

CHINA'S EMPLOYMENT LAWS AND THEIR IMPACT ON WOMEN WORKING IN CHINA

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INTRODUCTION

Since before and after the establishment of the People's Republic of China in 1949, Chinese women have been discriminated against, despite the emphasis on women's equality fostered by Mao Zedong during the reform era from 1949 to 1976. Mao fostered this equality by encouraging women to work. The 1954 Constitution of the People's Republic of China gave women "equal rights with men in all areas of political, economical, (sic) cultural, social, and domestic life."¹ Women's equality was further reinforced in the 1982 Constitution of the People's Republic of China and by the promulgation of many Chinese laws and regulations protecting women's rights.² During Deng Xiaoping's era of market reform economy, which started in 1979 with the opening up of China by the legalization of foreign joint ventures,³ many women in China became entrepreneurs and professionals.⁴ Even though these economic market reforms enabled more

¹ Constitution of the People's Republic of China of 1954, at art. 91.

² Constitution of the People's Republic of China of 1982, at arts. 33 and 48 ("All citizens are equal before the law and women enjoy equal rights with men.")

³ The Law of the People's Republic of China Concerning Wholly Foreign-Owned Ventures of 1986, *reprinted in* 2 CHINA L. FOR. BUS. [hereinafter "China Joint Venture Law"]; *see* China Publications Centre, CHINA'S FOREIGN ECONOMIC LEGISLATION (Vol. 1, 1982, Vol. 2 1986; Vol. 3, 1988) (providing translations of all laws of the PRC cited herein); *see also* Susan Tiefenbrun, *Joint Ventures in the USSR, Eastern Europe and the People's Republic of China as of December 1989*, 21, 4 NYU J. INT'L L. & POLITICS 667-794 (1989) (discussing the differences between the joint venture laws of the USSR, Eastern Europe, and China).

⁴ *See generally* GAIL HERSHATTER, WOMEN IN CHINA'S LONG TWENTIETH CENTURY 64-78 (2007); *see also* Jamie Burnett, *Women's Employment Rights in China: Creating*

women to work in China, the reforms and the subsequent enactment of protective employment discrimination laws, which have been poorly enforced, actually caused women to lose their jobs more quickly than men and to move women farther away from the equality promised by the Constitution, especially in the area of labor.

Women's discrimination in the labor force in China mirrors gender-based labor inequality in the world. In 1980, the United Nations estimated that although women did two-thirds of the world's work, they earned only one-tenth of the world's income, and women owned only one-hundredth of the world's property.⁵ In a more recent study, it was reported that "women all over the world are paid 15 to 50% less than men working the same jobs, and both societal and biological-based explanations have been used to justify this disparity."⁶ According to Susan Bisom-Rapp and Malcolm Sargeant, two prominent labor law scholars, "Women experience cumulative disadvantages in their working lives. They work more frequently in low-paid, part-time, or informal economy jobs. Their work lives are more likely to be interrupted by breaks necessitated by pregnancy, childbirth, or caregiving"⁷ for children and elder parents.⁸ In China, women's role as caregivers for the children in their own family as well as for the parents of their husband's family is firmly planted in Chinese tradition. This caregiving role creates tension and stress for the modern Chinese woman who wants and needs to work to meet the cost of living for her family but who also wants to be a good mother by tending to the everyday needs of her children.

Bisom-Rapp and Sargeant explain that working women have poorer outcomes than working men because of gender-based factors that include limited education and training for women, stereotyping of women, multiple discrimination against women, identification of women's primary role as caregiver, and women's limited choice of careers.⁹ A second set of factors that explain why women do not fare as well in the workplace as men is due to incremental disadvantages such as the "glass ceiling" and pay inequality, occupational segregation, non-standard working options such as part-time work or temporary work, career breaks (to care for children), and limited retirement and pensions (due to lower salaries and more career breaks). This paper will discuss how these same factors apply to women working in China.

Harmony for Women in the Workforce, 17 INDIANA J. GLOBAL LEGAL STUDIES 289 [hereinafter "Burnett"].

⁵ Burnett, *supra* note 4, at 53 (citing Kenneth G. Dau-Schmidt), 290, note 3.

⁶ *Id.* at 290.

⁷ SUSAN BISOM-RAPP & MALCOLM SARGEANT, LIFETIME DISADVANTAGE, DISCRIMINATION AND THE GENDERED WORKFORCE 3 (2016).

⁸ *See generally, id.*

⁹ *Id.* at 8.

Women in China are presumed less capable physically and mentally than men, and men are believed to have greater need of earned income because they are expected to be the primary providers of the family.¹⁰ Before Mao, woman's workplace was limited exclusively to the home. China joined the international trade market in 1979 with the adoption of a joint venture law,¹¹ and China's role in international trade greatly increased with its entry into the World Trade Organization on December 11, 2001. Now, Chinese women work, but they are concentrated in low-income jobs.¹² In China, as well as in the United States and Europe, society and the law have both impeded and facilitated equality for women in the workplace, but, in China, the role of culture and tradition have provided serious obstacles to the elimination of discrimination against women in the workplace.¹³ The adoption by China of international human rights treaties¹⁴ and international labor-related laws¹⁵ has also influenced gender-discrimination in the workplace in China.

This article will provide background information on the history and development of employment discrimination against women in China since Confucius to the present, the impact of domestic and international laws on gender-based employment discrimination in China, the role that culture and tradition play in fostering discrimination against women in society and in the workplace, and proposals for changes that might aid in the elimination of discrimination against women in the workplace in China.

¹⁰ See Jill Steans, *The Gender Dimension*, in THE GLOBAL TRANSFORMATIONS READER: AN INTRODUCTION TO THE GLOBALIZATION DEBATE 336, 367 (David Held & Anthony McGrew eds., 2003); see also, Burnett, *supra* note 4, at 290.

¹¹ China Joint Venture Law, *supra* note 3.

¹² Steans, *supra* note 10, at 367-68; Ninglan Xue, *Fundamental Labour Rights in China—Legal Implementation and Cultural Logic in Combating Sexual Harassment at Work in China: Legislation, Practice and Context*, 49 IUS GENTIUM 203, 204 (2016) (finding that women in China “often serve at a lower level of all kinds of social organizational structures...women are often treated as those who are led and managed while men are often in higher positions and paid more generously than women. In addition, traditional gender culture views women as subordinate to men.”)

¹³ Burnett, *supra* note 4, at 290.

¹⁴ See *infra* discussion of China's ratification of international human rights treaties, at text included between fns. 132-135.

¹⁵ See *infra* discussion of China's adoption and ratification of international labor laws at text between fns. 132-144.

I. HISTORY AND DEVELOPMENT OF DISCRIMINATION AGAINST WOMEN IN THE WORKPLACE IN CHINA

A. *Confucianism and Woman's Role in China Before 1949*

Confucius was a Chinese teacher, editor, politician, and philosopher who was born in 551 B.C. in the Lu state of China and died in 479 B.C. His teachings, popular aphorisms, and his models of social interaction have dominated Chinese thought and action for centuries. Even today the Communist Party supports the imperial Confucius who believed in obedience to the emperor, hierarchy, and loyalty.¹⁶ Confucius believed that the woman's place was in the home to take care of her husband and to raise sons.¹⁷ Confucius emphasized the need for women to be quiet, obedient, neat, chaste, and hard-working within the home, all of which furthered women's seclusion and isolation in Chinese society.¹⁸ Confucius taught that there is an essential difference between men and women which must be upheld to preserve the cosmic order.¹⁹

Before the Communist Revolution in 1949, during the last and late Qing dynasty from 1644-1911, "a Confucian ethic prevented all but the most destitute of women from working in the public sphere."²⁰ Women were confined to the home to prevent their contact with men who were not part of the family to preserve the virtue of daughters and wives.²¹ Laboring outside the home was associated with poverty and lack of virtue.²² Any woman who worked outside the home and ventured out into the public to earn paid employment was either a prostitute or an entertainer, both of which forms of employment were considered indecent and immoral until the early twentieth century.²³

Women's inferiority is deeply ingrained in the Chinese culture and is reflected in the *Five Classics*, a canonical literary text ascribed to

¹⁶ Simon Worrall, *Why is Confucius Still Relevant Today? His Sound Bites Hold Up*, NAT'L GEOGRAPHIC (March 25, 2015), <http://news.nationalgeographic.com/2015/03/150325-confucius-china-asia-philosophy-communist-party-ngbooktalk/>.

¹⁷ Yong-Qing Fang, *Women's Development in Hebei Province, PRC*, in *THE EMPLOYMENT OF WOMEN IN CHINESE CULTURES: HOLDING UP HALF THE SKY* 157, 163 (Cherlyn S. Granrose, ed., 2005).

¹⁸ LIN YUTANG, *MY COUNTRY AND MY PEOPLE* 153 (1935).

¹⁹ Richard W. Guisso, *Thunder Over the Lake: The Five Classics and the Perception of Women in Early China*, in *WOMEN IN CHINA: CURRENT DIRECTIONS IN HISTORICAL SCHOLARSHIP* 48 (Richard W. Guisso & Stanley Johannesen eds., 1981).

²⁰ Eileen Otis, *MARKETS AND BODIES: WOMEN, SERVICE WORK, AND THE MAKING OF INEQUALITY IN CHINA* 37 (2012).

²¹ *Id.*

²² *Id.*

²³ *Id.*

Confucius.²⁴ The Confucian view of woman is clearly stated in that text: “The female was inferior by nature, (sic) she was dark as the moon and changeable as water, jealous, narrow-minded and insinuating. She was indiscreet, unintelligent, and dominated by emotion. Her beauty was a snare for the unwary male, the ruination of states.”²⁵ Confucius believed that women are inferior to men because of their temperamental personalities and limited intellectual abilities.²⁶ For centuries, Chinese women’s feet were bound for aesthetic reasons that also rendered them crippled and dependent on men.²⁷ Practices such as foot binding, polygamy, and patrilineal wealth distribution, as well as bigotry and stereotypes reflected in the much heard slogan “an incapable man is better than a capable woman” permeated Chinese society and prevented women from joining the workforce for centuries.²⁸

By the 1920s, the influence of Confucianism on social institutions began to erode, due to British imperialism in the nineteenth century and Japanese colonialism in the twentieth century.²⁹ In the 1920s, rural women poured into Shanghai to take up employment in the modern textile industry, and in 1929 these women made up 76 percent of the labor force in the Shanghai mills.³⁰ But these women faced public scorn for defying traditional gender boundaries, and they had to contend with violent harassment by overseers and local gangs.³¹ A small minority of women started to take employment in “service work” as waitresses in teahouses. The teahouse women workers still faced ridicule and the public perception that they were indecent. Women formed a union of teahouse workers that established elaborate codes of conduct requiring austerity of their appearance and banning women from wearing makeup, having permanented hair, or flirting with guests at the teahouse.³² Still, the majority of Chinese women remained confined to the interior of the household and relatively secluded from society.

The Confucian ideologies that prescribed women’s household seclusion

²⁴ See Juliet Y. Mun, *The Impact of Confucianism on Gender Inequality in Asia*, 16 *GEO. J. GENDER & L.* 633 (Summer 2015) (an in-depth discussion of Confucianism and its impact on women).

²⁵ See Susan Tiefenbrun & Christie J. Edwards, *Gendercide and the Cultural Context of Sex Trafficking in China*, 32, 3 *FORDHAM INT’L L.J.* 731, 735 (Feb. 2009); see also Guisso, *supra* note 19, at 59.

²⁶ LIN YUTANG, *MY COUNTRY AND MY PEOPLE* 154 (1935).

²⁷ Tiefenbrun & Christie, *supra* note 25, at 773.

²⁸ Burnett, *supra* note 4, at 292-293.

²⁹ Otis, *supra* note 20, at 37.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 37-38.

were criticized by urban male intellectuals who were committed to China's modernization.³³ They blamed China's Confucian order for the country's weakness in the face of Western and Japanese imperialist domination, arguing that confining women to the household and depriving them of education fundamentally weakened the Chinese nation.³⁴ Many of the reforms advocated by these intellectuals in the 1920s were adopted by the Chinese Communist Party (hereinafter the "CCP") under Mao after 1949. Mao's encouragement of equality between men and women should have caused a radical change in the general perception of women in China, and Mao tried to make that change happen. In fact, the Peoples' Republic of China (PRC) invented a new slogan for women after 1949. They were called "iron women" and "the first female," meaning they were the first women to work outside the home in jobs typically reserved for men, such as welding, tractor driving, and streetcar driving.

The 1911 Revolution and the establishment of the Nationalist government provided women with an opportunity to change many of the traditional Confucian practices that discriminated against women.³⁵ While the Nationalists never made gender equality a priority, they did make some reforms that benefited women, such as outlawing foot binding, promoting universal education, and discouraging polygamy.³⁶ Women soon began to pursue higher levels of education, and they left the home to work in factories or even to undertake professional work.³⁷ But, there were few jobs considered suitable for women, and women received significantly lower pay than did their male counterparts. Moreover, women working outside the home faced societal disapproval and were considered to be little better than prostitutes.³⁸ During this time, women made up approximately seven and a half percent of the workforce in China.³⁹

Women also deal with the reality that male children are preferred in China. According to James Z. Lee & Wang Feng:

In Chinese culture, girls typically marry into the husband's family, leave home, and take care of their husband's parents. China's feudal tradition continuously subjected women to subordination by their father, husband, and even their son due to

³³ *Id.* at 38.

³⁴ *Id.*

³⁵ HERSHATTER, *supra* note 4, at 52-59 (discussing women's work in the reform era).

³⁶ Anna M. Han, *Holding Up More Than Half the Sky: Marketization and the Status of Women in China*, 11 J. CONTEMP. LEGAL ISSUES 791, 796 (2000).

³⁷ *Id.*

³⁸ Christine M. Bulger, *Fighting Gender Discrimination in the Chinese Workplace*, 20 B.C. THIRD WORLD L.J. 345, 350 (2000).

³⁹ *Id.*

a patriarchal and patrilineal system. . . Only the first male born traditionally inherits the parents' fortune. Only boys can continue the patrilineal family line. A strong preference for sons in China has existed since the second and third millennia B.C. This male-child preference, reinforced by Confucius, can be traced back to the custom of ancestor worship which is reflected again in the strong patrilineal system in China that systematically discriminates against daughters.⁴⁰

In rural areas of China, women are still held responsible for the sex of their children, and instances of physical assault, persistent abuse, violent beatings, and even murder have been documented for women who give birth to girls.⁴¹ On the other hand, mothers who give birth to sons receive a higher quality of medical care, better nutrition, and are expected to perform less housework.⁴² Male babies receive better food, finer clothing, and more expensive gifts at traditional ceremonies.⁴³ Girl babies are considered financial burdens because they are unavailable to take care of their own elderly parents who, upon retirement, do not receive enough money from the inadequate social services system in China.⁴⁴ A traditional Chinese saying is: "Daughters are like water that splashes out of the family and cannot be gotten back after marriage." In the southeast of China, daughters are referred to as "goods on which one loses one's capital" since it costs money to raise a daughter, only to hand them over to their husband's family.⁴⁵

B. Woman's Role in China under Mao Zedong from 1949-1976

When Mao Zedong came to power in 1949 and established the Peoples' Republic of China (PRC), he tried to relieve the subjugation of women by giving them the legal right to vote, an education, employment, marriage, and inheritance rights.⁴⁶ The goal of the Chinese Communist Revolution of 1949 was to achieve gender equality by granting equal economic, social, and cultural rights to men and women.⁴⁷ The Chinese Communist Party (CCP)

⁴⁰ JAMES Z. LEE & WANG FENG, *ONE QUARTER OF HUMANITY: MALTHUSIAN MYTHOLOGY AND CHINESE REALITIES, 1700-2000* 47 (1999).

⁴¹ CECELIA NATHANSEN MILWERTZ, *ACCEPTING POPULATION CONTROL: URBAN CHINESE WOMEN AND THE ONE-CHILD FAMILY POLICY* 16 (1997) [hereinafter "Milwertz"].

⁴² See World Health Organization (WHO), WHO Regional Office for the Western Pacific, *Women's Health in a Social Context in the Western Pacific Region* 31-33 (2011) [hereinafter "Women's Health"], www.wpro.who.int, ISBN 978 92 906537.

⁴³ *Id.*

⁴⁴ Tiefenbrun & Christie, *supra* note 25, at 734.

⁴⁵ *Id.* at 774.

⁴⁶ *Id.* at 734.

⁴⁷ VALERIE M. HUDSON & ANDREA M. DEN BOER, *BARE BRANCHES: SECURITY*

ratified its first Constitution in 1954 and declared women to be full citizens.⁴⁸ Article 91 of the Constitution of 1954 gave women “equal rights with men in all areas of political, economical, (sic) cultural, social, and domestic life.”⁴⁹ Mao passed new laws and regulations allowing a woman to obtain a divorce, own property, pursue a formal education, and receive equal pay for equal work.⁵⁰ The CCP considered women’s contribution to the workforce to be an integral part of state development.⁵¹ Mao coined an oft-repeated slogan, “Women hold up half the sky,” and he tried to provide equal access to education and jobs for both men and women.⁵² Mao also coined the slogan “anything a man can do, a woman can do also.”⁵³ These slogans were repeated by the CCP to try to encourage women’s participation in the workforce. Mao tried to give women more domestic rights, marriage rights, and inheritance rights.⁵⁴ Women in China worked in the fields alongside their husband as Mao attempted to expand the work force in China, increase the population, and indirectly provide a sense of equality between men and women. During the periods of the Great Leap Forward (1958-1960) and the Cultural Revolution (1966-1976), Mao encouraged population growth and an unbridled population increase.⁵⁵ Despite the labor reforms achieved under Mao, women were often placed in menial positions and paid far less than a man for similar work.⁵⁶ Mao attempted to undo centuries of belief that women are inferior to men.

The reforms for women’s rights and equality under Mao’s reign did not produce meaningful change for women because of the deep-seated gender discrimination in the Chinese culture and in Chinese society. Parents often considered paying for daughters to receive more than the most basic education to be a waste of resources, which made the legal possibility of women to receive an education irrelevant to many.⁵⁷ Women continued to receive lower wages than men for similar work.⁵⁸ The CCP and the

IMPLICATIONS OF ASIA’S SURPLUS MALE POPULATION 148 (2004).

⁴⁸ Han, *supra* note 36, at 797.

⁴⁹ Chinese Constitution of 1954 *supra* note 1, at art. 91; *see also* Burnett, *supra* note 4, at 293.

⁵⁰ Yongping Jiang, *Employment and Chinese Urban Women Under Two Systems*, in *HOLDING UP HALF THE SKY* 207, 213 (Tao Jie *et al.* eds, 2004).

⁵¹ *See generally*, HERSHATTER, *supra* note 4, at 60.

⁵² Tiefenbrun & Christie, *supra* note 25, at 774-775.

⁵³ HERSHATTER, *supra* note 4, at 61.

⁵⁴ Tiefenbrun & Christie, *supra* note 25, at 775.

⁵⁵ *See* JOHN S. AIRD, *SLAUGHTER OF THE INNOCENTS: COERCIVE BIRTH CONTROL IN CHINA* 20-28 (1990).

⁵⁶ Tiefenbrun & Christie, *supra* note 25, at 775.

⁵⁷ Han, *supra* note 36, at 802.

⁵⁸ Jiang, *supra* note 50, at 213.

government lead by Mao assigned a lower pay scale to women's industries like textiles and collective enterprises.⁵⁹ The policy of "equal pay for equal work" was implemented and effectively managed to provide men and women with similar incomes for similar positions.⁶⁰ But even this policy and implementation did not work to overturn Chinese society's reluctance to consider women equal to men. Pay discrepancies between men and women continued to exist, and men were promoted rather than women who performed as well or better than the men.⁶¹ The CCP also used a system of work points⁶² whereby heavy jobs reserved for men were given more work points, and women received fewer points, even if the women's work was more labor intensive or profitable.⁶³ The work points or wage points system was utilized in Communist China prior to 1956 to measure the jobs performed by Chinese citizens in order to provide compensation for labor. Certain jobs merited more work points, and more work points earned the worker a larger amount of coal, oil, salt, cotton, or other daily staples. Many Chinese women never even saw their wages because the whole household's work points were often given to the head of the household, who was usually the male.⁶⁴

During Mao's reign from 1949-1976, the Communist Party promoted the role of women in the workforce but continued to establish a practice of encouraging women to work only when workers were needed and sending them home before men when the workforce was saturated.⁶⁵ When the government wanted women to work, they provided nurseries, laundries, and other incentives to women so that they would be able to work outside the home.⁶⁶ Regardless of their job outside the home, the woman was still considered responsible for domestic chores and her family's general well-being.⁶⁷ This dual responsibility for women produced tension and stress for working women in China.

During the period of the Great Leap Forward (1958-1960), the Chinese Communist government encouraged women to join the labor force, usually so that they would take the unskilled work and free male workers for skilled

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² See CHARLES HOFFMAN, WORK INCENTIVE PRACTICES AND POLICIES IN THE PEOPLE'S REPUBLIC OF CHINA 1953-1965 18 (1967).

⁶³ HERSHATTER, *supra* note 4, at 63.

⁶⁴ ELLEN R. JUDD, THE CHINESE WOMEN'S MOVEMENT BETWEEN STATE AND MARKET 4 (2002); see also Burnett, *supra* note 4, at 294-295.

⁶⁵ HERSHATTER, *supra* note 4, at 60.

⁶⁶ Burnett, *supra* note 4, at 295.

⁶⁷ Bulger, *supra* note 38, at 350.

projects.⁶⁸ During the Cultural Revolution from 1966 to 1976, the number of working women in China increased, and some women even had leadership positions and jobs that were traditionally held by men.⁶⁹ Art and official communications began to depict women as fighters who worked alongside men. This was an attempt to create a new perception of women that has been referred to as “socialist androgyny.”⁷⁰ Women were praised for their strength and capacity for hard work, and they were discouraged from showing off feminine attributes.⁷¹ It is interesting to note that in modern times, in contrast to the perception of womanhood in the Mao era, the “new service worker” is required to display performances of “femininity and deference.”⁷² Despite the attempt to create a more masculine or androgynous perception of women during the Maoist revolution, gender discrimination remained ingrained in Chinese society, even at the heart of the Cultural Revolution.⁷³ The revolutionary female Red Guards recorded in memoirs the utter shock they felt at the gender discrimination that remained in China despite official discourse and government policy promulgating gender equality.⁷⁴ Basically the Cultural Revolution was a period of economic and social chaos, and whatever reforms were made to promote gender equality in the workplace were lost subsequently in the 1970s and 1980s.⁷⁵

There was then and still is now a great distinction between the Chinese Communist government's treatment of workers in urban and rural areas of China. During Mao's reign, “urban women employees enjoyed pay, benefits, and security of which their rural sisters could only dream.”⁷⁶ Urban employment under Mao was guaranteed, and urban women looked down on housewives for not taking part in the plan for social production, while unemployment in rural areas was simply a part of life.⁷⁷ This disparity between employment conditions for men and women in urban and rural areas of China still exists today.

⁶⁸ HERSHATTER, *supra* note 4, at 60-61.

⁶⁹ JUDD, *supra* note 64, at 4.

⁷⁰ HERSHATTER, *supra* note 4, at 95-96.

⁷¹ *Id.* at 96-97.

⁷² Otis, *supra* note 20, at 6.

⁷³ Burnett, *supra* note 4, at 295.

⁷⁴ HERSHATTER, *supra* note 4, at 95-96.

⁷⁵ Burnett, *supra* note 4, at 296.

⁷⁶ Wang Zheng, *Gender, Employment, and Women's Resistance*, in CHINESE SOCIETY: CHANGE, CONFLICT, AND RESISTANCE 158, 160 (Elizabeth J. Perry & Mark Selden eds., 2d ed. 2003).

⁷⁷ *Id.* at 159 - 160.

C. *Market Reform Economy under Deng Xiaoping from 1978 to 1989 and to the Present*

When Deng Xiaoping came to power almost immediately after Mao's death, he caused significant transformation in Chinese society including positive economic reforms as well as a serious negative setback to women's equality. Deng Xiaoping tried to improve the economy and restore credibility to the Communist Party. He marketized the economy and opened the country to trade with foreign nations. During the period of decentralization, privatization, and economic efficiency in the 1980s, huge numbers of government positions held by women were the first to be cut.⁷⁸ Under Deng Xiaoping, there was a transition from a planned economy under Communism to a free market economy.⁷⁹ Deng Xiaoping also enacted the One-Child Policy in 1979 in order to stem the tide of unbridled population growth under Mao, which allegedly caused poverty, hunger, health problems, housing shortages, transportation problems, illiteracy, lack of education, unemployment, overcrowding, resource depletion, soil erosion, and environmental degradation.⁸⁰ The combination of the One-Child Policy and the male-child preference in China caused a scarcity of women, an increase in forced abortions, sex selection abortions, forced sterilizations, harsh methods to enforce compliance, abandonment of infant girls, infanticide of girl babies, non-registration of children at birth, and a general decrease in the ratio of women to men in China.⁸¹

1. *Mao's Welfare State Reduced after 1979 in the Reform Era*

Deng Xiaoping eliminated the "iron rice bowl," a policy under Mao in which the state compensated both men and women for their work with a salary, medical care, housing, childcare, and even education.⁸² The Deng Xiaoping government also eliminated certain types of job security, such as children's inheritance of their parents' employment.⁸³ During this period competition for jobs was high, and jobs were limited. As before under Mao, it was assumed that women were the weaker, less capable members of society, and, therefore, they should be the ones to return to the home.⁸⁴

⁷⁸ EMILY HONIG & GAIL HERSHATTER, *PERSONAL VOICES: CHINESE WOMEN IN THE 1980S* 250 (1988).

⁷⁹ Tiefenbrun & Christie, *supra* note 25, at 734.

⁸⁰ AIRD, *supra* note 55, at 7.

⁸¹ *See generally* Tiefenbrun & Christie, *supra* note 25.

⁸² Bulger, *supra* note 36, at 351.

⁸³ Ronald C. Brown, *China's Employment Discrimination Laws During Economic Transition*, 19 COLUM. J. ASIAN L. 361, 365 (2006).

⁸⁴ JIEYU LIU, *GENDER AND WORK IN URBAN CHINA: WOMEN WORKERS OF THE UNLUCKY GENERATION* 143-144 (2007).

During Deng Xiaoping's reform era, the Maoist image of strong, heroic women workers was ridiculed as a symbol of backward obstacles to China's modernization.⁸⁵ Women's participation in labor declined by seven percent, and women made up only one third of the non-agricultural workforce.⁸⁶

2. Women's Work Only for Women in the Reform Era

Another result of the reform era under Deng Xiaoping was the limitation in the kinds of jobs available to women. While women during Mao's Cultural Revolution occupied leadership roles and took jobs that were not typical for women, under the market reform era of Deng Xiaoping, women were losing jobs at an alarming rate. Females in leadership positions were forced to transfer or retire and were otherwise marginalized.⁸⁷ Heavy industry jobs were considered too dangerous for women, and people criticized "Maoist disregard for 'natural' sex differences."⁸⁸ The jobs that remained open to women were typical women's work and lower paying jobs in collective industries and fields like catering, textiles, and healthcare.⁸⁹ Generally, "women in the reform era of Deng Xiaoping had less job mobility than men and earned drastically less than men throughout the reform era, and these trends continue today."⁹⁰

3. One-Child Policy of 1979

Family planning was instituted in China after 1979, and it was enforced harshly for any woman who did not obey the One-Child Policy. Family planning policies were reflected in the new Marriage Law of 1981.⁹¹ The Chinese Marriage Law of 1981 requires family planning for all married couples and prescribes age restrictions for marriage.⁹² The sacrifice of having only one child in the Chinese culture was glorified as a manifestation of obedience to duty and an expression of the love of one's country, and those who exceeded the family planning limits were publicly vilified as "irresponsible free-riders."⁹³ The One-Child Policy has now been changed

⁸⁵ *Id.* at 143.

⁸⁶ HERSHATTER, *supra* note 4, at 66.

⁸⁷ JUDD, *supra* note 64, at 4.

⁸⁸ HERSHATTER, *supra* note 4, at 64.

⁸⁹ *Id.* at 66.

⁹⁰ Burnett, *supra* note 4, at 297.

⁹¹ Marriage Law (promulgated by Order No. 9 of the Chairman of the Standing Comm. Nat'l People's Cong., Sept. 10, 1980, effective Jan. 1, 1981, en.pkulaw.cn; *see also* Tiefenbrun & Christie, *supra* note 25, at 757.

⁹² *Id.*

⁹³ *See* Tiefenbrun and Christie, *supra* note 25, at 759.

to a Two-Child Policy, but due to the increase in the cost of living in China, many Chinese families now choose to have only one child. The scarcity of women in China, caused by the One-Child Policy and its draconian enforcement, has caused an increase in forced prostitution, sex trafficking, and the sale of foreign women into China. Millions of women are missing in China because of female child abandonment and infanticide. The One-Child Policy caused women to become a high cost commodity.⁹⁴

Today, women in China have increasingly entered the workforce, but their identity is still strongly tied to their role as a wife and mother.⁹⁵ Women today are expected to maintain the household as well as work outside the home.⁹⁶ Women also consistently receive lower wages than men, and women migrant workers, who make up one third of all migrant workers in China, face difficult working conditions in the labor market such as low wages, wage arrears, lack of written contracts, inadequate social security coverage, lack of access to decent housing and public services, long overtime hours and poor or unsafe working conditions.⁹⁷ In 1996, it was reported that women make up the majority of the workers who are laid off or unemployed and men are commonly preferred for hiring and promotion.⁹⁸ Women also work in more dangerous working conditions, exposed to toxins and accident-prone factories.⁹⁹ Today, women are still subject to exploitation and abuse from employers because of their economic desperation and reportedly submissive nature.¹⁰⁰ Protection for pregnant female migrant workers is usually non-existent and contributes to a high level of gynecological disorders.¹⁰¹ Sexual harassment in the workplace in China is a common phenomenon, and many women report that the degree and frequency of harassment has risen.¹⁰² As discussed later in this paper, few (if any) women file lawsuits in China for sexual harassment or employment discrimination of any kind.

⁹⁴ *Id.* at 780.

⁹⁵ *Id.* at 775.

⁹⁶ HONIG & HERSHATTER, *supra* note 78, at 255.

⁹⁷ See U.N. General Assembly Human Rights Council “Report of the Working Group on the Issue of Discrimination Against Women in Law and in Practice: Mission to China,” Twenty-sixth session, Agenda item 3, at pages 14 -15. (A/HRC/26/39/Add.2) [hereinafter “U.N. Report of 2014”].

⁹⁸ Human Rights in China, *Caught between Tradition and the State: Violations of the Human Rights of Chinese Women*, 17 WOMEN’S RTS. L. REP. 285, 299 (1996) [hereinafter “Caught Between Tradition and the State”].

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 300.

¹⁰¹ *Id.* at 301.

¹⁰² *Id.*

4. Traditional Male-Child Preference Remains but Two-Child Policy Adopted in 2013

In light of the growing scarcity of women in China and the surge in trafficking of baby girls in and out of China as a result of the One-Child Policy and the male-child preference tradition, the Chinese government had to diversify its birth control policy in 2004.¹⁰³ At that time, the Chinese government permitted two children to be born in the rural regions and three in the ethnic regions.¹⁰⁴ China also began a “Girl Care Project” in order to encourage the birth of girls by cracking down on sex-selective abortions, female infanticide, and the abandonment of girl babies by rewarding families that give birth to girls.¹⁰⁵ Preferential treatment in housing, healthcare, and employment was provided to families with only daughters, as well as financial incentives and pensions.¹⁰⁶ Two children were allowed to be born in a family in which both the husband and the wife were themselves only children.¹⁰⁷ As mentioned above, in November 2013, the CCP made the decision to abandon the One-Child Policy and to adopt a Two-Child Policy. Under the new policy, families can have two children if one parent, rather than both parents, is an only child.¹⁰⁸

As the reforms in China continued in the 1990s and the Chinese economy improved, the status and role of women remained stagnant or even declined.¹⁰⁹ Women’s participation in the workforce increased from about thirty percent during the early years of the reform to forty percent in the 1990s, but women’s comparative pay decreased. In 1988, women made fifty-five percent as much money as men, and this figure declined to forty-two percent by 1994.¹¹⁰ While more and more women were finding paid jobs outside of the home, the negative perception of women working

¹⁰³ Eric Buculinao, *NBC: China Begins to Face Sex-Ratio Imbalance*, NBC NEWS (2004), http://www.nbcnews.com/id/5953508/ns/world_news/t/china-grapples-legacy-its-missing-girls/#.WLDCbDvhBPY; Xiaorong Li, *License to Coerce: Violence Against Women, State Responsibility, and Legal Failures in China's Family Planning Program*, 8 YALE J. L. & FEMINISM 145, 157 (1996).

¹⁰⁴ Buculinao, *supra* note 103.

¹⁰⁵ *Id.*

¹⁰⁶ Lesley Stahl, *China: Too Many Men, Lesley Stahl Reports on the Country's Unique Population Problem*, CBS NEWS (April 16, 2006), <http://www.cbsnews.com/stories/2006/04/13/60minutes/main1496589.shtml>.

¹⁰⁷ *Official: Single-Child Parents in China Can Have Second Child*, XINHUA (2007), http://news.xinhuanet.com/english/2007-07/10/content_6356302.htm.

¹⁰⁸ Aileen Clarke, *See How the One-Child Policy Changed China*, NAT'L GEOGRAPHIC, (November 13, 2015) (discussing why China's recently announced end of its one-child policy and adoption of a two-child policy may not resolve the country's demographic issues).

¹⁰⁹ Burnett, *supra* note 4, at 297.

¹¹⁰ HERSHATTER, *supra* note 4, at 66-67.

continued. People in China believed that women were “incapable of being leaders, that women were less competent both physically and mentally, and that males would not respond well to a female boss. . .”¹¹¹ These perceptions kept women out of higher paying technical or managerial positions in China.¹¹²

5. Protective Employment Laws from 1990s - Present

Gender discrimination in China from the 1990s until today is reflected in hiring policies, dismissal, earlier retirement, fines for violation of family planning regulations, wage differences, denial of certain social welfare benefits, and sexual harassment.¹¹³ As hard as it is to believe, many of the protective employment laws and regulations that were passed in China to ensure gender equality in the workplace have the opposite effect. These laws and regulations provide female employees with expensive benefits related to maternity, child care, and basic biological gender differences, making female employees more expensive to employ than male employees.¹¹⁴

Given a choice between a man or a woman, the Chinese employer is apt to hire the man because a male employee ultimately costs less than a female employee. The new employment laws and regulations force women to retire at an earlier age than men, which leaves them with lower pensions. Some work units in China have reportedly denied women’s requests to have children, and employers have forced women to sign contracts stating that they would not become pregnant.¹¹⁵ Some work units have fired female workers, especially migrant workers, for becoming pregnant.¹¹⁶ Studies have shown that 21 percent of rural women working in cities were fired after becoming pregnant or giving birth, and some women have delayed motherhood for fear of losing their job and promotion opportunities.¹¹⁷ Women in China continue to be the primary caregivers who bear this responsibility because the government and even the work units no longer provide for childcare or other benefits.¹¹⁸ According to Charles J. Ogletree & Rangita de Silva-de Alwis, “Chinese labor law thrusts child-bearing and

¹¹¹ Bulger, *supra* note 38, at 355.

¹¹² *Id.*

¹¹³ *Id.* at 298.

¹¹⁴ HERSHATTER, *supra* note 4, at 66.

¹¹⁵ Bulger, *supra* note 38, at 346-48.

¹¹⁶ *Id.*

¹¹⁷ See U.S. Dept. of State, Bureau of Democracy, Human Rights & Lab, 2007 Country Reports on Human Rights Practices (March 11, 2008), <http://www.state.gov/g/drl/rls/hrrpt/2007/100518.htm>.

¹¹⁸ Han, *supra* note 36, at 804.

child-rearing responsibilities entirely upon women.”¹¹⁹

D. *Hukou Residency System of 1958 to Present*

The economic reforms begun under Deng Xiaoping from 1978 to 1989 increased employment discrimination against women and led to a surge of migrant laborers, mostly women, to move from rural areas to cities seeking temporary employment.¹²⁰ Migrant workers face particular discrimination within the Chinese workforce due to the national “*hukou*” or residency system,¹²¹ which bars migration from rural to urban areas.¹²² This system spatially segregates peasants and urbanites, and prevents people living in rural areas from migrating to cities for work.

The *hukou* residency system requires people to work only in their permanent area of residence.¹²³ This system functions to exclude rural migrant workers from urban rights and services and to ban their permanent settlement in cities. Consequently, the *hukou* system creates a big divide between urban laborers who enjoy legal protections and benefits in a formal sector and rural laborers who remain in an informal sector that excludes them from protections and benefits. Women rural workers are particularly impacted by this 1958 household registration system which guarantees urban residents state-subsidized food, health care, education, housing, and pensions, but rural residents (about three-quarters of China’s population) are excluded from these benefits.¹²⁴

In recent years, the *hukou* rule has been altered¹²⁵ to allow some urban workers with steady employment to change residencies.¹²⁶ Currently, rural workers pour into urban centers in search of jobs, creating what is popularly known as a “floating population” of about 14 million people and forty percent of these migrants are women.¹²⁷ Many young rural women want to

¹¹⁹ Charles J. Ogletree & Rangita de Silva-de Alwis, *When Gender Differences Become a Trap: The Impact of China’s Labor Law on Women*, 14 YALE J.L. & FEMINISM 69, 78 (2002); see also Sarah Cook and Xiao-yuan Dong, *Harsh Choices: Chinese Women’s Paid Work and Unpaid Care Responsibilities under Economic Reform*, in DEVELOPMENT AND CHANGE 947-965 (2011) (focusing on the tension in Chinese women’s dual role as caregiver and income earner).

¹²⁰ CHING KWAN LEE, GENDER AND THE SOUTH CHINA MIRACLE 68 (1998).

¹²¹ See Otis, *supra* note 20, at 56.

¹²² *Id.*

¹²³ See Cindy C. Fan, *Migration, Hukou, and the City*, in CHINA URBANIZES: CONSEQUENCES, STRATEGIES, AND POLICIES 65, 67-68 (Shahid Yusuf & Anthony Saich eds., The World Bank 2008).

¹²⁴ Otis, *supra* note 20, at 56.

¹²⁵ *Id.*

¹²⁶ Fan, *supra* note 123, at 67-68.

¹²⁷ Otis, *supra* note 20, at 57.

move to the cities where there is more work and a better economy. Under the temporary residence provision of the household registration system, rural migrants are allowed a renewable one-year residence in cities, but they are barred from permanent settlement, and they have few rights or legal protections in the city.¹²⁸ Migrant workers in rural areas, mostly women, are often paid very low wages (or no wages at all) and are forced to labor under horrible conditions. Entire provinces in China have been known to prohibit the hiring of migrant workers from outside provinces because of the threat they pose to local wages and social order.¹²⁹ Urban women over thirty-five years of age living in cities often have difficulty finding jobs due to the constant supply of young, cheap workers from rural areas.¹³⁰ Recently, the Chinese government has tried to prevent disagreements between migrant workers from rural areas who pose a competitive threat especially to women workers in urban areas.¹³¹

III. THE IMPACT OF INTERNATIONAL LAWS ON WOMEN WORKING IN CHINA

When Mao came to power in 1949, the PRC remained relatively closed off to the international arena because of Mao's distrust of international law. In fact, the United Nations (UN) did not recognize the PRC for twenty-two years. UN recognition of the PRC in 1971 helped China improve its relations with the nations of the Western world, and China began to take part in international conferences and signed international treaties. This exposure to international meetings and international treaties influenced China with respect to its domestic laws concerning labor discrimination against women.¹³² For example, in 1975, China attended the International Women's Assembly, the first international forum on women's development.¹³³ In 1979, China attended the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)¹³⁴ and admitted that the status of

¹²⁸ *Id.*

¹²⁹ DOROTHY J. SOLINGER, *CONTESTING CITIZENSHIP IN URBAN CHINA: PEASANT MIGRANTS, THE STATE, AND THE LOGIC OF THE MARKET* 4 (1999).

¹³⁰ LEE, *supra* note 120, at 169.

¹³¹ See Na Lan, Note, *Is There New Hope in Labor Rights Protection for Chinese Migrant Workers?*, 10 *ASIAN-PACIFIC L. & POLICY J.* 482, 488-489 (2009).

¹³² See Burnett, *supra* note 4, at 300-301.

¹³³ Crystal Roberts, *Far From A Harmonious Society: Employment Discrimination in China*, 52 *SANTA CLARA L. REV.* 1531, 1547 (2012).

¹³⁴ Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180 (Dec. 18, 1979), 1249 U.N.T.S. 12 [hereinafter "CEDAW"], http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=eng.

women's rights in China needed improvement.¹³⁵ China actually signed and ratified the CEDAW treaty,¹³⁶ requiring China to submit annual progress reports to the UN CEDAW Committee on its attempts to eliminate discrimination of women in China.

A. *China and the International Labor Organization Conventions*

China was one of the founding states of the International Labor Organization (ILO) and, in 1944, China became a permanent member of the governing body of the ILO.¹³⁷ In 1990, China signed the ILO Convention for Equal Remuneration for Equal Work¹³⁸ and the ILO Convention Concerning Discrimination in respect of Employment and Occupation (entry into force June 15, 1960.)¹³⁹ China later ratified the ILO Convention Concerning Discrimination in respect of Employment and Occupation in 2006, thereby committing the Chinese government to implement affirmative measures and policies to eliminate employment discrimination.¹⁴⁰ China has signed and ratified international labor laws, but the problem is a failure to enforce these laws. In order to enforce the laws, the ILO "often resorts to public shaming or providing incentives for compliance such as funding or technology."¹⁴¹

B. *China and the UN Human Rights Conventions*

Adherence to UN human rights conventions and their respective optional protocols are important to Chinese labor law in general.¹⁴² As of 2014, China has signed and ratified six of the nine core UN human rights treaties.¹⁴³ These are: the CEDAW (1979), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) (1969), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (1987), the Convention on the Rights of the

¹³⁵ Burnett, *supra* note 4, at 301.

¹³⁶ CEDAW, *supra* note 134; see SUSAN TIEFENBRUN, WOMEN'S INTERNATIONAL AND COMPARATIVE HUMAN RIGHTS, 77-79 (2012) (discussing the importance of CEDAW for the implementation of women's human rights in general and more specifically in China).

¹³⁷ CHEN KE, LABOUR LAW IN CHINA 43 (2011).

¹³⁸ Xun Zeng, *Enforcing Equal Employment Opportunities in China*, 9 U. PA. J. LAB. & EMP. L. 991, 1014 (2007).

¹³⁹ See Brown, *supra* note 83, at 390, note 158.

¹⁴⁰ Roberts, *supra* note 133, at 1547.

¹⁴¹ *Id.*

¹⁴² KE, *supra* note 137, at 43.

¹⁴³ See generally SUSAN TIEFENBRUN, DECODING INTERNATIONAL LAW: SEMIOTICS AND THE HUMANITIES (2010); TIEFENBRUN, *supra* note 136 (discussing the United Nations human rights treaties and their impact on women's rights including labor rights).

Child (CRC) (1990), the International Covenant on Economic, Social, and Cultural Rights (ICESCR) (1976), and the Convention on the Rights of Persons with Disabilities (CRPD) (2008). China signed on to the International Covenant on Civil and Political Rights (ICCPR) on October 5, 1998, but it has not yet ratified it. By merely signing but not ratifying the ICCPR, which includes basic rights of both men and women without distinction of any kind for race, color, sex, language, or religion, China has undertaken the obligation to act in good faith not to defeat the purpose of the ICCPR. In recent years, there has been enormous interest demonstrated in open letters by Chinese citizens to Chinese leaders to ratify the ICCPR. In addition to these six UN human rights treaties, China has also signed and ratified the Convention on the Prevention and Punishment of the Crime of Genocide (1948), the International Convention on the Suppression and Punishment of the Crime of Apartheid (1973), the Convention Relating to the Status of Refugees (UNHCR) (1951), and the Protocol Relating to the Status of Refugees (1951).

The ratification of the ILO Conventions and UN human rights treaties as well as the implementation of domestic employment laws and regulations demonstrates China's earnest commitment to improving women's equality in the labor force.¹⁴⁴ Laws do produce change in society, and China's legal commitment to gender equality in the workplace may help change the long-standing customs, traditions, and stereotypes that have marginalized women in China since the time of Confucius to the present.¹⁴⁵

IV. CHINA'S DOMESTIC LABOR LAWS AND THEIR IMPACT ON WOMEN'S RIGHTS IN THE WORKPLACE

A. *History of Labor Laws in China Before 1949*

During the imperial period of the dynasties before 1949, Chinese workers were considered slaves and they had to struggle to survive.¹⁴⁶ In 1949, Mao Tse-Tung attempted to radically change the horrible condition of Chinese workers and he focused attention on the cruelty and severity of worker oppression.¹⁴⁷ China has done a great deal to enhance the life of men and women workers and to promote their rights and equality in the workforce. But, despite the herculean efforts made since 1949 to advance women's labor rights and to prevent gender-based employment discrimination, this goal will remain a challenge due to the cultural biases

¹⁴⁴ Roberts, *supra* note 133, at 1547.

¹⁴⁵ See Burnett, *supra* note 4, at 302.

¹⁴⁶ See KE, *supra* note 137, at 29.

¹⁴⁷ *Id.*

against women and the negative stereotypes of women that limit their employment potential and advancement in China.

B. Domestic Labor Laws in China from 1949-1954

Before and after the enactment of the 1954 Constitution, China attempted to establish economic, political, and social systems using Stalin's Soviet socialist system. The Chinese legal institutions and philosophy were copied largely from Russia.¹⁴⁸ By 1956, a lifelong employment system was implemented, and all necessary social benefits, including housing, medical insurance, and pensions were provided by the state-owned or collectively-owned enterprises. These basic labor systems and policies founded in the 1950s and styled along old Soviet system lines changed little in the 1960s and 1970s.¹⁴⁹ There were quite a few employment laws passed in the 1950s.¹⁵⁰ During Mao's Great Leap Forward from 1958-1961, Mao attempted to turn Communist ideology into a reality by launching a commune system involving the distribution of food and property according to one's need, but this system produced hunger and national economic crisis until 1966.¹⁵¹ During the Great Cultural Revolution from 1966-1976, there was very little labor legislation enacted.¹⁵²

C. Domestic Labor Legislation in China under Mao from 1949-1976 and under Deng Xiaoping from 1978 to 1995 and to the Present: A Comparison

In post-Mao China, a miraculous balance of two existing contradictory principles has drastically affected labor relations. Mao established a socialist system in imitation of the Stalinist system in Russia. Deng Xiaoping adopted a capitalist principle in 1979 to enhance the Chinese economy through joint ventures.¹⁵³ The capitalist principle seeks to market affordable labor to employers in order to expand both foreign direct investment and exports.¹⁵⁴ But China also retains a socialist principle that runs the political order led by the working class.¹⁵⁵

During the Maoist era, the socialist principle dominated, and in 1956

¹⁴⁸ *Id.* at 31.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 32.

¹⁵² *Id.*

¹⁵³ See Tiefenbrun, *supra* note 3, at 744-745.

¹⁵⁴ Daniel S. Cairns, *New Formalities for Casual Labor: Addressing Unintended Consequences of China's Labor Contract Law*, 24 WASH. INT'L. L.J. 219, 223 (2015).

¹⁵⁵ *Id.*

China virtually abolished labor contracts and put all workers under government control, guaranteeing all workers both work and a salary through a system of welfare known as the “iron rice bowl.”¹⁵⁶ Mao also set up a system of residency registration known as “*hukou*” that provides a right to social insurance, subsidized healthcare, and education to the residents of the locale where they are registered. But these rights are not automatically transferrable when a worker migrates to another area or to the city in search of work.¹⁵⁷

Deng Xiaoping later established a market reform economy and a new “contract” system, but the demand for labor depended on workers’ mobility. The *hukou* system set up under Mao conflicts with that mobility. The resulting combination of capitalist and socialist policies that exists today in China puts workers in a precarious position as unprotected migrants, mostly women, move into cities looking for work. This migration and lack of protection of migrant workers is a result of the extraordinary combination of capitalist and socialist systems in China.

China, then, has a capitalist economic system and a socialist political system, where the responsibility for protecting worker’s rights remains vested in the all-powerful Communist Party that delegates authority among the All-China Federation of Trade Unions (ACTFU) and the Ministry of Human Resources and Social Security (MOHRSS). It is the local governments that are supposed to implement the labor laws.¹⁵⁸ The ACFTU is the bridge and link between the CCP and the workers, and it is an important social pillar of State power.¹⁵⁹ But ACTFU is a union that is primarily an organ of the CCP and only secondarily a representative of workers.¹⁶⁰ MOHRSS is a bureaucratic agency that is directed by the State Council. It was formed in 2008 to supersede the functions of the Ministry of Labor and Social Security and the Ministry of Personnel.¹⁶¹

Under Deng Xiaoping, China dissolved the guaranteed Maoist “iron rice bowl” and its beneficial social welfare system because Deng Xiaoping favored, instead, the use of labor contracts and a market-based development. Deng Xiaoping’s combination of a capitalist market-reform economy and a socialist political system is frequently referred to as socialism with “Chinese characteristics” or the “socialist market economy.” This system initiated rapid development in China, but it also created splits among rural and urban,

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 223.

¹⁵⁸ *Id.* at 224.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 225.

¹⁶¹ *Id.*

migrant and non-migrant, union and non-union laborers.¹⁶²

Today, China focuses its economic development on cities on its East coast such as Shenzhen, Shanghai, and Beijing, with the beneficial establishment of free trade zones¹⁶³ that enhance foreign investment and trade. But China today also continues to enforce the Maoist *hukou* residency permit system, separating economic growth and social reproduction.¹⁶⁴ The dual arrangement of socialism and capitalism depresses wages, inhibits workers bargaining power, and provides cheap labor to employers. This process is referred to as “informalization,” “work precarity,” and “casualization,”¹⁶⁵ which has caused the establishment of widespread “informal” labor practices.

The types of employment that exist in the informal economy in China range from hired workers without formal contracts to those who are misclassified as informal employees, as well as domestic workers, temporary workers, casual workers, community service workers, hourly workers without specified wages, and workers in small enterprises without formalized employment.¹⁶⁶ Women in China are mostly employed in the informal economy. Between 1990 and 2004, informal employment grew by 12.5%.¹⁶⁷ In 2007, MOHRSS predicted that informal employment would become the default form of work in the coming decades. Prior to the enactment of the Labor Contract Law in 2008, the country faced a major scandal when large-scale slave labor practices were discovered in China.¹⁶⁸ But China is not alone in the use of informal labor. The ILO estimates that informal employment, characterized by poor working conditions, poverty, and wage theft, comprises the majority of all non-agricultural work worldwide.¹⁶⁹ Women and migrant workers are especially vulnerable to the hazards of informal employment in China.¹⁷⁰

D. Provisional Regulations from 1978 to Present

Mao's Great Cultural Revolution ended in August 1977, and the social and legal systems in China were gradually restored. The third session of the 11th General Meeting of the Communist Party of China was held in

¹⁶² *Id.* at 226.

¹⁶³ See SUSAN TIEFENBRUN, TAX FREE TRADE ZONES OF THE WORLD AND IN THE UNITED STATES 2, 9, 10, 16 (2012) (relating to the Free Trade Zones in China).

¹⁶⁴ Cairns, *supra* note 154, at 227.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 227-228.

¹⁶⁷ *Id.* at 228.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

December 1978, and the CCP was believed to have made significant economic, social, and legal policy changes.¹⁷¹ In the 1980s, the Chinese government started an experimental reform in the employment systems in state-owned enterprises by using the contract form to recruit new workers. In July 1986, the State Council issued four sets of regulations regarding contract employment: the Provisional Regulations on the Implementation for the Contract System in State-Owned Enterprises; the Provisional Regulation on the Recruitment of Workers by State-Owned Enterprises; the Provisional Regulations on Dismissal of Employees of State-Owned Enterprises in Violation of Discipline; and the Provisional Regulations on Unemployment Insurance for Employees of State-Owned Enterprises.¹⁷² In the 1980s, numerous regulations were adopted with regard to labor discipline, wages, home leave, industry safety, labor inspection, employment service, insurance and welfare and other matters.¹⁷³

1. The 1982 Constitution

Most of the significant provisions regarding labor issues were provided in the 1982 Constitution.¹⁷⁴ The 1982 Constitution also provides the first notable promotion of women's rights in Article 33, which proclaims that "all citizens are "equal before the law."¹⁷⁵ Moreover, the 1982 Constitution provides that "women. . .enjoy equal rights with men in all spheres of life, political, economic, cultural and social, and family life" (Article 48), and the "state protects the rights and interests of women, applies the principle of equal pay for equal work. . .and trains and selects cadres from among women" (Article 48).¹⁷⁶ The Chinese Constitution is not self-executing and is meant to be a guide for legislators to pass national laws in compliance with the Constitution of 1982 and then to implement the national laws.

2. 1988 Labor Protection Regulations

In 1988, the Labor Protection Regulations were passed to implement the women's labor rights set forth in the 1982 Constitution. However, the regulations have many problems because in trying to protect women, they promote stereotypes of women's weakness and focus on the traditional role of the woman as caretaker. The Labor Protection Regulations advocate the creation of health clinics, child care centers, breast feeding rooms, and other

¹⁷¹ KE, *supra* note 137, at 33.

¹⁷² *Id.*

¹⁷³ *Id.* at 34.

¹⁷⁴ Constitution of the People's Republic of China of 1982, at arts. 33 and 48.

¹⁷⁵ *Id.* at art. 33.

¹⁷⁶ *Id.* at art. 48.

services specifically for women, which must be provided presumably by the employer.¹⁷⁷ The regulations also create a variety of restrictions and special provisions only for women based on their specific biological condition. For example, women are banned from underground mining jobs and “high intensity” work; employers are required to provide women with maternity leave for ninety-eight days and child care; women are not permitted to work at high altitudes, in cold water, and at low temperatures while menstruating; employers are not allowed to employ women to perform jobs that “should not be done during pregnancy” or while breast feeding.¹⁷⁸ The 1988 Labor Protection Regulations provide a foundation for future legislation.

3. 1992 Law on the Protection of Rights and Interests of Women

The Law on the Protection of Rights and Interests of Women (LPRIW) was passed in 1992 to implement the policies and protections accorded in the 1988 Labor Protection Regulations and Article 48 of the 1982 Constitution.¹⁷⁹ The LPRIW is in effect today, with only slight modifications. It states that women shall receive equal pay and a number of other protections specifically for women such as prohibiting termination of a contract for reasons of marriage, pregnancy, maternity leave, or lactation. It also demands equal hiring standards for men and women.¹⁸⁰ The LPRIW also implements several provisions of CEDAW, which China signed and ratified in 1979, including allowing affirmative action in certain organizations. The LPWRI sets up a quota for women workers. It states that in “state organs, public organizations, enterprises and institutions...there shall be an appropriate number of women leading members.”¹⁸¹ The law also addresses the All-China Women’s Federation (ACWF), which is a national government-sponsored organization whose primary function is to transmit the Communist Party’s policies to women and to mobilize them to implement those policies. The LPWRI approves the direct involvement of the ACWF in state decision-making processes.¹⁸²

The LPWRI is a much-needed protective law specifically for women. But it reinforces traditional, patriarchal Confucian principles that define a woman’s primary obligation as the caregiver of the family and the one who

¹⁷⁷ See Han, *supra* note 36, at 801; see Burnett, *supra* note 4, at 304.

¹⁷⁸ See Bulger, *supra* note 38, at 361.

¹⁷⁹ Law on the Protection of Rights and Interests of Women (adopted by the National People’s Cong. Apr. 3, 1992, effective Oct. 1, 1992 (amended 2005) (P.R.C.) [hereinafter “LPRIW”], <http://www.nps.gov.cn/englishnpc/Law/200712/12/content...1283859.htm>.

¹⁸⁰ *Id.* at arts. 23, 24, and 26.

¹⁸¹ *Id.* at arts. 10-11.

¹⁸² *Id.* at art 5.

perpetuates the family by wisely raising a male descendent.¹⁸³ Thus, the requirement that employers must supply female employees with paid childcare arguably reinforces woman's role as primary caretaker. These extra protections accorded to women by the employer make it more expensive to hire a woman. The LPWRI also prohibits women from doing certain kinds of work that are "unsuitable for women."¹⁸⁴ But the LPWRI does not define which work is "unsuitable." Thus, employers may discriminate against women if they deem the work to be "unsuitable." Moreover, women must retire at an earlier age than men, even though retirement age discrimination is banned in art. 27 of the 2005 amended Constitution. Moreover, certain provisions for women in the LPWRI are not in compliance with CEDAW.¹⁸⁵ Because of all the mandated protections for women, the LPRIW arguably makes it more difficult for women to get hired in China.¹⁸⁶ Employers ignore anti-discrimination laws and seek to hire employees who will not get pregnant, not demand childcare, and not demand maternity leave.¹⁸⁷ According to Leta Hong Fincher, "Behind the public celebration of gender equality in the Communist workplace, women continue to shoulder the heavy burdens of childcare, housework and cooking at home."¹⁸⁸

4. Labor Law of 1994

On July 5, 1994, the Labor Law of the People's Republic of China (entry into force on January 1, 1995) was adopted by the Eighth Meeting of the Standing Committee of the Eighth National People's Congress of the PRC under Jiang Zemin, President of the PRC, in order to ensure that all laborers have the right to be employed on an equal basis, have a right to organize trade unions, and shall not be discriminated against regardless of their ethnic community, race, sex, or religious belief.¹⁸⁹ The Labor Law of 1994 specifically singles out females in particular in Article 13: "Females shall enjoy equal rights as males in employment. . .except for the types of work or posts that are not suitable for females as stipulated by the State."¹⁹⁰

¹⁸³ Bulger, *supra* note 38, at 348-49.

¹⁸⁴ LPWRI, *supra* note 179, at art. 22.

¹⁸⁵ CEDAW, *supra* note 134, at arts. 5 and 11.

¹⁸⁶ Burnett, *supra* note 4, at 305.

¹⁸⁷ HERSHATTER, *supra* note 4, at 66.

¹⁸⁸ Leta Hong Fincher, *China's Entrenched Gender Gap*, N.Y. TIMES (May 20, 2013), <http://www.nytimes.com/2013/05/21/opinion/global/chinas-entrenched-gender-gap.html>.

¹⁸⁹ Labour Law of the People's Republic of China (promulgated by the Standing Comm. National People's Cong., July 5, 1994, effective January 1, 1995) http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383754.htm.

¹⁹⁰ *Id.* at art. 13.

The Labor Law of 1994 consolidates all previous labor legislation and promulgates a unified law of labor relations on a national level, guaranteeing access to arbitration, litigation and worker's compensation.¹⁹¹ It mandates labor contracts between employers and employees. However, in the context of market reforms and economic restructuring under Deng Xiaoping and later, the Labor Law of 1994 provides inadequate protection. Privatization, layoffs, and unequal treatment of men and women and urban and rural workers have created the "floating worker population."¹⁹²

The Labor Law of 1994 does provide Chinese women with "special protection"¹⁹³ and even more labor protections than they had before. Women have an equal right to employment (except for work "unsuitable for women") and no employer may raise the employment standards for women or refuse to employ a woman on the basis of gender.¹⁹⁴ But the Labor Law of 1994 continues the paternalistic tone of the LPWRI by providing women with additional protections when they are menstruating¹⁹⁵ or pregnant¹⁹⁶ or breast feeding¹⁹⁷ or on maternity leave for no less than ninety days with pay.¹⁹⁸ Maternity leave has been extended from 90 days to 98 days as of April 28, 2012.¹⁹⁹ It is interesting to note that female workers are prohibited from engaging in work down in the pit of mines or work with "Grade IV physical labour (sic) intensity as stipulated by the State, or other work that female workers should avoid."²⁰⁰ These bans for women to engage in certain type of labor are the same for women as for juvenile workers or children.²⁰¹ Chinese women should object to not being able to determine by themselves what jobs they are physically capable of performing. Without specifying the amount of compensation, the Labor Law of 1994 does require employers who violate the employee's rights to compensate the employee.²⁰² This law does not protect applicants who are discriminated against when they apply. It protects workers only once they have been hired.

¹⁹¹ Cairns, *supra* note 154, at 229.

¹⁹² *Id.* at 230.

¹⁹³ Labour Law of the People's Republic of China, arts. 58-65 (Chapter VII Special Protection for Female Staff and Workers and Juvenile Workers).

¹⁹⁴ *Id.* at arts. 12 and 13.

¹⁹⁵ *Id.* at art. 60.

¹⁹⁶ *Id.* at art. 61.

¹⁹⁷ *Id.* at art. 63.

¹⁹⁸ *Id.* at art. 62.

¹⁹⁹ Laney Zhang, *China: Maternity Leave Extended from 90 Days to 98 Days*, GLOBAL LEGAL MONITOR (June 18, 2012).

²⁰⁰ Labor Law of 1994, *supra* note 189, at art. 59.

²⁰¹ *Id.* at art. 64.

²⁰² *Id.* at art. 28.

5. Program for the Development of Chinese Women 1995

After the Beijing Conference in 1995 which was designed to promote women's rights, the Chinese government made efforts to improve women's labor rights on the national level. In 1995, China created the Program for the Development of Chinese Women, focusing on the advancement of laws and the development of administrative sanctions for violations of these laws.²⁰³ The Chinese government also prioritized the promotion and increased hiring of female cadres in politics. Despite the enormous number of opportunities that the Chinese government created for women after 1995, "these changes. . . do not appear to have done exceedingly well, since in 2003 the CCP was only fourteen percent female."²⁰⁴ On the local level, the Chinese government encouraged local governments to pass legislation to advance women's interests. For example, a Hebei Women's Development Program, based on the LPRIW, set goals for women's improvement.

6. Chinese Law of the PRC on Employment Contracts 2008²⁰⁵

The Law of the PRC on Employment Contracts²⁰⁶ (hereinafter "The Labor Contract Law") was enacted in August 30, 2007 and put into effect on January 1, 2008.²⁰⁷ It was amended in 2013.²⁰⁸ This law attempts to eradicate many of the problems facing female workers in China. Despite the passage of the LPRWI and the 1994 Labor Law, employers continued to refuse to hire women or refuse to enter into a contract with them.²⁰⁹ Most

²⁰³ HERSHATTER, *supra* note 4, at 7.

²⁰⁴ Burnett, *supra* note 4, at 308.

²⁰⁵ Law on Promotion of Employment Contracts (promulgated by the Standing Comm. Nat'l People's Cong., June 29, 2007, effective Jan. 1, 2008) [hereinafter Labor Contract Law], www.hsph.harvard.edu; *see also* Lin Yang, Association of Corporate Counsel, "Guidelines on China's New Employment Contracts Law" (2008), m.acc.com.

²⁰⁶ Labor Contract Law, *supra* note 205; *see also* *New Employment Promotion Law in China*, 7 ASIAN HR E-NEWSLETTER 12 (Dec. 3, 2007), <http://www.pacificbridge.com/asiannews.asp?id=339>.

²⁰⁷ *See* Cairns, *supra* note 154, at 219 (discussing how this new Labor Contract Law of 2008 expanded legal protection for workers by mandating that labor contracts be in writing and delivered to all workers, including women).

²⁰⁸ Amendments to the Labor Contract Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 28, 2012, effective July 1, 2013). The Amendments to the Labor Contract Law of 2013 have the following provisions: they define "temporary" positions in Art. 66 of the Labor Contract Law to be six months or less; auxiliary positions are not to be considered core positions; dispatch workers may be employed as substitutes when full-time employees are on leave; and the business is required to replace full-time workers with other full-time workers when possible. Contractual employment is the default form of employment in China, and dispatch labor may only be used to supplement, not replace, a firm's full time workforce. *Id.*

²⁰⁹ Zhiyong Wang, *Women in the Workplace: A Great Leap Backward*, China.org.cn,

women workers in China still do not sign contracts, and if they do, the contract is largely ignored. The Labor Contract Law adds sanctions for employers who do not create written contracts with their employees, do not honor the terms of the contract, or impose excessive probationary periods, etc.²¹⁰ This law basically bans unfair employment contract practices, which is designed to benefit women who have for years been working without a contract.

The Labor Contract Law has four aims: to protect workers and secure their benefits contained in a new legislation,²¹¹ to clarify employer obligations,²¹² to require the employer to provide notice to individual workers of their rights and of the employer's obligations to the employee,²¹³ and to provide better monitoring of labor conditions through the empowerment of local labor officials.²¹⁴

The Labor Contract Law does provide for for-cause termination provisions in contracts for full-time, long-term employees. It requires severance pay for most worker covered by a full-time contract, sets limits on overtime hours, and requires employers to provide written contracts to all employees as of January 1, 2008.²¹⁵ Since women are mostly part-time or short-term workers, these protections do not protect women workers for the most part. The Labor Contract Law requires permanent contracts for workers employed for a specific period of time, which limits the practice of temporary contracts.²¹⁶ The law promotes social insurance coverage for workers and ensures payment of overtime wages.²¹⁷

The purpose of the Labor Contract Law is to formalize the labor economy by restricting probationary periods for workers and by curtailing frivolous firing.²¹⁸ Even though there has been an observable increase in the number of workers benefiting from labor contracts, the majority of workers today remain employed under short-term contracts,²¹⁹ and those workers are primarily women. China's national labor union, the ACFTU, expressed its

(March 22, 2004), <http://www.china.org.cn/english/2004/Mar/90950.htm>.

²¹⁰ See e.g. Labor Contract Law, *supra* note 205, at art. 42(4) (stating, "An employer may not terminate an employment contract...if the worker...is a female employee in her pregnancy, confinement or nursing period").

²¹¹ Labor Contract Law, *supra* note 205, at art. 1.

²¹² *Id.*

²¹³ *Id.* at art. 8.

²¹⁴ *Id.* at art. 5; see also Cairns, *supra* note 154, at 230.

²¹⁵ Labor Contract Law, *supra* note 205, at art. 10; see also Cairns, *supra* note 154, at 230.

²¹⁶ Labor Contract Law, *supra* note 205, at art. 15; see also Cairns, *supra* note 154, at 230.

²¹⁷ Cairns, *supra* note 154, at 230.

²¹⁸ *Id.* at 231.

²¹⁹ *Id.*

public support for the law.²²⁰

However, employers, predicting that the law would effectively raise the cost of employing full-time, long-term workers, sought methods of “creative compliance” with the law, using the loophole in this law for so-called “dispatch workers.”²²¹ Many employers simply chose to not provide labor contracts to workers.²²² Dispatch workers are employed by third-party dispatch service agencies and, thus, they are not covered by employment contracts with the firms where they work. The use of dispatch workers grew in the first five years following the enactment of the Labor Contract Law from a negligible share of China’s labor force into a pervasive phenomenon.²²³ The use of dispatch workers basically has eroded the protections of the Labor Contract Law. In response, the Standing Committee of the National People’s Congress decided to amend the Labor Contract Law effective July 1, 2013 to reduce the scale and purpose of dispatch labor and to regulate more tightly the dispatch industry.²²⁴ In March 2, 2014, the dispatch agencies and standard industry wide practices became licensed, and these new regulations restrict enterprises from hiring more than ten percent of their workers as dispatch workers. But it is not clear whether China’s effort to intervene in employment arrangements through legislation will ameliorate the protection of workers, especially women workers who are used frequently as dispatch workers.²²⁵

7. Employment Promotion Law of 2008²²⁶

The Employment Promotion Law was passed at the 29th session of the Standing Committee of the 10th National People’s Congress on August 30, 2007, and it took effect on January 1, 2008. This law directly affects working women in China. The purpose of the law is to create fair employment conditions and curtail employment discrimination by advancing employment and creating social harmony in China.²²⁷ This law is more comprehensive than the Labor Law of 1994. It specifically prohibits gender discrimination in employment practices and places the obligation of avoiding discriminatory employment practices on the employer.²²⁸ Employers may not restrict female employees from getting married or

²²⁰ *Id.* at 234.

²²¹ *Id.* at 219.

²²² *Id.* at 235.

²²³ *Id.* at 219.

²²⁴ Cairns, *supra* note 154, at 219.

²²⁵ *Id.*

²²⁶ Labor Contract Law, *supra* note 205.

²²⁷ *Id.* at art 1.

²²⁸ *Id.* at art. 12.

bearing a child.²²⁹ To do so would be to give employers too much power. But Chinese working women often need to seek the permission of their employer to become pregnant,²³⁰ and they are sometimes forced to promise that they will not get pregnant for a specified period of time.²³¹ Women giving birth outside of the schedule imposed by the employer may face the withholding of their year-end bonuses.²³² This law specifically states that employers may not include a clause in the employment contract that restricts female employees from getting married or bearing a child.²³³ In the Shanxi Province, a new women's labor rights law was implemented in 2015 to allow menopausal women to ask for work adjustments to better accommodate their condition.²³⁴

The Employment Promotion Law of 2008 has a number of flaws.²³⁵ Most of the articles in this law protect only those women who are seeking employment. It also allows employers to discriminate in hiring for jobs that are "unsuitable for women."²³⁶ This law maintains the patriarchal view that women are weaker than men and must be protected because women are incapable of determining for themselves which jobs they are capable of performing.²³⁷ The ILO criticized this law claiming that the wording of the law could be misinterpreted and could possibly lead to segregated job vacancies, training, guidance and job offers.²³⁸

The Employment Law of 2008 is a positive step toward eliminating gender discrimination in the workplace. The Employment Law of 2008 specifies that the "unsuitable position" for women must be one that has been designated by the state.²³⁹ This is an improvement from prior laws that did not define what was "unsuitable" for women. The Labor Ministry also identifies several jobs that are unsuitable for women in an administrative regulation, which include working in mines, lumbering, the installation and removal of scaffolding and carrying material weighing more than 20 kg and

²²⁹ *Id.* at art. 27.

²³⁰ Felicia Sonmez, *Women Must Get Pregnant 'On Schedule,' Chinese Company Tells Staff*, THE WALL STREET JOURNAL (July 3, 2015), <http://blogs.wsj.com/chinarealtime/2015/07/03/women-must-get-pregnant-on-schedule-chinese-company-tells-staff/>.

²³¹ Ogletree & de Silva-de Alwis, *supra* note 119, at 345-47.

²³² Sonmez, *supra* note 230.

²³³ Employment Promotion Law in China (2008), *supra* note 226, at art. 27.

²³⁴ Vanna Emia, *Shanxi Province to Implement New Women's Labor Rights Law*, LIFE AND CULTURE, Sept. 1, 2015.

²³⁵ Employment Promotion Law in China (2008), *supra* note 226, at arts. 3 and 27.

²³⁶ *Id.* at art. 27.

²³⁷ Burnett, *supra* note 4, at 312.

²³⁸ *Id.*

²³⁹ *Id.*

over six times an hour.²⁴⁰ The prohibition for women working in mines also existed under the Labor Law of 1994.

8. Law on Labor Dispute Mediation and Arbitration of 2008²⁴¹

The goal of this law is to resolve employment dispute in a fair and timely manner, protect the lawful rights and interests of the concerned parties, and promote harmonious and stable employment relationships.²⁴² This law loosens requirements for the mediation and arbitration of employment disputes. It eliminates the filing fee for mediation and arbitration, which helps underpaid women and relieves the financial burden of litigation.²⁴³ One can seek mediation and arbitration one year from the time the party “learnt or ought to have learnt that his/her/its rights were infringed, and allows for a suspension of this statute of limitation for legitimate reasons.”²⁴⁴ If the arbitrator is biased or asks for a bribe, the law provides penalties for the biased arbitrator.²⁴⁵ The case may be transferred to court for enforcement.²⁴⁶ Once the arbitral decision is made, the parties have only fifteen days to appeal it before a final decision is made.²⁴⁷ Thus, employers no longer have a way to tie up the case indefinitely in the court which could cost the complainant extensive legal fees. The employee can contest an unjust arbitration decision, but it must do so within fifteen days after the decision is made.

The most recent Chinese Employment Contract Law of 2008 has created much debate among employers, workers, and lawyers. The reason for this debate is that the new law makes it impossible for employers to avoid contracting with employees. Moreover, employers must provide workers with the means to enforce their own rights using grievance mechanisms. Prior to the enactment of the Employment Contract Law of 2008, another party acting on behalf of the aggrieved worker had to bring the lawsuit against the employer. Attorneys in China now work with

²⁴⁰ See *Law Said to Protect Women from Prejudice*, CHINA DAILY (Oct. 11, 2007), <http://www.china.org.cn/English/government/227580.htm>.

²⁴¹ Hu Jintao (胡锦涛) [Law of the People’s Republic of China on Labor Dispute Mediation and Arbitration] (promulgated by the Standing Comm. 10th Nat’l People’s Cong., Dec. 29, 2007, effective May 1, 2008) Congressional-Executive Commission on China, Jan. 13, 2013 (China), <https://www.cecc.gov/resources/legal-provisions/labor-dispute-mediation-and-arbitration-law-of-the-peoples-republic-of>.

²⁴² *Id.* at arts. 34-44.

²⁴³ *Id.* at art. 1.

²⁴⁴ *Id.* at art. 27.

²⁴⁵ See *id.* at arts. 33-34.

²⁴⁶ *Id.* at art. 44.

²⁴⁷ *Id.* at art. 48.

companies to ensure their compliance with the law. As soon as the law was passed, workers went on strike against a paper company that violated the law.²⁴⁸ It is hard to tell how effective this law will prove to be to eliminate discrimination against women in the workplace. It does show that the Chinese government is quite committed to protecting employment rights. But it does place the power in the hands of the individual employee to protect her own rights against an employer who demonstrates gender discrimination in hiring and on the job.

9. Chinese Employment Law Guide of 2015 Concerning Work for International Students

In February 2016, there was another new change made in labor law for international students who want to work in China. International students who have studied in China may work in China after they have graduated from a school in China. The students should be 18 years or more and in perfect health. They must have professional skills that are beneficial to Chinese industry. Students should not have a criminal record. They must have a clearly defined employer and a passport that is still valid or other relevant travel documents instead of a passport. They must have an alien employment license if they are foreign students or they must get special permission from the Ministry of Human Resources and Social Security in China. If this person wants a job other than an internship, she must get authorization to hold that other job, in accordance with the Employment Law Guide of 2015. People with foreigner employment permits must obtain a work permit from China as well. The foreigners must get an invitation from their employer to obtain a work permit.²⁴⁹

China's labor laws have undergone many transformations in recent years. Employee and employer rights and obligations were outlined in the Labor Law of 1994. In 2008, several changes were made regarding collective bargaining rules. In February 2016, a new change was made whereby international students are permitted to work in China after they have graduated there.²⁵⁰ These new labor laws have also brought China more in line with international standards. In particular, the introduction of the labor contract is aimed at improving job security of workers and opening the term of employment for those who have had completely fixed terms in the past. It also aids women who have accepted jobs without a contract.

²⁴⁸ See Jonathan Adams, *Is China's Labor Law Working?*, NEWSWEEK (Feb. 14, 2008), <http://www.newsweek.com/chinas-labor-law-working-94073>.

²⁴⁹ See Yuri Khlystov, *China Labor Laws: Out with the Old, In with the New*, LAOWAI CAREER (June 21, 2016), <https://www.laowaicareer.com/blog/china-labor-laws-old-new/>.

²⁵⁰ *Id.*

V. REMEDIES FOR EMPLOYEES WHO ARE DISCRIMINATED AGAINST AT WORK

If there is a labor dispute between an employee and employer, the woman employee is probably unable to pay the high costs of litigation and she remains virtually without a remedy.²⁵¹ Few people file discrimination claims in Chinese courts due to conceptual and institutional barriers, even though employment discrimination violations are many, especially towards women.²⁵² The Chinese people find the term “discrimination” strange, and they conceive of “discrimination” as a weakness that brings shame to them.²⁵³ It seems as if admitting being discriminated against is a symbol of being in a low social class.²⁵⁴ There are cultural reasons why Chinese people are reluctant to sue employers who discriminate against them. For one, Confucius was against lawsuits.²⁵⁵ The cost and time-consuming aspect of litigation may also dissuade people from using this as a remedy. Corruption in the legal system is well-known, and Chinese people are not a litigious society. If a woman wants to sue her employer, she has to bring the labor dispute to the Labor Bureau’s Labor Arbitration Commission, pay a small fee, and then wait for an arbitration tribunal to convene. One cannot go before a court in China until mediation and arbitration are concluded. If the complaining party is unhappy with the outcome of the arbitration, it can be appealed to the People’s Courts within fifteen days of the decision,²⁵⁶ thus requiring more legal assistance. A case can have three hearings if a party is unhappy with the decision.²⁵⁷

A. *Customs and Practices That Prevent Women from Defending Their Employment Rights in Chinese Court*

As outlined above, the early laws and regulations defending women’s labor rights were ineffective because the laws were not enforced or even enforceable. Instead, the laws as written reinforce gender-based stereotypes and the extensive protections afforded women act as a disincentive for employers to hire women whom they perceive to be more expensive to hire than men. In China, there is also limited access to legal aid clinics, and attorneys always screen their cases, oftentimes preferring to take men who

²⁵¹ See Labor Law of 1994, *supra* note 189, at arts. 77-84.

²⁵² Jiefeng Lu, *Regulating Employment Discrimination in China: A Discussion from the Socio-legal Perspective*, 23 MICH. J. INT’L L. 437, 437 (2015).

²⁵³ *Id.* at 449.

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 454.

²⁵⁶ Labor Law of 1994, *supra* note 189, at art. 83.

²⁵⁷ See *id.* at art. 91; see Burnett, *supra* note 4, at 307-308.

can pay.²⁵⁸ Women are perceived by many lawyers to be “difficult” clients.²⁵⁹ Chinese women are afraid to litigate because they think it will only make matters worse. There is generally a lack of binding case precedent in China, which makes it difficult for courts to arrive at uniform standards.²⁶⁰ The judiciary in China is not fully independent, and judges prefer not to rule against a government that pays their salaries. Local protectionism is a serious problem in China and makes women who are discriminated against at work reluctant to sue in a local court.

B. Proposals to Eliminate Gender Discrimination in Chinese Employment Practices

Employment discrimination against women in China still continues today despite many laws passed that protect women in the workplace and promote gender equality. The laws are solid, but the enforcement is poor. Precarious work and informalization of the economy are dominant trends that are predicted to continue,²⁶¹ and which particularly affect women workers.

A recent UN Report of the Working Group of the Human Rights Council on the issue of discrimination against women in law and practice,²⁶² written after the UN Mission to China, discusses achievements and challenges to obtain gender equality and human rights for women in China. This UN Report of 2014 welcomes the loosening of the One-Child Policy,²⁶³ but it states that the General Program of the Constitution, calling for ethnic harmonization and equality, lacks equal vigor with respect to gender.²⁶⁴ The Report draws attention to the need for the achievement of gender equality and the empowerment of women, and it points to the risks arising from current demographic and economic trends in China.²⁶⁵ The Report references the National Human Rights Action Plan (2012-2015)(Section III) in which the state guarantees protection of the rights and interests of women and its commitment to promoting gender equality.²⁶⁶ However, the Report notes that the Chinese government is deeply aware that full achievement of the enjoyment of human rights is a work in progress with many

²⁵⁸ See Ethan Michelson, *The Practice of Law as an Obstacle to Justice*, 40 LAW & SOC'Y REV, 1, 15 (2006).

²⁵⁹ *Id.* at 21-22.

²⁶⁰ See Ogletree, *supra* note 119, at 95.

²⁶¹ Cairns, *supra* note 154, at 247.

²⁶² UN Report of 2014, *supra* note 97.

²⁶³ *Id.* at 4.

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 4-5.

challenges.²⁶⁷ The UN Report of 2014 also welcomes China's openness to international law by referencing China's ratification of CEDAW, the ICESCR, the CRC, the CRPD, and ILO Equal Remuneration Convention No. 100 (1951), ILO Convention No. 111 (1958) concerning Discrimination in Respect of Employment and Occupation, and ILO Convention No. 128 (1973) concerning the Minimum Age for Admission to Employment.²⁶⁸ This international legal framework adopted by China provides a solid foundation for continued progress in achieving full enjoyment of women's rights and gender equality in China.²⁶⁹

The UN Report of 2014 references an agenda for reform announced at the third plenary session of the 18th Central Committee of the Communist Party of China in November 2013 and its impact on Chinese women.²⁷⁰ To achieve this reform, China has passed many domestic laws and regulations including its 1982 Constitution. Article 48 of the 1982 Constitution establishes the principle of equality between women and men. The Law on the Protection of the Rights and Interests of Women (LPWRI), as amended in 2005, stipulates that the state has the responsibility to prevent all discrimination against women, and to take measures to gradually improve the system for protecting their rights and interests, and to guarantee their enjoyment of equal rights with men to work and to social security, equal pay for equal work and equal welfare benefits. It also states that women have equal rights to inherit and own land.²⁷¹ The Labor Law of 1994 and the Law on the Promotion of Employment of 2008 provide workers seeking employment freedom from discrimination based on gender. The Labor Contract Law of 2008 states that the formation of a labor contract must be based on the principles of fairness and equality. The Marriage Law, as amended in 2001, states that marriage is to be based on equality between men and women, and the rights of women must be protected.²⁷² The Special Provisions on the Labor Protection of Female Employees of 2012 improve on the special measures for pregnancy and maternity rights for women. In this law, for the first time, the employer has an obligation to prevent sexual harassment of women in the workplace.²⁷³ Sexual harassment is extremely prevalent in Chinese employment, and despite the many laws in place, harassment continues in the workplace.²⁷⁴

²⁶⁷ *Id.* at 5

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.* at 1.

²⁷¹ *Id.* at 5.

²⁷² *Id.* at 5-6.

²⁷³ *Id.* at 6.

²⁷⁴ Roberts, *supra* note 133, at 1541.

The UN Report of 2014 reminds us that the Law of the People's Republic of China on Guarding State Secrets, as amended in 2010, and the regulations on the implementation of this law of 2014, restrict the publication of specific information on women's work and family planning in China. This is tantamount to censorship. Information about women in the workplace should be publicly accessible in order to enable enforcement of the laws affecting gender equality in the workplace.²⁷⁵

To eliminate gender discrimination in the Chinese workplace, one must undo centuries of stereotypes and modify cultural practices that have continuously marginalized women. Eliminating or even reducing gender discrimination in the Chinese workplace is not an easy task. China must enact and then effectively enforce laws that influence society's belief in women's equality. There is inadequate implementation of the many laws enacted in China prohibiting discrimination against women due in part to the vagueness of the laws.²⁷⁶ China now needs to improve its enforcement policies. Laws that are unenforced are no laws at all.

Further, women in China should be encouraged to litigate when their rights have been violated in the workplace. Most women do not litigate employment discrimination cases. In 2014, a Chinese woman brought a gender employment discrimination case in Beijing Court, and she won.²⁷⁷ Women would be more likely to go to court if they were aided by the establishment of free legal aid clinics. This would relieve women of the relatively high cost of litigation and enable them to sue their employer when they are not treated fairly or in accordance with China's employment laws. Legal aid centers have already been set up in China by local government organizations, universities, trade unions, and NGOs.²⁷⁸

There is a serious attempt in China today to reform its legal system, which if accomplished, should ban the custom of bribery, eliminate judicial corruption, require judges to be more professionally trained in specialty areas such as employment law, and invite more women to take part in the judiciary as judges. In addition, more women should be placed in government positions in order to influence policy decisions. The 1982 Constitution, which insists on the legitimacy of gender equality at all levels, needs to be effectively implemented. Affirmative action for women should be instituted and enforced by a quota system. Women and men both need to know what the employment laws are in order to determine whether or not these laws have been violated in the workplace. Therefore, employment

²⁷⁵ UN Report of 2014, *supra* note 97, at 7.

²⁷⁶ *Id* at 6.

²⁷⁷ Julie Makinen, *China's Women Begin to Confront Blatant Workplace Bias*, L.A. TIMES, Feb. 28, 2014.

²⁷⁸ *See* Burnett, *supra* note 4, at 315.

laws in China should be widely publicized. Law schools and legal education centers should be set up and funded by local governments in order to educate the public about employment laws in China. Movies and documentaries should publicize gender equality in the workplace. Yearly conferences, like the famous Beijing Conference of 1995, should be held in China and widely publicized both nationally and internationally in order to inculcate the value of gender equality. The existing employment laws should be amended to eliminate any vague language or language that reflects stereotypes of women or their lack of fitness for serious employment and for high paying jobs. The government should eliminate the difference between men's and women's retirement age. The Chinese government should eliminate the language in employment laws that refers to work that is "unsuitable" for women. China should let women decide for themselves what job they can and cannot fulfill. Employers should not be required to pay high fees for women's maternity leave, health care or child care services. This protectionism works only to further gender discrimination against women, and it encourages employers to hire men who are less expensive to employ than women. If both the mother and the father in China would take time off from work to care for children, this would change the perception that only women can be the primary caregivers. Employment laws in China should provide incentives such as bonuses to employers who rehire female employees who take time off to care for their children.

In 2010, the participation of women in the labor force in China was 64% of the female population aged over 15.²⁷⁹ In 2016, 72% of mothers between the ages of 25 and 34 with children under the age of 6 are now employed in China.²⁸⁰ But women earn on average of 35% less than men for doing similar work. Women earn just over two-thirds (67.3%) of men's income in urban areas, and just over half (56%) of men's income in rural areas.²⁸¹ Moreover, women in blue collar occupations (e.g. factory workers) are often required to retire at age 50, and women in white collar occupations (e.g. professionals, managers) must retire at age 55. College professors can work until age 60. In contrast to the early mandatory age retirement of 50 or 55 for women, the mandatory retirement age for urban employed men is 60.²⁸²

Recently, there have been serious reductions in state provisions of child and elder care services, making it difficult for women to reconcile paid work

²⁷⁹ UN Report of 2014, *supra* note 97, at 8.

²⁸⁰ *Catalyst Quick Take: Women in the Worldforce: China*, CATALYST, <http://www.catalyst.org/knowledge/women-workforce-china> (July 8, 2016) [hereinafter "Catalyst"].

²⁸¹ *Id.*

²⁸² *Id.*

and unpaid care for children, the elderly and the sick which, in China, as elsewhere, is predominantly the responsibility of women.²⁸³ There has been a reemergence of traditional values in China, pressuring women to withdraw from the labor market when they marry and have a child.²⁸⁴ Moreover, the participation of women in political and public life is exceptionally low.²⁸⁵

Women face multiple forms of discrimination in China.²⁸⁶ Stereotypes regarding the roles and responsibilities of women are reflected in family roles, education, occupation, and preference for sons in China.²⁸⁷ According to the Gender Equality White Paper of 2015, more than 72% of women in China had a clear perception of “not being hired or promoted because of gender discrimination.”²⁸⁸ The state media in China encourages these stereotypes by claiming, for example, that there is a “crisis” in China because increasing numbers of educated women cannot find husbands.²⁸⁹ Women who are not married are shunned in China and referred to as “leftover women.”²⁹⁰ Because more women are working now, the phenomenon of late marriage among Chinese professional women is more frequent and accepted. Women are marrying later, with the mean average for women was 25 years old in 2015, compared to 23 years old in 2011.²⁹¹ It has been reported recently that there is a drop-in matrimony which affects economic and social life in China.²⁹² A 2010 study shows that half of the women with a university degree or above are unmarried or divorced.²⁹³ Almost 50% of highly educated women (with post-secondary education) are unmarried, which is 10.1 % higher than the percentage of unmarried and highly educated men.²⁹⁴

Lesbian, bisexual, and transgender women in China are subject to

²⁸³ UN Report of 2014, *supra* note 97, at 8.

²⁸⁴ *Id.*

²⁸⁵ *Id.* at 13.

²⁸⁶ *See generally*, GENDER EQUALITY AND WOMEN'S DEVELOPMENT IN CHINA, THE STATE COUNCIL INFO. OFFICE OF CHINA, (2015) (listing all the advancements made by China to promote women's rights and gender equality in the workplace) [hereinafter “Gender Equality White Paper of 2015”].

²⁸⁷ UN Report of 2014, *supra* note 97, at 15.

²⁸⁸ Yang Hui, *Urban Women's Gender Discrimination Issues in Employment*, <http://www.womenofchina.cn/html/report/144652-1.htm> (Sept. 6, 2012).

²⁸⁹ UN Report of 2014, *supra* note 97, at 15.

²⁹⁰ *Id.*

²⁹¹ Catalyst, *supra* note 280.

²⁹² “Because [women] are highly educated, they hold well-paid jobs, they lose the financial incentive to get married.” Amie Tsang & Zhang Tiantian, *Marriage Falls in China, Transforming Finances and Families*, N.Y. TIMES, Sept. 11, 2016.

²⁹³ Helen Gao, *Why Chinese Women Still Can't Get A Break*, NY TIMES, Oct. 13, 2016.

²⁹⁴ Catalyst, *supra* note 280.

multiple forms of discrimination and violence in the workplace.²⁹⁵ Women in China complain about the sexual harassment they experience on the job. The Sunflower Women Workers Center, a nonprofit in the southern city of Guangzhou, found in a fall survey of female factory employees that 70% of respondents said they had been sexually harassed at work, and that more than 15% had quit their job because of harassment.²⁹⁶

Women in China are vulnerable and subject to sex trafficking and forced labor.²⁹⁷ China is a source, destination, and transit country, and in 2016 China was placed on the Tier 2 Watch List of the U.S. Trafficking in Persons Report for the third consecutive year.²⁹⁸ This means that the government of the PRC does not fully meet the minimum standards for the elimination of trafficking, but the PRC is making significant efforts to do so.²⁹⁹ China has received a waiver from an otherwise required downgrade to Tier 3 because its government has devoted sufficient resources to a written plan that, if implemented, would constitute making significant efforts to meet the minimum standards.³⁰⁰ China is a country that has been on the lowest Tier 3, which is a category designated for countries that do not have a trafficking law and are not making an attempt to solve the problem of human trafficking. Domestic trafficking is “the most significant problem in China,” as reported in the U.S. Department of State TIP Report in 2008.³⁰¹ State-sponsored forced labor continues to be an area of significant concern in China.³⁰² China is a developing nation with the second strongest economy in the world that is respected by nations big and small. This paper argues that China’s medieval beliefs about women’s inferiority must change. China has taken the right step to enact laws promulgating gender equality in society, in the law, and in the workplace. Now, it is up to the women in China to make sure that enforcement of these laws is effectively started and sustained through social pressure. Women in China need to find a respected female spokesperson who can help them to organize and to manifest their grievances effectively about discrimination against women in the workplace. Women must inculcate in their children a respect for the rule of law and for equal rights for women in Chinese society. Without the influence of women in China, this change for equality in the workplace will not take place

²⁹⁵ UN Report of 2014, *supra* note 97, at 16.

²⁹⁶ Makinsen, *supra* note 277.

²⁹⁷ See generally, Susan Tiefenbrun, *Human Trafficking in China*, 6 U. ST. THOMAS L.J. 247 (2008).

²⁹⁸ U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT, <https://www.state.gov/documents/organization/258876.pdf>, 129 (2016) [hereinafter “TIP Report (2016)”].

²⁹⁹ *Id.* at 130.

³⁰⁰ *Id.*

³⁰¹ Tiefenbrun, *supra* note 297, at 249.

³⁰² TIP Report (2016), *supra* note 298, at 130.

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because of the heavy pull from culture and tradition that typically work against the protection and provision of women's human rights.