

²³⁵ *See id.*

²³⁶ *See id.*

²³⁷ *See id.*

²³⁸ *See* Rosenthal, *supra* note 2.

²³⁹ *See id.*

²⁴⁰ *See id.*

²⁴¹ *See* Agatha Ngai, *Clarification of Laws Urged as Cases Rise*, S. CHINA MORNING POST, May 30, 1997, at 9.

²⁴² *See id.*

²⁴³ *See* Minxin Pci, Address Before the House Committee on International Relations, Subcommittee on Asia and the Pacific, Subcommittee on International Economic Policy

lawsuits filed by citizens against the Chinese government averaged about 10,000 per year.²⁴⁴ After the ALL went into effect in October, 1990, it took some time for the number of cases filed under the law to increase.²⁴⁵ In 1991, about 25,600 suits were filed against the government, and the average number of suits filed in 1992 and 1993 were approximately 27,000 per year.²⁴⁶ In 1993, administrative decisions were amended or dismissed about 20% of the time; almost 24% of the administrative decisions were affirmed.²⁴⁷ However, over 40% of the suits filed in 1993 were withdrawn by the plaintiffs.²⁴⁸ This high rate suggests that government officials may have been exerting pressures on citizens to drop their lawsuits,²⁴⁹ a concern that was predicted to deter individuals from filing in the first place.

In spite of this, the number of ALL cases filed grew to 51,370 in 1995, and an estimated 100,000 cases in 1997.²⁵⁰ One survey found that 39% of lawsuits brought under the ALL resulted in at least a partial victory.²⁵¹ ALL cases seem to be particularly successful when challenging the actions of law enforcement officers. For example, Wang Debing, a restaurant owner in Luzho, in Sichuan Province, was jailed for fifteen days by the local police in 1996.²⁵² Wang had been accused of spiking the food served in his restaurant with opium.²⁵³ Wang won when he sued under the ALL because the police had no evidence against him.²⁵⁴

In a 1994 case, Huang Jin, a businessman in Benxi, in Liaoning Province, was accused of fraud and jailed for twenty-one days.²⁵⁵ The police also confiscated tons of steel and 300 pairs of shoes from

and Trade (Sept. 19, 1996), in FED. NEWS SERVICE, available in LEXIS, ASIAPC Library, ALLNWS File [hereinafter Pci Address].

²⁴⁴ See *id.*

²⁴⁵ On January 24, 1991, Ma Yuan, vice-president of the Supreme People's Court said that there had not yet been a large increase in administrative cases. See *Litigation Law Implementation Proceeding Smoothly*, BBC Summary of World Broadcasts, Jan. 30, 1991, available in LEXIS, ASIAPC Library, BBCSWB File. The ALL also had not caused administrative organs to change their normal operating activities. See *id.*

²⁴⁶ See Pci Address, *supra* note 243.

²⁴⁷ See Edward J. Epstein & Chong Tin Cho, *The Legal Reform*, in CHINA REVIEW 1995 6.1, 6.30 (Lo Chi Kin et al. eds., 1995).

²⁴⁸ See *id.*

²⁴⁹ See *id.*

²⁵⁰ See Rosenthal, *supra* note 2.

²⁵¹ See *id.*

²⁵² See *id.*

²⁵³ See *id.*

²⁵⁴ See *id.*

²⁵⁵ See Rosenthal, *supra* note 2.

Huang's business.²⁵⁶ After Huang sued under the ALL, the court ruled that he had been illegally detained.²⁵⁷ The police were then ordered to return Huang's property and pay medical expenses Huang incurred for an illness he suffered while in jail.²⁵⁸

It also appears that the increased number of ALL cases has changed administrative agencies' attitudes about pressuring individuals to drop their lawsuits. More recently, the very act of filing a claim has often resulted in the government backing down on its challenged action, amounting to an out-of-court settlement.²⁵⁹ For example, in November, 1991, the State Press and Publications Administration (SPPA) decided to close down the China Chengshi Publishing House (CCPH) for publishing and selling types and quantities of books that the SPPA did not find appropriate.²⁶⁰ The CCPH refused to close down, and eventually filed suit against the administrative agency under the ALL in the Beijing Municipal Intermediate People's Court in February, 1992.²⁶¹ By January, 1993, the SPPA reversed its decision and agreed to restore the publishing house, which in turn withdrew its suit against the administrative agency.²⁶²

Although Sun Lili's efforts to sue her employer under the ALL have not yet proved successful, it is important that a family planning case has gone this far through the Chinese judicial system.²⁶³ Challenges to family planning decisions usually go no farther than internal administrative review.²⁶⁴ Sun's continuing appeals will bring increasing attention to the family planning regulations which unduly burden women in China. Also, while the PRC touts that its laws give special protection to women in the workplace, these regulations lose all effect if a woman's employer decides that she has violated family planning regulations.²⁶⁵ Therefore, Sun Lili must challenge administrative authorities under the ALL on the argument that employer's family planning regulations and those of the local government, Beijing, are

²⁵⁶ See *id.*

²⁵⁷ See *id.*

²⁵⁸ See *id.*

²⁵⁹ See *id.*

²⁶⁰ See *Press and Publications: First Major Press Legal Case Wound Up "Satisfactorily,"* BBC Summary of World Broadcasts, Jan. 13, 1993, available in LEXIS, ASIAPC Library, BBCSWB File [hereinafter *First Major Press Legal Case*].

²⁶¹ See *Banned Publishing House Sues Government Department,* Agence France Presse, Apr. 9, 1992, available in LEXIS, NEWS Library, ARCNEWS File.

²⁶² See *First Major Press Legal Case,* *supra* note 260.

²⁶³ See Olojede, *supra* note 3.

²⁶⁴ See *id.*

²⁶⁵ See Labor Protection Regulations, *supra* note 27, art. 15, at 43.

inconsistent.²⁶⁶ Conflicts of SOE, local, and national laws in China, along with several other problems in the judicial system, present even more difficulties in the struggle for protection of citizens' rights.

III. DIFFICULTIES OF SEEKING LEGAL REDRESS THROUGH THE JUDICIAL SYSTEM

A. *Conflict of Laws*

The ALL does not instruct the courts on how to proceed if they determine that there is a conflict between the challenged local regulations and national laws or regulations.²⁶⁷ In addition, the Constitution has no provisions that constrain the various law-making bodies from enacting conflicting laws.²⁶⁸ However, in 1985, the Supreme People's Court's "Notice on Strengthening Economic Adjudication" advised the lower people's courts to report conflicts between local legislation and the Constitution, national laws²⁶⁹ or administrative regulations²⁷⁰ to the local People's Congress and its standing committee.²⁷¹ The notice does not provide how the court should proceed after making the report or what result should be reached.²⁷² There is some disagreement over the import of "reporting" the conflict to the local legislature,²⁷³ but it appears that the report either simply serves to put the local People's Congress on notice of the apparent conflict or as a request for legislative interpretation.²⁷⁴

It could be argued in Sun Lili's case that the dismissal and excessive fines imposed by her work unit violate a woman's equal right to work as granted by the Constitution, LWPRI, and the Labor Law, because penalties for violating family planning regulations fall almost exclusively on mothers. However, the national Labor Protection Regulations deny special protections to women who violate the state family

²⁶⁶ See Rosenthal, *supra* note 2.

²⁶⁷ See Finder, *supra* note 216, at 25.

²⁶⁸ See Catherine Cheng Jie, *Conflict of Laws in China, The China Connection Legal Forum* (visited May 17, 2000) <http://www.enstar.co.uk/china/law/articles/legal_b.htm>.

²⁶⁹ National laws are passed by the National People's Congress or its Standing Committee. See Finder, *supra* note 216, at 25.

²⁷⁰ Administrative regulations are promulgated by the State Council. See *id.*

²⁷¹ See *id.*; Liu Nanping, "Judicial Review" in *China: A Comparative Perspective*, 14 REV. SOCIALIST L. 241, 245-46 (1988).

²⁷² See Finder, *supra* note 216, at 25-26.

²⁷³ See Nanping, *supra* note 271, at 246 (arguing that the Supreme People's Court is declaring its authority to declare invalid local laws that contravene the Constitution).

²⁷⁴ See Finder, *supra* note 216, at 26.

planning requirements.²⁷⁵ This could be read as a conflict between national laws, but most likely it would be interpreted simply as an explanatory refinement of the national policy on the equality of women.

This situation then leaves the conflict between two types of local administrative law in Sun Lili's case: the work unit's family planning rules and the Beijing municipal family planning regulations. The Beijing regulations state that a childless woman who gives birth without permission should be fined 200 yuan (about \$25), but her work unit fined her 3,100 yuan (about \$400).²⁷⁶ However, some Beijing legal experts, who agreed that the fine sounded excessive, were unsure whether it was actually illegal.²⁷⁷ Chinese law is unclear on whether municipal regulations prohibit work units from imposing harsher penalties.²⁷⁸ Usually such conflicts of law on a local level are settled through "reconciliation," or negotiation.²⁷⁹ Because there is no legally prescribed method of dealing with conflict on the local level, the courts continually have difficulties about how to apply the laws in a particular case.²⁸⁰ Also, individual judges have full discretion in making these decisions, which can prevent citizens from receiving a fair hearing.²⁸¹

Sun's argument is based on the work unit's disregard of the Beijing regulations and the fact that Sun had no notice of the work unit's fines.²⁸² Although Sun has lost at the district and intermediate levels of the People's Court, the Center for Women's Law Studies and Legal Services of Beijing University, which represented the three female engineers who challenged the earlier retirement age for women, plans to reopen Sun's case.²⁸³ Stanley Lubman, a specialist in Chinese law is heartened just by the occurrence of this case: "China is filled with abuses of discretion, and the law has the potential to curb these."²⁸⁴ Hopefully, Sun's case, and others like it, will draw greater attention to the issue of conflict of laws of different levels of Chinese government and the resulting unfair consequences imposed upon all individuals.

²⁷⁵ See Labor Protection Regulations, art. 15, *supra* note 27, at 43.

²⁷⁶ See Rosenthal, *supra* note 2.

²⁷⁷ See *id.*

²⁷⁸ See *id.*

²⁷⁹ See Jie, *supra* note 268.

²⁸⁰ See *id.*

²⁸¹ See *id.*

²⁸² See Rosenthal, *supra* note 2.

²⁸³ See *id.*; Olojede, *supra* note 3.

²⁸⁴ See Rosenthal, *supra* note 2.

B. Structure of the Legal System

While the question of how to handle conflicts of law bogs down the judicial process, the structure of the Chinese legal system itself limits the ability of judicial action to improve the status of women in employment. The Chinese judicial system has the potential to provide more uniformity and consistency of enforcement than other government entities because it has formal authority to issue judgments that cut across bureaucratic and territorial boundaries.²⁸⁵ However, courts often have difficulty in enforcing their own decisions.²⁸⁶

Commentators find that the Chinese courts are not vested with adequate authority to enforce judgments against offending administrative organs.²⁸⁷ Any authority that courts may have in enforcing decisions against administrative agencies arises from "the bureaucratic rank of individual judges."²⁸⁸ Despite the fact that the judiciary and legislature at any given level of government are supposed to possess equal authority, the chief executive of the particular legislative branch usually has a higher bureaucratic rank than the court president.²⁸⁹ As a result, "low-status" judges will not be able to order "higher-status" administrative officials to follow their decisions.²⁹⁰

In 1998, it was found that, over the previous three years, the percentage of executed judgments was decreasing while the number of decisions that could be executed was increasing; the number of unsettled cases had also substantially increased.²⁹¹ In response, the Supreme People's Court placed the judgment enforcement high on its agenda, urging the leaders of all people's courts to "attach great importance to the execution of court verdicts. . . ."²⁹² Supreme People's Court President Xiao Yang also encouraged all people's courts to

²⁸⁵ See Clarke, *supra* note 35, at 32.

²⁸⁶ See *id.* at 33; Lubman, *supra* note 36; *Congress Hears Report on Work of Courts, Procuratorial Bodies*, BBC Summary of World Broadcasts, Mar. 12, 1999, available in LEXIS, ASIAPC Library, BBCSWB File.

²⁸⁷ See Clarke, *supra* note 35, at 65-69. Stanley Lubman, a consulting professor at Stanford University Law School, explains: "Chinese courts do not have the authority, because they are on the same level, not higher than, the agencies whose acts they review." See Rosenthal, *supra* note 2.

²⁸⁸ See Clarke, *supra* note 35, at 66. Many judges have served as trusted leaders in the Communist Party for a number of years before being appointed. See Bing, *supra* note 212, at 16-17.

²⁸⁹ See Clarke, *supra* note 35, at 66.

²⁹⁰ See *id.* at 67.

²⁹¹ See *Supreme Court President Urges Courts to Uphold Verdicts*, BBC Summary of World Broadcasts, May 11, 1998, available in LEXIS, ASIAPC Library, BBCSWB File.

²⁹² See *id.*

"dare to uphold principles, firmly resist illegal interference, and exert great efforts to address the problem."²⁹³ It remains to be seen whether these recommendations will lead to an increase in the execution of court judgments.

Local law enforcement authorities may also refuse to execute court judgments.²⁹⁴ Their reluctance to enforce judgments against local enterprises stems from the fear of driving away local business.²⁹⁵ This will obviously be a substantial hindrance to fighting employment discrimination against women. It seems unlikely that local law enforcement officials will keep after neighborhood businesses to compensate female victims of discrimination given the continuing Chinese tradition of the lower status of women.

C. Ineffectiveness of Judges

1. Lack of Independence in Decision-Making

Some of the weaknesses of the Chinese court system are due in part to the ineffectiveness of its judges. Regarding the negative court rulings in Sun's case, Guo Jianmei of the Women's Law Studies and Legal Services said that "[s]ome judges are afraid of making mistakes because they think family planning is national policy, and they don't want to be on the wrong side of what they think is government policy."²⁹⁶ Indeed, Ren Jianxin, the president of the Supreme People's Court, has admitted that some judges have not heard administrative cases properly because they were afraid of adversely affecting their relationships with administrative organs.²⁹⁷

This fear arises from the fact that the legislative branch of the government at all levels nominate and appoint judges and determine courts' budgets.²⁹⁸ Chinese judges are also not tenured.²⁹⁹ Due to this control of the courts by local administrative organs, judges feel pres-

²⁹³ See *id.*

²⁹⁴ See Clarke, *supra* note 35, at 67.

²⁹⁵ See *id.*

²⁹⁶ See Olojede, *supra* note 3.

²⁹⁷ See Ren Jianxin, *Supreme People's Court Work Report*, BBC Summary of World Broadcasts, Apr. 22, 1994, available in LEXIS, ASIAPC Library, BBCSWB File.

²⁹⁸ See Bing, *supra* note 212, at 17; Lubman, *supra* note 36.

²⁹⁹ See Bing, *supra* note 212, at 18; Lubman, *supra* note 36.

sure to decide cases in line with the policy of the superior governmental body.³⁰⁰

Judges' fears are not unfounded, since retaliatory acts by administrative organs have been widespread.³⁰¹ In one incident, a court that applied to the city construction bureau for a permit to construct a four-story office building was approved for only a three-story one because the court had previously quashed an unfair administrative decision made by the construction bureau.³⁰² These various outside influences on judicial decision-making, coupled with restraints on review imposed by the controlling laws, cast doubt on the existence of independent and impartial judicial review in China.

2. Lack of Education and Training

Furthermore, the quality of judges is also questionable since there are no required qualifications for being a judge.³⁰³ Many judges have had no formal legal training and are not familiar with administrative issues.³⁰⁴ Li Daomin, chief judge in Henan province, has complained that "[t]he quality of our judges is just not high enough. . . . Most haven't gone to college. . . . They look at the court like an iron rice bowl. They put their sons and daughters on the payroll and I can't do anything about it."³⁰⁵

This judicial ignorance of the law is also untenable in the Chinese judicial system, which is much more inquisitorial than adversarial.³⁰⁶ Since judges play a more controlling role in a proceeding, their lack of knowledge of the legal issues at hand can disadvantage all parties involved, especially individual litigants.³⁰⁷ Also, while some indices of prior decisions exist, there is no regular system of case reporting or method of researching case law by subject matter.³⁰⁸ Under circum-

³⁰⁰ See Lubman, *supra* note 36. In 1991, Huang Jie, chief of the Administrative Tribunal of the Supreme People's Court in Beijing, acknowledged that "local courts, especially courts at the basic level, are controlled by the local government to a large extent." See Huang Jie on the *Administrative Litigation Law*, CHINESE L. & GOV'T, Fall 1991, Vol. 24, No. 3, at 43, 44.

³⁰¹ See Bing, *supra* note 212, at 17.

³⁰² See *id.* at 17-18 (citing LIAOWANG [Outlook Weekly], No. 13, overseas edition, (Beijing: Mar. 30, 1992), at 4).

³⁰³ See *id.* at 16.

³⁰⁴ See *id.*; Clarke, *supra* note 35, at 58; Lubman, *supra* note 36.

³⁰⁵ See John Pomfret, *China Aides Reveal Wave of Crime and Corruption: In Reports, Judicial System Held Inadequate*, INT'L HERALD TRIB. (Neuilly-sur-Seine, France), Mar. 11, 1999, at 1.

³⁰⁶ See Clarke, *supra* note 35, at 58.

³⁰⁷ See *id.*

³⁰⁸ See *id.* at 58-59 & n.253.

stances such as these, parties and lawyers are unable to predict how judges with little or no knowledge about the matters before them will rule, or to formulate persuasive arguments.³⁰⁹

The lack of legal education of judges is also reflected in written decisions that are inarticulate and unconvincing.³¹⁰ The judgments "tend to be short, imprecise, and full of political and polemical wording."³¹¹

In the face of all these problems, it appears that China is attempting to improve the skills of its judicial officials. In 1994, Zhu Mingshan, vice-president of the Supreme People's Court, announced that the courts would complete pre-post training for 42,000 new members in the next several years, periodically sponsor seminars to introduce and explain new laws, and hold regular training classes for judges.³¹² Later, in early 1998, the Supreme People's Procuratorate and the Supreme People's Court launched a year-long attempt to root out incompetent judges and court personnel.³¹³ As a result, 4,200 "unqualified" judicial workers were dismissed nationwide.³¹⁴ However, Judge Li of Henan does not "think these problems will be solved by one or two campaigns."³¹⁵ Li also doubted the effect of encouraging judges and prosecutors to improve their legal training: "We get some of the officials to study law—we ask them to do it all the time—but we don't know if they learn any lessons."³¹⁶

3. Corruption

Corruption is also widespread in the Chinese judicial system.³¹⁷ Xiao Yang, president of the Supreme People's Court, and Han Zhubin, China's chief prosecutor, "acknowledged that corruption is firmly entrenched among judges and prosecutors" at the annual meeting of the National People's Congress in March, 1999.³¹⁸

³⁰⁹ See *id.* at 59.

³¹⁰ See Bing, *supra* note 212, at 16.

³¹¹ See *id.*

³¹² See Ren Jianxin *Urges Improved Academic Training for Judiciary*, BBC Summary of World Broadcasts, June 13, 1994, available in LEXIS, ASIAPC Library, BBCSWB File [hereinafter *Ren Urges Improved Training*].

³¹³ See Pomfret, *supra* note 37.

³¹⁴ See *id.*

³¹⁵ See Pomfret, *supra* note 305.

³¹⁶ See *id.*

³¹⁷ See Lubman, *supra* note 36; Clarke, *supra* note 35, at 59; Pomfret, *supra* note 37.

³¹⁸ See Pomfret, *supra* note 37.

During the previous year, the Supreme People's Procuratorate and the Supreme People's Court had also instituted a campaign to root out corruption.³¹⁹ The resulting statistics revealed an alarming growth in corruption in the judicial system. In 1997, 1,051 judges and staff members were convicted of abuses of power; the number had more than doubled to 2,512 in 1998.³²⁰ In addition, 1,401 prosecutors and staff members were either disciplined or prosecuted in 1998.³²¹

The case of Li Chunxuan, a retired public bus conductor who sued the Beijing No. 1 Public Bus Company for its refusal to make early retirement payments, illustrates the judicial corruption problem.³²² Li, 48, who suffered from high blood pressure and heart trouble, argued that he should be receiving payments twice as large as the bus company was paying him.³²³ Li has been fighting his case in the courts since 1996 with his appeal dragging on for six months with no conclusion.³²⁴ He blames corruption for his difficulties, claiming that the bus company bribed the lower court judges.³²⁵ As long as such corruption continues, it will be extremely difficult for individuals, especially women, to sue their employers for discriminatory practices.

IV. STRATEGIES TO INCREASE THE SUCCESS OF CHALLENGES TO GENDER DISCRIMINATION IN EMPLOYMENT

Challenging gender discrimination in the workplace involves many intertwined issues, and it will take a long time to change centuries of tradition and belief in China.³²⁶ There will likely never be a Chinese society in which women and men share completely equal status; indeed, formal equality has its own downsides in its failure to protect important women's concerns.³²⁷

³¹⁹ *See id.*

³²⁰ *See id.*

³²¹ *See id.*

³²² *See* Charles Hutzler, *Legal Reform Process Under Question in China*, AAP NEWSFEED, Mar. 2, 1998, available in LEXIS, ASIAPC Library, CURNWS File.

³²³ *See id.*

³²⁴ *See id.*

³²⁵ *See id.*

³²⁶ *See supra* Parts II-III.

³²⁷ *See generally* Cynthia Grant Bowman & Elizabeth M. Schneider, *Feminist Legal Theory, Feminist Law Making, and the Legal Profession*, 67 *FORDHAM L. REV.* 249 (1998) (discussing how formal equality theory allowed women to gain access to the legal profession, but does not address problems such as women's continuing role as primary caretakers of children, women receiving lower salaries than men in similar legal positions, and women being forced to take on the characteristics and lifestyles associated with men in order to succeed as lawyers); Mary Becker, *The Sixties Shift to Formal Equality and the Courts: An Argument for*

The strategies proposed in this section are not intended to provide a simple solution for as complicated a problem as gender discrimination. Rather, they point out specific problems in fighting workplace gender discrimination in society as a whole and in the legal system, and they also suggest methods of easing and perhaps correcting those difficulties. Many of these strategies should be applied in the United States and other countries worldwide, as well as in China, to elevate women's status in society. It is also significant that several of the ideas embodied in these tactics are already elements of law and policy or have been urged by Chinese leaders.³²⁸ However, lack of enforcement and implementation, as well as reluctance to societal change, has resulted in the failure of many well-meaning attempts at improving women's status in China.³²⁹

A. Education

1. Changing Attitudes About the Role of Women

Ideally, education and consciousness raising would change the traditional Chinese perception of the inferiority of women to men, leading to equality of men and women without the need for legal intervention. Realistically, of course, this will not be the case, as we can see here in the United States, where women are continually confronted with gender discrimination in numerous forms and situations despite all of the efforts that have gone into improving the status of women.³³⁰

However, education is still as key to fighting gender discrimination in Chinese society as it is in any other country. Chen Muhua, vice-chairwoman of the National People's Congress (NPC) Standing Committee and president of the ACWF, stressed that it is vital that male officials be made aware that women's problems "are not only the

Pragmatism and Politics, 40 WM. & MARY L. REV. 209 (1998) (discussing the successes and failures of formal equality).

³²⁸ See *supra* Part II.A-C; *Supreme Court President Urges Courts to Uphold Verdicts*, *supra* note 291; *Ren Urges Improved Training*, *supra* note 312.

³²⁹ See *supra* Parts I.C-G, II.A-C.

³³⁰ See generally, e.g., Kate Zernike, *MIT Women Win a Fight Against Bias: In Rare Move, School Admits Discrimination*, BOSTON GLOBE, Mar. 21, 1999, available in 1999 WL 6053541; L.M. Sixel, *Down on Heels: Are High Heels at Work a Kind of Discrimination?*, CHI. TRIB., Jan. 10, 1999, available in 1999 WL 2833620; *Lawsuit Alleges Sex Bias at UC Lab*, SACRAMENTO BEE, Dec. 24, 1998, available in 1998 WL 22566989.

problems of individuals, but of the whole of society."³³¹ HRIC has recommended that the government "encourage the formation of more grassroots initiatives on women's rights."³³² Chen also urged women's organizations and activists to forward their suggestions to the NPC Standing Committee and the AWCF.³³³

The "Program for Chinese Women's Development (1995–2000)," the result of the United Nations Fourth World Conference on Women held in Beijing in 1995, sets out an extensive list of actions that should be taken in China to "guide and enhance the development of Chinese women's undertakings."³³⁴ Of particular importance in fighting employment discrimination are the directives that call for all members of Chinese society to strive to "form civilized habits that respect and protect women" and for women's federations to "improve in representing and safeguarding women's rights and interests."³³⁵ However, as a whole, the program seems to emphasize that women take action to improve their own individual conditions.³³⁶ While this can only help women, it is not enough, because there are still so many other structural and societal barriers to improving women's opportunities.³³⁷ Deeply embedded stereotypes about women's work and intellectual abilities and role in society must also change.

2. Improving Women's Educational Opportunities

Traditional Chinese attitudes about the value of educating daughters must also change to reflect the same importance as that placed on educating sons.³³⁸ The argument that it is too expensive to educate girls when there is a lack of job opportunities³³⁹ is circular; if women were better educated, they would be more competitive with men. If women were regarded as having greater potential than simply serving as the producers of children, preferably sons, and caretakers

³³¹ See *China: Survey: Women's Status Rising, Problems Still Remain*, in FBIS Daily Report: China, June 13, 1997, available in *World News Connection*, <<http://wnc.fedworld.gov>> (visited May 17, 2000) [hereinafter *Problems Still Remain*].

³³² HRIC, *supra* note 1, at 306.

³³³ See *Problems Still Remain*, *supra* note 331.

³³⁴ See *Call for Action to Build on Success for Women's Conference*, BBC Summary of World Broadcasts, Sept. 19, 1995, available in LEXIS, ASIAPC Library, BBCSWB File.

³³⁵ See *id.*

³³⁶ See generally *id.*

³³⁷ See *supra* Parts I.C–G, II.A–C.

³³⁸ See Jordan, *supra* note 4, at 69.

³³⁹ See Riley, *supra* note 87.

of the household, the broader value of educating daughters would be more readily apparent.

B. *The Constitution and Statutory Law*

1. Awareness of Laws

While increasing numbers of plaintiffs have challenged administrative organs' actions under the ALL,³⁴⁰ there seem to be fairly few filings of workplace gender discrimination claims.³⁴¹ The only cases directly addressing gender discrimination are the earlier retirement age cases which have been based on illegal actions of SOEs that illegally attempted to force women into early retirement.³⁴² If the Labor Protection Regulations, the Labor Law, and the LPWRI were better publicized and explained, more awareness of women's rights and gender discrimination challenges would result. Increased awareness can also lead to citizens questioning the government about inadequacies of laws that are ineffective in practice. However, the problem of lack of enforcement mechanisms under the LPWRI remains.³⁴³

2. Enforcement Mechanisms

Since the LPWRI does not establish any new private cause of action, any suit to protect a woman's rights must be based on another law.³⁴⁴ If the Chinese government sincerely wishes to take positive steps in protecting women's rights, a new private cause of action for violations of the LPWRI should be built into the law.³⁴⁵ Otherwise, without a basis in other law, a woman who feels that rights protected by the LPWRI have been violated has no real course of challenging the actions besides complaining to the relevant administrative agency or to the ACWF, which often proves futile.³⁴⁶

³⁴⁰ See discussion *supra* Part II.D.3.

³⁴¹ See discussion *supra* Part I.F.1.

³⁴² See *id.*

³⁴³ See Hecht, *supra* note 183.

³⁴⁴ See *id.*

³⁴⁵ See Hecht, *supra* note 183; HRIC, *supra* note 1, at 304.

³⁴⁶ See Hecht, *supra* note 183.

3. Contingency of Rights

While the government touts its Labor Protection Regulations as important strides in protecting female employees,³⁴⁷ all of this “protection” can be denied if the work unit decides that the woman involved has violated its family planning regulations.³⁴⁸ This is especially troubling because the family planning policy is widely viewed as a human rights violation outside of China.³⁴⁹ Piling a denial of employment rights on top of a human rights violation should be viewed as intolerable, but it is likely often used as an excuse to deny the rights of or to punish female workers.

Even assuming there is no human rights violation in the family planning policy, more consideration should be given to extenuating circumstances. In Sun Lili’s case, she was in danger of not being able to have any more children if she had another abortion.³⁵⁰ She and her husband had been using contraceptives, but the method had failed.³⁵¹ Most significantly, this was her first child, which is allowed by the national family planning policy.³⁵² The bare fact that she had failed to get permission for the pregnancy resulted in Sun’s dismissal, denial of health care benefits, and a fine equal to one-third of her yearly salary.³⁵³ This should seem entirely unreasonable to the average person, but since it is not explicitly illegal, the decision has stood.³⁵⁴

Women also disproportionately bear the punishment of violating the family planning regulations.³⁵⁵ Women are forced to get abortions, be sterilized, and use contraceptives, as well as be denied benefits, fired, and fined, while the men who impregnated them are not affected.³⁵⁶ Perhaps if Chinese law also held these men responsible, more attention would be given to the violations of human rights that are inflicted by the family planning policy because of the punitive effect on men.

³⁴⁷ See 1996 Human Rights White Paper, *supra* note 1.

³⁴⁸ See Labor Protection Regulations, art. 15 *supra* note 27, at 43.

³⁴⁹ See U.S. State Dep’t Report, *supra* note 4; HRIC, *supra* note 1, at 285–86. See generally Sharon K. Hom, *Female Infanticide in China: The Human Rights Specter and Thoughts Towards (An)Other Vision*, 23 COLUM. HUM. RTS. L. REV. 249, 263–70 (1991–1992).

³⁵⁰ See Olojede, *supra* note 3.

³⁵¹ See Rosenthal, *supra* note 2.

³⁵² See Olojede, *supra* note 3; Rosenthal, *supra* note 2.

³⁵³ See Olojede, *supra* note 3; Rosenthal, *supra* note 2.

³⁵⁴ See Olojede, *supra* note 3; Rosenthal, *supra* note 2.

³⁵⁵ See HRIC, *supra* note 1, at 286.

³⁵⁶ See *id.*

4. Actionable Constitutional Rights

Since a cause of action cannot be based on a right enumerated in the Constitution, Chinese constitutional rights are more policy than actual enforceable law.³⁵⁷ An article in the *Beijing Review* in 1995 criticized the United States for censuring China for its treatment of women.³⁵⁸ The article first discussed the United States' history of unequal treatment; it then went on to enumerate the many rights granted to women by the Chinese Constitution, basically arguing that the status of women in China is far superior to and better protected than that of American women.³⁵⁹ Because the rights guaranteed by the Chinese Constitution are unenforceable on their own, the article simply functions as another piece of government propaganda. For these rights to be truly liberating for women, the PRC must allow causes of action based on enumerated constitutional guarantees.

5. Gender Bias of Laws

The Labor Protection Regulations and the Labor Law both have provisions that masquerade as special protections for women, but actually perpetuate "[c]enturies of gender stereotyping based upon classifying certain attributes as male, and therefore positive, and other attributes as female, and therefore negative. . . ."³⁶⁰ One expert in Chinese law, Ann D. Jordan, argues that eliminating biases and sexist assumptions in laws should help in dispelling gender stereotypes: "China must be encouraged to create a truly non-sexist equal legal environment in which equality of opportunity and treatment are the norm and discrimination is permitted only when necessary to effectuate equality. . . ."³⁶¹

C. The Legal System

Officials in the Chinese government have acknowledged many of the problems that plague their legal system.³⁶² They have encouraged the leaders of the courts and administrative organs to take steps that

³⁵⁷ See Jordan, *supra* note 4, at 58.

³⁵⁸ See generally *Differing Status of Chinese and American Women*, Xinhua News Agency, Sept. 8, 1995, available in LEXIS, ASIAPC Library, ARCNWS File.

³⁵⁹ See generally *id.*

³⁶⁰ See Jordan, *supra* note 4, at 104.

³⁶¹ See *id.*

³⁶² See, e.g., *Supreme Court President Urges Courts to Uphold Verdicts*, *supra* note 291; Ren, *supra* note 297; Pomfret, *supra* note 305.

should lead to significant improvements in the government.³⁶³ However, some of these steps seem to have fallen short of being commands to the lower-level officials, and many local leaders and judges are content to maintain the status quo that protects their actions and financially rewards them for their illegal or unethical activities.³⁶⁴ The following strategies, if effectively implemented, should aid in reforming the Chinese legal system.

1. Strengthening the Authority of Courts

One major restraint on the authority of the courts is its limited ability to review the decisions of administrative organs.³⁶⁵ For example, the ALL only allows judges to decide the legality of a particular administrative action; its validity or reasonableness is not reviewable.³⁶⁶ A judge must also defer to the administrative organ's own interpretations of its regulations, which will obviously be favorable to the agency.³⁶⁷ To remedy this, the PRC should allow a wider scope of review in particular circumstances, especially in the context of the ALL and similar laws which are intended to correct inappropriate administrative actions.³⁶⁸

Because the administrative and judicial systems are on the same level, courts also often have difficulty in enforcing judgments upon offending administrative organs.³⁶⁹ Whether or not a decision is enforced is often based upon a particular judge's individual power and status.³⁷⁰ The PRC must change this situation and give courts the authority to bind administrative agencies by their decisions.

However, administrative officials probably will not easily accept such action. Therefore, the national government will need to accompany any new national policy with incentives for administrative officials to comply as well as a concentration on cooperation between all levels and departments of the government in developing a fairer and more effective legal system. Supreme People's Court President

³⁶³ See, e.g., *Supreme Court President Urges Courts to Uphold Verdicts*, *supra* note 291; Ren, *supra* note 297; Pomfret, *supra* note 305.

³⁶⁴ See Lubman, *supra* note 36; Pomfret, *supra* note 37.

³⁶⁵ See *supra* Part II.D.2.a.

³⁶⁶ See *id.*

³⁶⁷ See *id.*

³⁶⁸ See ALL, *supra* note 19.

³⁶⁹ See Clarke, *supra* note 35, at 33.

³⁷⁰ See *id.* at 66-67.

Xiao Yang has already asked the various judicial departments to institute these measures:

[C]onstant efforts must be made to institutionalize and standardize the execution of court verdicts. We must tighten coordination with relevant departments through establishing stable coordination mechanisms, do our best to create an external environment that can facilitate the execution of court verdicts. In particular, we must strive to obtain the support and understanding of party committees and governments at all levels. People's courts across the country must intensify their efforts in supervising the execution of court verdicts.³⁷¹

2. Formulation of Policies to Solve Conflicts of Law

The conflict of laws problem in a case like Sun Lili's is complicated because the conflict is between concurrent local governing bodies, the local municipal government and the work unit.³⁷² There is no constitutional or national provision on handling conflicts of law.³⁷³ When conflicts between national and local law arise, they can be reported to the local People's Congress for interpretation, but no final judgment on which law should govern will be issued.³⁷⁴ Therefore, when conflicts arise between local governing entities, and there is not even a hierarchical difference between the two departments, it will be even more difficult to decide which law should govern. Accordingly, the national government should formulate a controlling policy on determining which law should govern at all levels of government to aid judges in deciding such cases.

3. Allowing Judges Independence in Interpreting Regulations

Two major problems complicate independent judicial action: judges must defer to administrative organ interpretation of their own regulations, and there are often outside pressures, such as the local government that pays the salary of the judge or angry defendant administrative officials, that influence judges' decisions beyond the boundaries of the facts of a given case.³⁷⁵ It would be easy to say that

³⁷¹ See *Supreme Court President Urges Courts to Uphold Verdicts*, *supra* note 291.

³⁷² See Rosenthal, *supra* note 2.

³⁷³ See Finder, *supra* note 216, at 25-26; Jie, *supra* note 268.

³⁷⁴ See Finder, *supra* note 216, at 25-26.

³⁷⁵ See Ren, *supra* note 297; Lubman, *supra* note 36; Olojede, *supra* note 3.

the PRC should allow judges to use their own judgment in interpreting administrative regulations, but it likely would be unworkable if ordered as national law; such action would probably function like the many other Chinese laws that frame intents or policies, but are nonetheless unenforceable.³⁷⁶

It is also difficult to deal with the outside pressures on judicial decision-making. Granting tenure to judges may help if a particular judge does not have to worry about being dismissed for an unpopular decision.³⁷⁷ Taking control of payment of salaries and judicial appointments from the local levels of government and turning it over to the provincial or national levels of the court system may also curb this problem.³⁷⁸

The above methods should be carefully implemented to make the judicial process fairer for individual citizens. Any course of action taken at this time should support Supreme People's Court President Xiao Yang in his recommendations to the people's courts: "Judicial departments must actively proceed with their reforms so that there will be institutions that can ensure people's courts' independent, impartial, and unhampered adjudication."³⁷⁹

C. *The Judiciary*

1. Qualifications

The fact that many Chinese judges have little or no legal training seems rather shocking.³⁸⁰ More intensive training of judges began in the mid-1980s and has been moderately successful in elevating the quality of the judiciary.³⁸¹ In 1994, the Supreme People's Court continued to stress "the need to step up efforts" to improve academic training.³⁸² Five years later, Chief Judge Li of Henan still bemoaned the lack of education that plagues the judiciary, and the fact that 4,200 "unqualified" judicial workers recently had been dismissed.³⁸³

³⁷⁶ See Jordan, *supra* note 4, at 58 (arguing that the Constitution provides only a "theoretical possibility of a right" and one must look to individual laws for actual effective government policy); Hecht, *supra* note 183 (arguing that the LPWRI does not provide any enforcement mechanisms).

³⁷⁷ See Bing, *supra* note 212, at 18.

³⁷⁸ See Bing, *supra* note 212, at 17; Lubman, *supra* note 36.

³⁷⁹ See Supreme Court President Urges Courts to Uphold Verdicts, *supra* note 291.

³⁸⁰ See discussion *supra* Part III.C.2.

³⁸¹ See Bing, *supra* note 212, at 16; Ren Urges Improved Training, *supra* note 312.

³⁸² See Ren Urges Improved Training, *supra* note 312.

³⁸³ See Pomfret, *supra* note 37.

While the Chinese judiciary is taking positive steps to acknowledge the inadequacies of some of its judges and to urge increased training,³⁸⁴ more drastic measures should be taken to further improve the quality of judges. Required qualifications, such as a law degree and substantial post-schooling experience, should be formulated. Incumbent judges who do not meet these qualifications should be required to participate in legal training courses and seminars. However, as Chief Judge Li complained, judges who feel that they should not have to study law cannot be forced to learn any lessons even if they are required to attend training sessions.³⁸⁵ Therefore, it may take the eventual retirement of such judges and replacement with fully qualified candidates to attain a high quality Chinese judiciary.

2. Corruption

As corruption grows in the Chinese judiciary, the Supreme People's Court needs to continue its efforts in exposing corruption.³⁸⁶ Also, a greater sense of moral uprightness and the need for impartial and fair decision-making must be instilled in all judges in an attempt to prevent corrupt actions from occurring in the first place. However, this may be very difficult since corruption is so extensive.³⁸⁷

Given this situation, it is imperative that heavy penalties be imposed on judges convicted of engaging in acts of corruption as a deterrent to other judges. China has also been engaged in an anti-corruption campaign to rid the government of far-reaching corruption.³⁸⁸ This has resulted in numerous convictions with punishments of lengthy prison terms and even death sentences.³⁸⁹ While I do not suggest so drastic a measure as a death sentence for a corruption con-

³⁸⁴ See *Ren Urges Improved Training*, *supra* note 312; Pomfret, *supra* note 37.

³⁸⁵ See Pomfret, *supra* note 305.

³⁸⁶ See Lubman, *supra* note 36; Pomfret, *supra* note 37.

³⁸⁷ See Clarke, *supra* note 35, at 59; Hutzler, *supra* note 322; Lubman, *supra* note 36; Pomfret, *supra* note 37.

³⁸⁸ See generally *Former Senior Hainan Official Receives Five-Year Sentence for Bribery*, BBC Summary of World Broadcasts, June 10, 1997, available in LEXIS, ASIAPC Library, BBCSWB File [hereinafter *Official Receives Five-Year Sentence*]; Peter Lim, *China's NPC Delegates Flex Muscles with Call for Clean Government*, Agence France Presse, Mar. 8, 1999, available in LEXIS, ASIAPC Library, CURNWS File; *Legal Journal Details Huge Corruption Cases*, BBC Summary of World Broadcasts, Nov. 27, 1997; available in LEXIS, ASIAPC Library, BBCSWB File [hereinafter *Huge Corruption Cases*].

³⁸⁹ See *Huge Corruption Cases*, *supra* note 388; *Official Receives Five-Year Sentence*, *supra* note 388.

viction, the Chinese government should focus just as much attention on fighting corruption in the judiciary.

3. Female Judges

Better promotion of female role models would lead to an overall improvement of women's status, in terms of having more female opinions involved in shaping Chinese government and society, encouraging women to pursue an education, and demonstrating that women have the ability to lead the country just as well as men. Very few women have attained leadership positions in Chinese government and business, due both to the traditional belief in the inferiority of women and their primary role as household caretakers and to their relative lack of education in comparison to men.³⁹⁰ The Chinese government, press, and women's federations should strive to emphasize the advances and accomplishments of women and profile women who have attained high-level positions. They should also endeavor to portray women who have achieved professional success in a positive light, not as women who have ignored their traditional role as the subservient wife and mother.

Steps have been taken in this direction, especially by the ACWF.³⁹¹ For example, the Supreme People's Court and the ACWF recognized China's "Ten Outstanding Women Judges" in February, 1999.³⁹² One of the judges, Zhu Xiaomei, "was once blamed for 'distrusting the party committee' by overturning a verdict affirmed by a county party chief."³⁹³ Not only does this commendation highlight the important professional achievements of women, but it demonstrates how women judges have the power to influence and challenge the Chinese political system.³⁹⁴ This example can draw more women into higher education, the legal system, and eventually the judiciary.³⁹⁵ In turn, women can gain a more powerful role in elevating the status of women, recognizing instances of gender discrimination, and remedying these injustices in the Chinese workplace.

³⁹⁰ See discussion *supra* Part I.C.

³⁹¹ See *China Commends 10 Women Judges*, Xinhua News Agency, Feb. 25, 1999, available in LEXIS, ASIAPC Library, CURNWS File.

³⁹² See *id.*

³⁹³ See *id.*

³⁹⁴ See *id.*

³⁹⁵ Only 2,800 of the 180,000 elected judges in China are women. See *id.*

D. *Costs Associated with Employing Women*

The Labor Law and the Labor Protection Regulations, which were intended to protect women in the employment sphere, have caused many employers to prefer hiring men over women because of the costs associated with providing women with maternity leave, break periods, special work schedules, and the like.³⁹⁶ Some cities or other administrative units have created insurance systems to cover pregnancy.³⁹⁷ While narrow-minded employers still will be frustrated with making other accommodations for women, these insurance programs can at least soften the financial blow of the Labor Law and the Labor Protection Regulations requirements. Another method of dealing with this problem is to impose a flat tax on all employees, male and female, which not only financially provides for pregnancy, but also acknowledges the responsibility of both women and men to support the country's children.³⁹⁸

CONCLUSION

In some ways, it seems hypocritical to criticize China for its gender discrimination in the sphere of unemployment while similar unfair practices against women continue in the United States.³⁹⁹ However, the fact that the discrimination in China is openly tolerated by the government and even sanctioned by law without adequate opportunity to challenge the actions makes the Chinese situation much more unjust and intolerable.

It is important to realize that the traditional Chinese conception of "human rights," the elevation of the importance of society as a whole over the rights of the individual, differs from that of the Western belief in the existence of certain inalienable rights of the individual.⁴⁰⁰ As a result, the goal of gender equality has been subordinated to "greater" national interests in class equality and economic development.⁴⁰¹ For example, Chinese women were called to join the workforce during the Cultural Revolution of the 1960s and early

³⁹⁶ See HRIC, *supra* note 1, at 303; Palmer, *supra* note 168, at 453.

³⁹⁷ See HRIC, *supra* note 1, at 304.

³⁹⁸ See *id.* at 304.

³⁹⁹ See generally Zernike, *supra* note 330; Sixel, *supra* note 330; *Lawsuit Alleges Sex Bias at UC Lab*, *supra* note 330.

⁴⁰⁰ See RONALD C. KEITH, CHINA'S STRUGGLE FOR THE RULE OF LAW 55 (1994). See generally Andrew J. Nathan, *Sources of Chinese Rights Thinking*, in HUMAN RIGHTS IN CONTEMPORARY CHINA 125, 135-54 (R. Randle Edwards et al. eds., 1986).

⁴⁰¹ See Woo, *supra* note 31, at 161.

1970s to meet a demand for labor that men could not satisfy.⁴⁰² However, since economic reforms were declared by the PRC in 1979, women have been urged to return to the home to allow men to take the decreased number of available jobs.⁴⁰³ Accordingly, gender discrimination has been allowed to persist with little challenge or protest.

However, economic reforms and greater influence of Western ideas about the rights of women have recently led a new generation of Chinese to seek out justice through social reform and legal redress.⁴⁰⁴ Younger Chinese citizens are becoming less dependent on the government than their parents were, and they are therefore more willing to challenge the discriminatory actions and beliefs of employers and the government.⁴⁰⁵ Hopefully, this pressure will force the government to meaningfully implement and enforce the strategies discussed above and to instill a stronger sense of morality and responsibility on the citizenry and its officials. While this social and legal change will require much time, effort, and conflict, and it is likely that gender discrimination in the workplace will never be eradicated, the situation of female employees in China can be significantly improved. Sun Lili's case should play a vital role in this transformation, since her challenge has internationally publicized the injustice of employment discrimination, the family planning policy, and obstacles to redress within the legal system of China.⁴⁰⁶

⁴⁰² *See id.*

⁴⁰³ *See id.*

⁴⁰⁴ *See supra* text accompanying notes 233–40.

⁴⁰⁵ *See id.*

⁴⁰⁶ *See supra* text accompanying notes 7–24.

