

# Women's Rights in the People's Republic of China: Patriarchal Wine Poured From a Socialist Bottle

ANN D. JORDAN\*

## INTRODUCTION

The government of the People's Republic of China (the "PRC") and the Chinese Communist Party (the "CCP") are rightfully proud of the improvements to women's lives that have occurred under their leadership. Women's feet are no longer bound, women are no longer legally purchased as slaves and concubines, women's literacy has increased dramatically, and women now participate in practically all spheres of business, industry and government. Nonetheless, there is extensive evidence presented in the Chinese press and scholarly literature that the PRC remains a patriarchal,<sup>1</sup> patrilineal and patrilocal society in which inequality based on sex<sup>2</sup> persists. Equally disturbing are the serious doubts raised by many observers about the government's commitment to the elimination of these problems and to the enforcement of women's rights.<sup>3</sup> They note that the situation of many women is quite

---

\* Lecturer-in-Law, The Chinese University of Hong Kong; Fulbright Professor, People's Republic of China (1990-91); Fulbright Professor, Hong Kong (1989-90); Columbia University School of Law, J.D.; Columbia University School of General Studies, B.A. I would like to thank the United College of The Chinese University of Hong Kong for providing me with funds to carry out this research, my research assistants, Patsy Moy, Shirley Yeung, Ng Po Ling and Chan Mei Yuet for their diligent work, and Michael Davis and Sharon Horn for their comments on earlier drafts.

1. "Patriarchy is the process of differentiating women from men while privileging men. It is the process of transforming (biological) females into women and males into men." Z. Eisenstein, *The Female Body and the Law* 20-21 (1988).

2. The term sex is used rather than gender as sexual characteristics are innate, while gender is culturally defined. Gender roles may be adopted cross-sexually (i.e., transsexual behavior) but even women who adopt male gender roles are not exempt from discriminatory treatment. Thus, women's sex, not their gender role, is the basis upon which the law discriminates against women.

3. See, e.g., Paul D. McKenzie, *China and the Women's Convention: Prospects for the Implementation of an International Norm*, 7 *China L. Rep.* 21, 55 (1991); Maria Hsia Chang, *Women: Human Rights in the People's Republic of China* 250-267 (1988); Tamara Jacka, *Back to the Wok: Women and Employment in Chinese Industry in the 1980s*, 24 *Austr. J. of Chin. Aff.* 1 (1990); Hooper, *China's Modernization: Are Young Women Going to Lose Out?*, 10 *Mod.*

shocking; women are routinely and illegally purchased and sold in open markets, forced into unwanted marriages, and suffer from disproportionately high rates of unemployment and illiteracy.

The Chinese government does not dispute these facts. Instead, it points as evidence of its continued commitment to women's rights to its Constitution,<sup>4</sup> its signing of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (the "Convention")<sup>5</sup>, and to the recent adoption of the Law for the Protection of Women's Rights and Interests ("Women's Protection Law")<sup>6</sup>. In the government's view, the persistent existence of sexual discrimination is due to the lack of implementation and enforcement of the laws, the continued existence of remnants of feudal thinking among the public and the negative influence of nascent capitalism and decadent Western bourgeois thinking.<sup>7</sup>

As women are becoming increasingly marginalized under the current economic reform policies, an important task for formulating any new policies to improve women's status must be, first, to determine the sources of the inequality, the role the government has played in contributing to the situation, and the role it can be called upon to play in reversing the current negative trends. Obviously, corrective action would be vastly different depending upon which of the two interpretations of the causes of women's inferior position outlined above is more accurate. If, on the one hand, internal governmental policies are the source of discrimination against women, then government officials must engage in introspective behavior and search out the sources of their own biases before they will be in a position to eradicate the source of discriminatory policies. If, on the other hand, external forces and lack of cooperation at the local government level are the source, then the role of

---

China 317 (1984).

4. Most Western scholars do not dispute this assertion, partly because they do not look beyond the Constitution and partly because they do not understand the Chinese definition of legal sexual equality. This article will, hopefully, dispel any notion that Chinese women have achieved formal legal equality.

5. Opened for signature, Dec. 18, 1979, 34 U.N. GAOR, Supp. No. 46, at 193, U.N. Doc. A/34/36 (1979) (adopted by the PRC on Sept. 29, 1980) [hereinafter Convention].

6. *Funü Quanyi Baozhangfa* [Law for the Protection of Women's Rights and Interests] (Oct. 1, 1992) [hereinafter Women's Protection Law], reported in *Renmin Ribao* [People's Daily], Apr. 10, 1992, at 3.

7. China's Initial reports of States Parties to the Committee on the Elimination of All Forms of Discrimination Against Women, CEDAW/C/5/Add. 14, May 25, 1983, at 15.

government would be to educate the public and to supervise law enforcement more closely.

A primary question asked in this paper is whether or not (and, if so, how) the laws themselves (and, by extension, governmental policies) contribute to women's inferior status. The methodology employed is to scrutinize numerous laws for sexual bias in the language or in the laws' silence. One goal of this investigation is to develop a theoretical understanding of governmental policy towards women by comparing its commitment to equality in law with its stated theoretical perspective on women's issues. The greater the gap between the law as written and the theory as proclaimed, the greater the probability exists that the government is concerned about upholding another set (or other sets) of values, which values have not been articulated, even amongst the government's policy makers themselves. Another goal of this paper is to expose and recommend areas of the law that are urgently in need of legislative reform.

Part I introduces the Chinese government's expressly-stated policy towards women, which is based upon Engels' theory of women's liberation through labor, and to the Chinese concept of rights, in general. Part I also introduces the hypothesis that implementation of the theory of women's liberation through labor and scope of the laws enacted to promote equal rights is often circumscribed by a policy to protect the patriarchal, patrilocal and patrilineal structure of Chinese society. The male-dominated CCP and PRC government valorize patriarchy, however, only to the extent that doing so does not conflict other more important policy goals. I will argue that the emancipation of women and the protection of women's rights, then, are not championed because the principle of sexual equality is cherished by the political elite; rather, they are encouraged and promoted only when it is convenient, expedient or necessary for the implementation of other goals, such as economic development, mobilization of women behind the CCP, or the destruction of potential threats to CCP control from powerful patriarchal clans.

Part II contains a close textual reading of the language of numerous important Chinese laws relating to women.<sup>8</sup> The content and language

---

8. This paper is not intended to be a comprehensive survey of all laws affecting women. Such laws are found, however, in *Funü he Weichengnian Falü Baohu Quanshu* [Compilation of Laws for the Protection of Women and Minors] (1991) and *Zhongguo Funü Falü Shiyong Quanshu* (Practical Compilation of Chinese Laws Affecting Women) (1993) (on file with author) [hereinafter *Compilation of Laws*].

of laws that directly or indirectly affect women serve as written testament to the CCP's and the government's policies towards women. They clarify the Chinese meaning of terms such as women's rights, discrimination, and sexual equality and, in so doing, they reveal the extent of the differences between the Western and Chinese definitions of those terms. For example, where Westerners see legally-sanctioned discrimination and relegation of women to second-class status, the Chinese see legally-protected special rights for women and lawful protection of the traditional right of the patriarchal head of the household. The laws reveal a view of women's rights, women's place and women's work that is consistent with the hypothesis set out in Part I.

Part III contains the observation that the historical development of women's rights and the present status of women in China and in the West over the last century contain striking similarities and that those similarities serve to undermine any moral authority claimed by the Chinese government that women's rights in China are unique rather than universal (or at least not shared by people from non-Chinese cultures). Finally, I conclude with a generally pessimistic view that further improvements to women's legal status cannot be achieved under the existing Chinese policy towards women. Yet I offer the hope that China's promise to implement the Convention could be a force for change.

#### PART I: LIBERATION THROUGH LABOR, LEGAL RIGHTS AND PATRIARCHY

##### *Liberation Through Labor Theory Subsumed Women's Issues Within A Class Analysis*

Engels is responsible for depoliticizing women's issues under Marxism by placing those issues into a class context, based on women's relationship to economic productivity. Engels wrote:

To emancipate woman and make her the equal of the man is and remains an impossibility so long as the woman is shut out from social productive labor and restricted to private domestic labor. The emancipation of woman will only be possible when woman can take part in production on a large, social scale,

and domestic work no longer claims anything but an insignificant amount of her time.<sup>9</sup>

He predicted that, as women's economic independence increased through participation in paid labor, women's liberation would naturally follow. Engels failed to acknowledge that women might constitute a class separate from, and totally unrelated to, economic class and, consequently, did not consider women's subordination to be a result of male domination. Sexual discrimination, he believed, was merely caused by the division of labor into women's work (private) and men's work (public) under capitalism, with men's work having the greater monetary value. He believed that men traditionally have been able to rule over women because of their superior economic power, which was achieved when men came to produce goods outside the home that had a higher value than that of the goods produced by women inside the home.<sup>10</sup> To achieve equality, women would have to emulate men by entering into the economic life of the community. Engels argued that communism alone could provide the necessary conditions for women's liberation because it alone does not permit the development of an (economic) class-based system. Whether or not such a system would permit the development of a class system based on sex was never considered by Engels. As a result, communists historically have treated women's issues passively, rather than actively, as was the case in the areas of political and economic reform.<sup>11</sup>

Chinese communists had no difficulty in transplanting Engels' analysis onto Chinese soil. Mao, like Engels, tied the end of men's domination over women to the complete elimination of the pre-existing economic system, which meant, in the Chinese case, to the end of feudalism. According to Mao, the abolition of "inequality between men and women" would occur as a "natural consequence of the victory in the political and economic struggles," i.e., when feudalism is overthrown and communism is practiced.<sup>12</sup> Nonetheless, Mao was a realist who saw a grave danger to the CCP if it promoted women's issues too forcefully within a male-dominated rural society. He cautioned against "making too

---

9. F. Engels, *The Origin of the Family, Private Property and the State* 221 (1972).

10. R. Tong, *Feminist Thought: A Comprehensive Introduction* 48 (1989).

11. K. Johnson, *Women, the Family and Peasant Revolution in China* 221 (1983).

12. Mao Zedong, *Report on an Investigation of the Peasant Movement in Hunan*, 1 *Selected Works of Mao Tse-tung* 23, 46 (1967).

much of an effort” on behalf of women fearing that peasant associations, which were dominated by men and which carried out the early reforms, would be accused of standing for the “communization of wives.”<sup>13</sup> As articulated by Lucie Cheng,

[t]he CCP clearly saw the necessity of gaining women’s support and participation in the war and in the land struggle; however, the Party’s fear of alienating peasant men and its understandable concern for survival limited the scope and depth of the efforts to achieve gender equality.<sup>14</sup>

From these very early days of the Chinese Communist revolution, the CCP made it clear that its policies and laws relating to women had the purpose of liberating women from their domestic duties in order to take up the Communist struggle by contributing to the task of economic development outside the home.<sup>15</sup> In one of first laws it adopted after assuming power, the new government “candidly admitted that the [new 1950] Marriage Law’s purpose was ‘to liberate women . . . in order to promote the . . . construction of a New Democratic China.’”<sup>16</sup> Thus, the early liberation of women complemented the government’s greater policy objective of rebuilding China.

One would expect that laws based upon the “liberation through labor” theory would prohibit and punish all forms of discrimination in hiring, placement, wages, promotion, etc., and would recognize that the burdens of childbearing, childrearing and housework are to be shared by the sexes. Anything less would be counterproductive if the only goal were to free women to work in the paid labor force. As is demonstrated in Part II, this has not occurred because of the government’s continued support for varying degrees of traditional male domination in the family, society, economy and politics.

---

13. *Id.* The tendency of the male-dominated CCP to entrench male power within the early CCP is revealed very clearly by Christina Gilmartin. See Christina Gilmartin, *Gender in the Formation of a Communist Body Politic*, 19 *Mod. China* 299 (1993).

14. Lucie Cheng, *Women and Class Analysis in the Chinese Land Revolution*, 4 *Berkeley Women’s L.J.* 62, 66 (1988-89) (citations omitted).

15. See generally D. Davin, *Women-Work: Women and the Party in Revolutionary China* (1976); E. Croll, *Women and Rural Development in China* (1985).

16. Chang, *supra* note 3, at 256.

*Constitutional Promise of Equality Before and Under the Law*

The liberation through labor theory can partly explain the law's favorable treatment of women in the areas of labor, education and marriage. That theory recognizes that an educated working woman who is happily married can contribute more to the reconstruction and development of a new China than can an illiterate, domesticated and miserable one. However, it does not explain the negative aspects of those laws or other laws, such as the property, inheritance or criminal laws, or the one-child policy. To understand the source of the negative impact legal reform has had upon women, it is necessary to turn to China's Constitution, which promises equality "before the law" and equal rights.<sup>17</sup> These promises mark a fundamental shift from the attitude in dynastic China when laws were applied unequally, when women's status was always subordinate to men's and men were privileged at women's expense.

The CCP abandoned this legal structure and replaced it with a more egalitarian one. Since 1949, it has adopted a series of constitutions in which various types of rights were imbedded. At the same time, it has also revised laws relating to property, marriage, inheritance and criminal sanctions in ways that benefitted women tremendously. Marriage rights have been shifted from the family to the individual, with the result that decisions about marriage and divorce now are legally held by individuals rather than by the male head of the household. Property rights and inheritance are no longer strictly male privileges and the extremely complex Qing criminal code, which contained hierarchies of crimes and punishments based on class and status, has been replaced with a simpler, more egalitarian criminal code.

As the purpose of the CCP's revolution was to abolish the class nature of Chinese society, it was only natural that laws would be written in a neutral fashion in order to avoid privileging any particular segment of society. The result in many areas of the law has been to create legal equality between women and men. However, the constitutional promises of equality have not resulted in equality of access and opportunity for women in all areas because women's oppression was believed to be a

---

17. Zhonghua Renmin Gongheguo Xianfa [Constitution of the P.R.C.] arts. 33, 48 (1982) [hereinafter 1982 Const.]. Similar language was also in the 1954 Constitution. See Zhonghua Renmin Gongheguo Xianfa [Constitution of the P.R.C.] arts. 85, 86, 96 (1954) [hereinafter 1954 Const.].

consequence of the economic system rather than the patriarchal system. Thus, the tendency towards a more egalitarian society can only partially explain the present legal status of women.

### *Unarticulated Policy to Protect the Patriarchal Structure*

The reason for the failure of the liberation through labor theory and the principle of equality before and under the law to achieve real sexual equality can be explained by the existence of a third policy of the male-dominated government and CCP: the policy to preserve (to the extent practicable) the existing patriarchal structure. As discussed above, this policy was openly acknowledged by Mao during the early revolutionary days but the leadership since then has never openly admitted that such a policy exists.

The laws discussed in Part II reveal that the government has never abandoned its early decision to preserve many of the powers Chinese men have traditionally held over women. Many laws assure that men will continue to wield power or to dominate the society within a patriarchal social, economic and political structure. For example, in the area of labor, women's emancipation from the domestic sphere to participate in the public labor sector has been a feature of past economic policies, first and foremost, as a means to increase the supply of labor. When the workforce needs to be increased, women's and men's constitutionally-declared equal right to work is actively promoted. During the Cultural Revolution, when the extent of the effort undertaken was so great that all able women were pressured to work, liberation rhetoric was utilized as a propaganda tool to convince women, and their families, that women's responsibilities to society were more important than their responsibilities at home. On the other hand, when the economy can no longer absorb all able-bodied adults wanting to work, women, and not men, are called upon to abandon their right to work and the laws are written in a way that supports or permits this to occur. As a result of this interplay between women's liberation, patriarchal privilege and economic development during periods of high female employment women's gains were strictly fortuitous and were not the result of campaigns to promote women's rights or to meet the individual needs of women. They were, and continue to be, a by-product of campaigns to carry out economic policies.

During the current drive towards a socialist market economy, fewer workers are needed, so the rhetoric has taken a decidedly conservative



turn. The emphasis has shifted from the importance of women's participation in economic production to women's role in reproduction and family life. Significantly, a 1961 speech by Deng Xiaoping was recently republished, in which Deng stressed women's new role in the modern economic reform era. Deng outlined women's responsibilities in the family and the way in which women's work in building up the family also contributes to building up China.<sup>18</sup> The government and the press now denounce women's liberation as a remnant of Cultural Revolutionary ultra-leftism that should be abandoned for women's real liberation, which is to work in areas for which they are specially suited. One Chinese commentator, for example, stated the problem as follows:

[D]uring the Cultural Revolution ultra-left ideas overstressed "women's liberation" by its continual emphasis of the concept that "women are equal to men," and by making them do work for which they were obviously unfitted.<sup>19</sup>

Women are now deemed to be more 'fitted' to the housewife and mother role and are urged to stay home for the good of the country and family by helping to reduce traffic congestion and to solve the unemployment problem.<sup>20</sup> As an incentive to stay home, many work units are willing to pay women a high percentage of their salaries for several years after childbirth.<sup>21</sup> The media, which continues to relay messages from the CCP, now extols the virtues of the 'feminine' woman who puts her family before her work and who is interested in her physical appearance.<sup>22</sup> Women who accept their traditional roles are

---

18. Most Important is to Get the Regular Jobs Done, *Renmin Ribao* [People's Daily] Mar. 10, 1991, at 1.

19. Trend of Women Leaving Workforce Praised, *Xinhua* [New China], Sept. 17, 1988.

20. Ma Lizhen, Women: The Debate on Jobs vs Homemaking, *China Reconstructs* 66, 68 (Mar. 1989).

21. A mining plant in Shenyang, a major Northeastern industrial city, forced 1,000 women with small children to take leave at 50-70% of pay (not including the bonus which can double the salary). *Gongmin Ribao* [Worker's Daily], Mar. 23, 1985, at 1. Nine million women are expected to be dropped from the country's labor force in this manner. New Labor System Encourages Women to Spend More Time at Home, *Xinhua* [New China], Sept. 5, 1988.

22. For example, the lesson of one popular soap opera was that women whose marriages are in trouble should take modeling courses and dress more attractively in order to save their marriages. Fashion shows are very popular now among women of all ages, presumably, in reaction to the years of being forced into dull, unattractive unisex clothing. In another very popular series, a working class woman married to a cadre's son was held up as the 'model' wife because she sacrificed everything for her family, never complained and constantly served others. All the urban

reported in the press to be happier than working women and, at the same time, they are contributing to modernization by withdrawing their 'excess' labor from the work force. Some public rhetoric can still be heard espousing the rights of women and women's central role in reform of the economy, but the louder message now being sent is that equality will not bring women happiness or wealth.<sup>23</sup>

The reason for this message is simple: a billion-plus population, out of which 200-plus million are unemployed,<sup>24</sup> and government enterprises that are now compelled by the profit motive to rationalize production by eliminating the expense of providing cradle-to-grave services to millions of unproductive employees.<sup>25</sup> The remedy selected was crafted to safeguard men's frontline position in the new economic order and this could only be done by abandoning the theory of liberation through labor and the constitutional promise of equality under the law.

The fundamental principle in operation appears to be that men should not be required to sacrifice their traditional patriarchal roles (and all the rights and privileges those roles offer) unless absolutely necessary. As a correlative principle, women should be granted rights only when the benefit to the society as a whole is considered to be significantly greater than the cost of any infringement upon, or diminution of, existing male prerogatives. Thus, many laws permit men to retain traditional positions of dominance in the family and society because there is no perceived benefit to be reaped by society if women's right to equality is increased. The review of laws in Part II shows that most laws touching upon the status of women or male-female relations are infected to some extent with such bias.

---

women I spoke with at the time told me that they detested this woman's character as they did not want to be forced back into the traditional role of obedient wife and sacrificing mother. Also, women are now being used in advertisements, as in the West, to sell everything from cars to dish soap. The Women's Federation and female scholars correctly see this trend to place beauty and passivity above talent and education as dangerous for women's liberation and equality.

23. Not everyone agrees that women are best served by staying home. Government-sponsored women's federations and women leaders are strongly opposed to this new policy, recognizing it is a step backward for women. They continue to insist that women's only hope for a better and more independent life is through participation in paid labor. See, e.g., Xinhua [New China], Mar. 24, 1988.

24. S. China Morning Post, Mar. 3, 1993, at Bus. 2.

25. New Labor System Encourages Women to Spend More Time at Home, Xinhua [New China], Sept. 5, 1988.

## PART II: CHINESE LAWS, SEX DISCRIMINATION AND SEXUAL EQUALITY

### *Early Legal Reforms Dramatically Changed Women's Lives*

The impact on women's lives of laws enacted by the early CCP government cannot be underestimated.<sup>26</sup> Taken as a whole, the laws effectively transferred many of the powers traditionally held by the patriarchal family into the hands of its individual members, including women. Even if women were too intimidated to seek a divorce, demand their share of land or vote, the absolute control husbands and patriarchal clans and villages traditionally held over them was seriously and permanently weakened.

Nonetheless, once the revolutionary dust had settled, it was clear that the government had not been able, nor its leaders willing, to redistribute all of the pre-existing balance of power that favored men.<sup>27</sup> Men still predominated then, as they do now, in all avenues of access to power, whether through control of the levers of power in the government or in the workplace. The early reforms, while dramatic when viewed from the vantage point of pre-communist Confucian society, had quite limited objectives regarding women. As the CCP wanted to transform peasant women into industrial workers, it needed to free them from the tyranny of the family, to transform them from being dependent members of a family into somewhat independent members of a civil society and to educate them to become productive workers. Laws that encouraged women to work outside the home, freed them from marriages in which they were appreciated only for their domestic and reproductive capabilities, and educated them to participate in a modern industrial society served these goals very well.

### *Constitutional Law*

A Chinese Constitution is not the same as a Western one, and the rights granted in a Chinese Constitution are not comparable to the rights

---

26. Zhonghua Renmin Gongheguo Hunyinfu [The Marriage Law of the P.R.C.] (May 1, 1950) [hereinafter 1950 Marriage Law]; Zhonghua Remin Gongheguo Tudi Gaigefa [The Land Reform Law of the P.R.C.] (June 30, 1950); Zhonghua Renmin Gongheguo Xuanjufa [Electoral Law] (Mar. 1, 1953); 1954 Const., *supra* note 17.

27. See, e.g., M. Wolf, *Revolution Postponed: Women in Contemporary China* (1985).

recognized in a Western one. Chinese constitutions are akin to declarations of policy,<sup>28</sup> and official proclamations that women and men in China have achieved legal equality because the Constitution says so are meaningless. First, rights in Chinese constitutions are not derived from any theory of natural rights having universal applicability but are implemented according to current policy, which is dictated by China's 'special' circumstances.<sup>29</sup> Thus, Chinese rights-related laws are not intended to meet any international standards; on the contrary, they are positive expressions of domestic policy. Second, Chinese constitutional rights are "programmatic," i.e., they are granted, modified, suspended and withdrawn by the state for the sole purpose of implementing particular policies.<sup>30</sup> Third, the constitution itself only contains the theoretical possibility of a right. Thus, in order to speak about constitutional rights, it is necessary to speak about substantive legal rights because that is where the government's actual policy is located.<sup>31</sup>

Lastly, even if substantive and procedural rights are set out in a domestic law, the right to sue for infringement is never absolute and can be curtailed if exercising the right would "infringe upon the interests of the state, of society . . . ."<sup>32</sup> As explained in the Chinese press, "[n]ot all individual interests in accord with socialist laws are necessarily morally legitimate. \*\*\* Whether they are legitimate or not depends upon their relation to the collective interests of the society at a given time."<sup>33</sup> This means that the cost of compensating an individual for a rights' violation must always be small when compared to the cost to the society of providing that redress.<sup>34</sup> As an example, Maria Chang has noted in reference to the new freedom of marriage and divorce in the 1950 Marriage Law that "if the single-party state at any point judged that this

---

28. Stanley Lubman, *Studying Contemporary Chinese Law: Limits, Possibilities and Strategy*, 39 *Am. J. Comp. L.* 293, 325 (1991) (Chinese rights are contingent, transitory and "are goals to be reached rather than prerogatives of personhood").

29. Human Rights in China, Preface at I-II (Info. Office of State Council, Nov. 1991).

30. A. Nathan, *Chinese Democracy* 116 (1985).

31. "A [Chinese] constitution is a general summary of present policy. Laws are more particularized statements of policy." William C. Jones, *The Constitution of the People's Republic of China*, 63 *Wash. U. L.Q.* 707, 714 (1985).

32. 1982 *Const.*, *supra* note 17, art. 51.

33. *Guangming Ribao* [Bright Light Daily], Nov. 15, 1980, at 3, quoted in A. Nathan, *Sources of Chinese Rights Thinking*, *Human Rights in Contemporary China* 125, 144 (R. Edwards, L. Henkin and A. Nathan eds., 1986).

34. Nathan gives the following example: "[A]ppeals which demand compensation that the state cannot afford to provide have been ruled 'unreasonable' even if the citizen involved has the law on his side." *Id.*

'freedom' to marry and divorce worked against the larger objective of economic development, the state would not hesitate to suppress the same individual 'rights and liberties' it once championed . . . ."<sup>35</sup> This limitation applies equally to the right recently granted women in the Women's Protection Law to sue for certain rights violations.<sup>36</sup> Access to a remedy is controlled by the government-controlled Women's Federation, the woman's work unit and the courts, all of which can refuse to pursue a claim if the political climate dictates that enforcement is subversive, immoral, unworthy or otherwise deemed inappropriate for whatever reason.

Thus, the use of the English words 'constitution,' 'rights,' 'equal' and 'egalitarian,' to describe Chinese phenomena is misleading. It tends "to give 'familiar language about rights and procedural safeguards . . . the connotations that such language carries in our own legal culture.'"<sup>37</sup> For example, among Westerners, the word 'constitution' carries connotations of legally-enforceable rights and the term 'rights' carries meanings derived from the European theory of 'natural rights.' Neither of these definitions apply in China. Therefore, I assume that Chinese laws that permit discrimination against women have been intentionally drafted that way and are not simply the result of a failed attempt to meet Western or international standards. As will be evident in the laws analyzed below, the Chinese definition of the term 'women's rights' is a highly-restricted and flexible one.

### *Labor Laws*

The limited goals of the CCP regarding the liberation of women, that is, to create conditions to enable women to enter the public labor force, has meant that the elimination of discriminatory practices and paternalistic policies in the workplace were not necessary. As a result, women have entered the labor force in large numbers<sup>38</sup> but not equally. In 1949, women constituted only 7.5 percent of the paid labor force and,

---

35. Chang, *supra* note 3 at 256.

36. Women's Protection Law, *supra* note 6, art. 48.

37. William P. Alford, On the Limits of 'Grand Theory' in Comparative Law, 61 Wash. L. Rev. 945, 947 (1986), quoted in Lubman, *supra* note 28, at 327.

38. The 1990 census reports that women now comprise 37.6% of the work force (and 48.4% of the population). Women: A Force in Public Life, Beijing Rev., Mar. 9-15, 1992, at 19.

by 1988, they made up 37.5 percent,<sup>39</sup> with the majority of them concentrated in the lower paid and less secure private and collective sector.<sup>40</sup> They now predominate in manual labor (almost half are in agriculture, animal husbandry and fisheries) and occupy a very low percentage of the technical or managerial-level positions. Women also suffer from discriminatory treatment in hiring,<sup>41</sup> training and promotion,<sup>42</sup> and bear a disproportionate share of unemployment<sup>43</sup> and layoffs.<sup>44</sup> In the political arena, they have fared even worse. In the 13th Party Congress, there were no women on the influential State Council, in leadership positions in the National People's Congress (but 21.3 percent of the representatives were women) or the Party, or as heads of any of the 41 ministries.<sup>45</sup>

As a result, women receive 84 percent of men's average monthly salary between the ages of 20-45 and only 56 percent by age 55.<sup>46</sup> The

---

39. Cong Zhibiao Tixi Kan Woguo Funü Diwei [Analyzing Women's Status Using an Index System], 1 Xuexi yu Tansuo [Study and Explore] 51 (1991) (on file with author).

40. In Longkou City in Shandong Province, 80% of workers in the textile, garment and household electronic appliance industry workers are women (Chinese Women: Active in Society, Beijing Rev., Nov. 12-18, 1990, at 20, 21) and women constitute 90% of the labor force in small town industries of wool spinning, clothing, handicraft weaving, toys and electronics (Working Women, 1334 China News Analysis 1, 2 (May 1, 1987). See also Jacka, *supra* note 3 at 15; Hu, Li and Shi, Analysis of Wages and Bonus Payments Among Tianjin Urban Workers, 113 China Q. 77, 81 (1988).

41. A 1987 survey of 660 enterprises in 11 provinces, autonomous regions and municipalities conducted by the Women Workers Committee of the All-China Federation of Trade Unions, revealed that "only 5.3% of employers were willing to hire women for jobs that can be performed by either sex." Women Demand Equal Employment Opportunities, Xinhua [New China], Feb. 25, 1988. Even those employers willing to hire women often require women to score higher on entrance tests than men. Working Women, *supra* note 40, at 2.

42. Working Women, *supra* note 40, at 3.

43. In one city, "70 percent of the jobless youth are female" (Problems Facing Employment of Women Explored, Xinhua [New China], Oct. 22, 1988) and in some other cities up to 80% of all unemployed youth are women (New Labor System, *supra* note 25, at 32).

44. The 1987 survey reports that 64% of redundant workers are women. Preliminary Analysis Report on the Survey of the Social Status of China's Women, 26 Chinese education and Society 7 (1993). It should be kept in mind that women only constitute 37.6% of the total work force.

45. Zhonggong Zuigao Lingdao Ceng [The Highest Leaders of China's Government and Party] 309-320 (1989); Zhongguo Funü Tongji Ziliao [Statistics on Chinese Women] 571-72 (1991) (on file with author).

46. Zhongguo Funü Shehui Diwei Gaiguan [General Observations on the Social Status of Chinese Women] 86 (1993). Only 1.43% have leadership positions in the CCP, government, professions and industry, 9.12% are specialized and technical personnel, 6.03% are office workers, 12.38% are in the commercial service sector, 48.36% are in agriculture, livestock, forestry and fishery, and 21.11% are in manufacturing and transportation. Preliminary Analysis Report, *supra* note 44, at 9. The complete study is contained in the General Observations cited immediately

difference cannot be explained by educational level as women consistently make less than men at all educational levels.<sup>47</sup> Salary differentials only tell part of the story. The differential is actually much larger due to men's greater ability, through their near monopoly on public and private managerial and administrative jobs, to obtain in-kind perquisites, such as personal and exclusive of a company car, assignment of bigger and better housing, the ability to travel and give frequent banquets at company expense. Also, such positions of power bring the ability to sell or exchange favors (otherwise known as corrupt practices) for scarce or expensive commodities. Consequently, for those holding positions of power, salaries constitute only a fraction of the real value of the job.

Discriminatory treatment is not always result of misinterpretation or improper implementation of the law, or a willingness of people to violate the law. It is often legal. For example, female laborers (*nügongren*) must retire at 50 while male laborers can work until 60.<sup>48</sup> Female cadres who are not professionals or intellectuals must retire at 55, while their male counterparts can work until age 60.<sup>49</sup> Certain female teachers, doctors and scientific and technical personal can retire at 60, while their male counterparts retire at 65.<sup>50</sup> This age difference has been cited by numerous employers as an excuse not to hire women because early retirement results in work units having to make pension payments for five or ten years longer to women than to men.<sup>51</sup> Alternatively, the fact that women will work five or ten years fewer than men has also

---

above. The study was conducted by the All-China Women's Federation and the State Statistical Bureau in 1990-1991.

47. General Observations on the Social Status of Chinese Women, *supra* note 46, at 87.

48. Guowuyuan Guanyu Gongren Tuixiu, Tuizide Zanxing Banfa [State Council Interim Procedures Concerning Retirement or Resignation of Workers], art. 1(1) (June 3, 1978), reprinted in *Zhonghua Renmin Gongheguo Falü Quanshu* [Collection of the Laws of the PRC] 1393 (1990) [hereinafter *Law Collection*].

49. Guowuyuan Guanyu Anzhi Lao, Ruò, Bing, Can Ganbude Zanxing Banfa [Temporary Procedures Regarding Placement of Cadres Who are Old, Weak, Ill or Disabled], art. 4 (June 3, 1978), reprinted in *Law Collection*, *supra* note 48, at 1380. Only women intellectuals "can now retire at the same age as their male colleagues - 60." *New Rule for Female Professionals*, *China Daily*, Feb. 25, 1991, at 4.

50. Guowuyuan Guanyu Yanchang Bufen Gupan Laoshi, Yisheng, Keji ren yuan Tuixiu Nianlingde Tongzhi [State Council Circular Extending the Retirement Age of Some Essential Teachers, Doctors, Scientists and Technicians] (Sept. 12, 1983), reprinted in *Law Collection*, *supra* note 48, at 1389.

51. Equal Rights to Education Should Be Guaranteed, *China Daily*, Dec. 4, 1990 at 4.

provided work units with an excuse not to train or promote women.<sup>52</sup> Many women I met in China were deeply angered at the unfairness of being forced to retire at an age when they were still healthy and able to work, while their male counterparts were not.

Perhaps the major legal source of discriminatory treatment of women is the Labor Protection Regulations, which were promulgated to "reduce and resolve special difficulties encountered in labor and work . . . by female staff and workers due to their physiological characteristics, [to] protect their health and contribute to the building of socialist modernization."<sup>53</sup> The Labor Protection Regulations prohibit women from working in mine pits<sup>54</sup> or in certain unspecified types of labor that are determined by the Ministry of Labor as "unsuitable" for women.<sup>55</sup> Similar power is delegated under the Hiring Regulations to individual enterprises, which may legally refuse to hire women if, in the opinion of enterprise management, women are unsuitable for the job.<sup>56</sup> The law contains the assumption that, unless the contrary is shown, men are suitable for all types of jobs while all women are assumed to be unsuitable for certain types of work. Further, the law can be applied arbitrarily as neither set of regulations contains any criteria for determining which circumstances are unsuitable for women. Both sets of Regulations appear to have been written by people who believe that the nature of women's "special characteristics" is so well understood by the public that there is no need to describe those characteristics or to prove any causal connection between those characteristics and women's presumed inability to perform certain types of work. The drafters simply assumed that all women are constitutionally unfit, due to their sex, to perform the same work as men. These laws confer a second-class status

---

52. Working Women, *supra* note 40, at 3.

53. Nüzigong Laodong Baohu Guiding [Regulations for the Protection of Female Staff and Laborers], art. 1 (Sept. 1, 1988) [hereinafter Labor Protection Regulations] (on file with author). These regulations only apply to "state organizations, mass organizations, enterprises and institutions" and not to agriculture, collectives or the private sector where most women work. Thus, mainly city women are affected. *Id.* art. 2.

54. *Id.* art. 5.

55. *Id.* art. 16.

56. Guoying Qiye Zhaoyong Gongren Zanxing Guiding [Provisional Regulations on Hiring of Workers in State Enterprises], art. 8 (Oct. 1, 1986), trans. in H.K. Josephs, *Labor Law in China: Choice and Responsibility* 160 (1990). This renders ineffective another provision requiring enterprises to hire workers "from society at large" by taking those "who have scored highest on a comprehensive examination." *Id.* art. 2.



upon all women and support the deeply-ingrained Chinese belief that women are physically inferior to men.<sup>57</sup>

The regulations also assume that, once women do find work, they must be protected. During menstruation, women are prevented from working at "high altitude[s], in places with low temperature[s], in cold water, or on jobs with a labour intensity of third grade, as stipulated by the state."<sup>58</sup> During pregnancy, women may not engage in labor involving any work "which should not be done during pregnancy," may not work overtime or on night shifts and must have rest periods at work.<sup>59</sup> Again, the drafters believed, without supporting evidence, that certain (unspecified) "physiological characteristics" render women physically unable to work up to capacity during menstruation and during the entire nine-month term of pregnancy.

The drafters also assumed (and made sure) that women are solely responsible for burdens associated with reproduction and childcare. The Labor Protection Regulations impose all pregnancy and child-care-related expenses upon the employers of women workers.<sup>60</sup> An enterprise that has women workers with small children must provide nursing mothers with two thirty-minute breaks for baby feeding,<sup>61</sup> and, if it employs a large number of women, it must "establish health clinics, restrooms for pregnant women, breast-feeding rooms, childcare centres and kindergartens."<sup>62</sup> In addition, work units often must pay the entire government-mandated "one-child allowances" to mothers, but not to fathers.<sup>63</sup> By imposing child-bearing and childcare costs on the woman's work unit, the regulations explicitly support the view that

---

57. The Deputy Director of the Department of Labor Management and Employment of the Ministry of Labor, has expressed this assumption openly: "Because of the physiological and psychological differences between men and women, the difference between them in physical strength, intelligence and capability, and personality traits is fairly large." *Vigorously Open Wide Employment Channels, Find Places for City-Town Women*, Gongren Ribao [Workers' Daily], Apr. 9, 1991, at 5 (on file with author).

58. Labor Protection Regulations, *supra* note 53, art. 6.

59. *Id.* art. 7.

60. There have been some attempts to share this burden between the wife's and husband's work units and suggestions have been made that a fund should be set up to pay these expenses so that they do not fall exclusively on the women's work units. However, there is no evidence yet that these suggestions have been implemented extensively.

61. Labor Protection Regulations, *supra* note 53, art. 9.

62. *Id.* art. 11.

63. *Working Women*, *supra* note 40, at 3. Some local regulations require the cost to be split between the parents' work units but in the majority of localities, the women's work units normally pay the entire sum.

women alone are responsible for child care. This view of women is also reflected in a regulation that permits work units to punish unmarried pregnant women but not the unmarried fathers.<sup>64</sup>

Lastly, the Labor Protection Regulations assume, and support the belief, that women are intellectually inferior to men. Women, unlike men, are not permitted to decide for themselves whether or not to assume work-related risks, such as in mining, despite the fact that, in some areas of China, mining may be the only work available.<sup>65</sup> They are also not permitted to decide whether or not they are able to work when menstruating or pregnant. Men do not suffer from any similar restrictions regarding work-related risks or illness. It could be argued that such laws protect women from exploitation and possible damage to their reproductive organs. This argument fails on two counts. First, an employer in a socialist country is presumably unable to exploit workers who collectively own the means of production. Second, if a woman's reproductive organs are at risk, evidence from studies outside China have shown that men's reproductive organs are also at risk under the same circumstances. The best explanation for the existence of paternalistic laws applicable only to women is the belief among many Chinese people that women are simply inferior to men and, as such, men (either personally, or in the form of the employer or the government) have a right, perhaps even a duty, to make certain decisions for women.<sup>66</sup>

The consequences of the "special" treatment of women has been extremely negative.<sup>67</sup> In the new socialist-market economy, factory managers are responsible for profits and losses and cite such costly

---

64. Guanyu Nüzìgong Feihun Shengyushi Shìfou Xiàngshòu Laobào Tàidài Wéntí (Jìelù) [Relating to the Issue of Whether or Not When Unmarried Women Workers Giving Birth Can Receive the Special Labor Treatment (Extract)] (Sept. 10, 1965), reprinted in *Compilation of Laws*, *supra* note 8, at 171.

65. Debate Over Women's Labour Laws, *China Daily*, Dec. 10, 1990, at 1. It may be the case that such laws were drafted in response to particular cases of exploitation or mistreatment of women. Laws could have been drafted to protect all workers from such treatment without creating a sex-based class of workers.

66. The lack of any special provisions in Chinese laws to protect men, as a class, indicates that women are power-less and men power-full, and supports the view that the government believes that men have a paternalistic obligation to protect power-less women. For a more sympathetic view of China's protectionist labor laws, see Margaret Y.K. Woo, *Biology and Equality: Challenge for Feminism in the Socialist and the Liberal State*, 42 *Emory L.J.* 143 (1993).

67. Western feminists have been highly critical of laws that treat women as 'special' in the context of a legal system that treats men as the 'norm.' See, e.g., Eisenstein, *supra* note 1; Ann C. Scales, *The Emergence of a Feminist Jurisprudence: An Essay*, 95 *Yale L.J.* 1373 (1986).

regulations as a justification for not hiring women.<sup>68</sup> They point out that factories employing a large number of women workers suffer losses due to the extra costs associated with women workers.<sup>69</sup> Even factories that do hire women often refuse to provide the required special facilities for women or implement the special work rules for women.<sup>70</sup> Laws like the ones providing for women's early retirement and expensive social welfare benefits at work have provided enterprises with excuses for discriminating against women in hiring, promotion, training and layoffs. No matter what the stated purpose of the laws is, the bottom line for women is that the regulations cost them dearly in terms of a disproportionately high rate of unemployment (often hidden under the euphemistic title "waiting for work") and lower wages.

The liberation through labor theory, then, does not mean that women can exchange their traditional household and caregiving roles for a job and shared household and childcare responsibilities. Neither does the constitutional promise that "women enjoy equal rights with men"<sup>71</sup> mean that women have equal access to employment opportunities or equal treatment once employed. Rather, it means separate but equal: separate because women have access to some jobs but not necessarily the same jobs as men and equal in the sense that, if the government fulfills its promise of providing some type of work for all able adults, women's and men's right to work has been realized.<sup>72</sup> According to this rationale, if there are no jobs available in the fields classified as 'women's work' (e.g., factory work in the collective sector), then the fact that women find it more difficult than men to find jobs is attributable to a lack of jobs rather than to discrimination. The legal justification for separate but

---

68. "[E]nterprises have exercised their growing autonomy by hiring fewer women. Enterprise administrators have stated that they hire as few women as possible, for a variety of reasons. \*\*\* Another reason given is that protective regulations allowing time off for maternity leave and child care impose an economic cost on the enterprise. In addition, the fewer the number of female employees, the lower the investment necessary in enterprise nurseries and schools." Josephs, *supra* note 56, at 50-51 (footnotes omitted).

69. *Factories Employing More Women Suffer Losses*, *China Daily*, Mar. 26, 1988, at 3.

70. *More Than Half of 425 Enterprises Have Not Yet Implemented the Regulations for the Protection of Female Staff and Workers*, *Zhongguo Funübao* [Women of China], Nov. 8, 1989, at 1 (on file with author).

71. 1982 Const., *supra* note 17, art. 48.

72. A representative of the Women's Federation in Changchun, Jilin Province, told me that a woman who is not hired because an enterprise does not hire women would be assigned to another job by the government. She did not believe that women in this situation have any right to complain because individual choice of work is not the issue. The issue is whether or not women are able to find work. See 1982 Const., *supra* note 17, art. 42.

equal treatment is based on the assumption that women are physically and intellectually inferior to men. This does not conflict with Chinese rights theory because programmatic rights are not founded on the 'natural rights' theory but are created and defined by the state. The Chinese definition of equality in labor, then, simply means that women have an equal right to some type of work, if and when the government needs their labor.

Likewise, the Constitutional promise of "equal pay for equal work"<sup>73</sup> is qualified. Equal pay requires the existence of equal work, and equal work requires that women and men perform the same or similar type of work. As women's work is ghettoized into the textile, garment, household electrical appliance industries and collective sectors and men work predominantly in the higher-paid public sector, women cannot perform the same type of work as men, leaving a majority of women unable to demand higher pay. Similarly, women who are hired for the same jobs as men cannot be expected to be paid equally if the law requires them to be excused periodically from working or to be given lighter duties due to their "special characteristics." Women who are not permitted by law to perform the 'same' quality or amount of work as men can justifiably be paid less than men.

Given the limited, programmatic and relativistic definition of equality and the limited goals of the liberation through labor theory, the government can assert that legal equality in the labor field has been accomplished and that the existing female unemployment problem is a result of other factors, such as economic restructuring. It can also cite the number of women who now work in the public sector as proof of the efficacy of its policy since the primary goal of the labor through liberation policy was to increase the number of women in the paid work force and not to provide equality of opportunity and treatment. Likewise, the government can maintain that women do not suffer from negative discrimination because the laws that treat women differently from men are actually instances of positive discrimination for women because those laws provide women with privileges unavailable to men.

---

73. *Id.* art. 48.

*Education*

All Chinese children have a constitutional "right to receive [an] education."<sup>74</sup> The substance of this right is found in the Compulsory Education Law, which mandates nine years of education for all children.<sup>75</sup> Despite its gender-neutral language, seventy percent of all illiterates and semi-literates in China are women,<sup>76</sup> which means that, out of over 500 million women, over 150 million are illiterate or semi-literate<sup>77</sup> and 64 percent of all school dropouts under the age of fifteen are girls.<sup>78</sup> Either the law is not being enforced equally against parents of boys and girls or parents are more likely to keep their daughters at home and send their sons to school.

While it is certainly true that parents see no benefit in educating daughters who will become members of their husbands' families upon marriage, it is also true that the problem is aggravated by the law. Parents who illegally keep their children out of school are merely required to undergo criticism and send the children to school, that is, if the local authorities decide to enforce the law (which it appears they seldom do).<sup>79</sup> Under the current economic reform policy, individuals are allowed to earn cash from private or collective enterprises, which, in turn, provides families with a strong incentive to put their daughters to work during the short term before their marriage. Even the risk of punishment for breaking the Compulsory Education Law is not a deterrent because the punishment is so slight.<sup>80</sup> There is less incentive to keep sons at home since investing in the education of a son holds the long-term possibility of a future reward in terms of the son's potentially higher income and greater ability to support his parents in their old age.

Parents can also legally keep their children out of school if they can prove to local authorities (who probably share the parents' views) that "special circumstances" (undefined) exist.<sup>81</sup> This combination of a weak

---

74. Id. art. 46.

75. Zhonghua Renmin Gongheguo Yiwu Jiaoyufa [Compulsory Education Law of the P.R.C.], art. 2 (July 1, 1986) [hereinafter Compulsory Education Law], trans. in *The Laws of the P.R.C.* (1979-1982) 250-253 (Beijing, 1987) [hereinafter *Laws of the PRC*].

76. Statistics on Chinese Women, *supra* note 45, at 63.

77. Zhiding Funüfa de Shikao [Thoughts on the Proposed Women's Law], 1 Funü Yanjiu [Women's Research] 3, 4 (1990).

78. Statistics on Chinese Women, *supra* note 45, at 219, 223.

79. Compulsory Education Law, *supra* note 75, art. 15.

80. Girls Strike for Right To Attend School, *S. China Morning Post*, Dec. 5, 1988, at 1.

81. Compulsory Education Law, *supra* note 75, art. 11.

enforcement mechanism and a standard-less exemption provision does little to change the public's belief that educating a daughter is like watering a neighbor's garden.<sup>82</sup>

Girls who do manage to attend school beyond the primary grades face further discrimination. Entrance to Chinese universities is reasonably fair as, until recently, it has been based upon comparable entrance examinations scores of boys and girls (at least at the undergraduate level).<sup>83</sup> However, because fewer girls are graduated from high school,<sup>84</sup> fewer are able to enter college and fewer graduate,<sup>85</sup> or go on to obtain master's or Ph.D degrees.<sup>86</sup>

Girls who do not attend university but who are channelled into one of the special secondary schools are often discriminated against in admittance and types of training offered. Even though girls constituted 45 percent of the graduates from such schools in 1990,<sup>87</sup> that figure is misleading. It hides the fact that these schools often have explicitly-discriminatory admissions policies and often operate as separate schools for girls and boys, with each having its own gender-related training courses.

Typical is Shanghai where a report on the status of women in polytechnic and vocational schools found that "women accounted for 70 percent of the students" denied admittance to senior middle school, polytechnic and vocational schools.<sup>88</sup> The Shanghai Education Bureau's response was not to prohibit the use of discriminatory admission requirements; instead, it drafted regulations to assure women a certain number of positions in the city's polytechnic and vocational schools. It also set up several women-only vocational schools "in a bid to guarantee women's *full* right to education."<sup>89</sup> Presumably most of the women-only

---

82. This belief is also captured in the expression, 'a woman without ability is a woman of virtue' (nǚ wú cái jiù shì dé).

83. Higher education is becoming a market commodity with the highest bidder obtaining admission to some universities. See For Sale: Degrees in Guangdong, S. China Morning Post, July 18, 1993, at 3 ("Half the places at Guangdong [Province] universities are for sale....").

84. Girls constitute 38% of high school graduates. Zhongguo Jiaoyu Tongji Nianjian [Educational Statistics Yearbook of China] 60 (State Ed. Comm., 1991/92).

85. Girls constitute 33% of the entering and 20% of the graduating classes. Id. at 22.

86. Master's degree: women constitute 27% of the entrants and 25% of the graduates; Ph.D. degree: women constitute 11% of the entrants and 10% of the graduates. Id. at 38-39.

87. Id. at 71.

88. Equal Rights, *supra* note 51.

89. Id. (emphasis added). The use of the term "full" rights is ambiguous. Apparently, it is satisfied by providing separate and unequal or dissimilar educational opportunities to girls and boys.

slots will be filled by women studying in women-only vocational schools (instead of in the existing, predominantly male, schools). The Bureau also set aside certain subjects, such as "nursing, typewriting, long-distance telephone operating, and kindergarten teaching" for women.<sup>90</sup> Unfortunately, the fields selected are already occupied almost entirely by women and so the set-aside will not provide additional employment opportunities for women graduates. The set-asides and the women-only schools will only further ghettoize women's work and make it practically impossible for women ever to 'catch up' with men who will continue to receive training that prepares them for the more technical, higher-paying and/or more important work. This type of women's education makes it virtually impossible for women to move out of 'women's work' into the more challenging fields now occupied predominantly by men.

The Education Law and other, similar facially-neutral laws provide legal equality without sexual equality. As described by Zillah Eisenstein: "Legal equality is part of, but not the same as, sexual equality, which involves extralegal relations of power."<sup>91</sup> In China, those extralegal relations of power are the existing political, economic and social structures that favor and privilege men over women and boys over girls. A facially-neutral law ignores this reality because it contains an assumption of an equality that does not exist; therefore, the law perpetuates rather than solves the existing sexual inequalities that become apparent upon implementation. In this sense, the laws are dishonest and misleading because they appear to treat both sexes equally but, in fact, do not.

The government currently has no incentive to intervene and assure equality of opportunity and treatment of girls and boys because of the continuing high overall rate of unemployment. Under these circumstances, the cost of educating girls is high when compared to the low demand for an educated female labor force. Women's education is simply less important than men's under the current economic reform. Just as women are now expected to give up their jobs to men, they are also expected to abandon their hopes for an education equal to that given to men. From the government's perspective, any increase in the level of women's education would be counterproductive and an expensive waste

---

90. *Id.* Women who are "short, clumsy and unattractive," need not apply, however, to nursing school in Beijing. *Authorities Get Sick of Ugly Nurses*, *S. China Morning Post*, Oct. 18, 1991, at 12.

91. Eisenstein, *supra* note 1, at 71.

of resources. Thus, girls' and women's low level of education actually plays a very important role in making women less desirable employees, thereby increasing men's job opportunities and ensuring the dependency of women upon men.

The Women's Protection Law makes some attempt to address this problem. It gives the Women's Federations, the supervising department and the courts the power to order "corrections" and impose administrative sanctions in cases where a work unit or an individual has violated "the principle of equality between men and women in such aspects as starting school [or] entering a higher school."<sup>92</sup> This provision will not serve to increase the attendance of young girls unless someone makes a complaint on their behalf. It is unlikely that any girl would charge her parents with a violation. As to older female students, given the Chinese view that separate but equal satisfies the requirement for 'equality,' this provision will probably not be used to require school districts, such as the one in Shanghai, to admit girls to vocational and technical schools on a non-discriminatory basis. The Chinese view, presumably, would be that the principle of equality has not been violated by the Shanghai authorities or any other similar local authorities as long as girls have been provided with some type of opportunity to study. Whether or not girls should be treated the same as boys is irrelevant to this view of equality in education.

### *Marriage and Divorce*

Women's status in marriage has been raised dramatically by the implementation of laws granting men and women the right to choose their own marriage partners, prohibiting forced marriages, and permitting non-consensual divorce.<sup>93</sup> The underlying principle is that marriage is "based . . . on equal rights for the sexes."<sup>94</sup> The extent of the changes brought about as a result is shown in a recent study in which it was found that over 79 percent of women under the age of 40 have made their own marriage decisions while only 24 percent of the women over

---

92. Women's Protection Law, *supra* note 6, art. 50.

93. 1982 Const., *supra* note 17, art. 49; Zhonghua Renmin Gongheguo Hunyinfafa [The Marriage Law of the P.R.C.], arts. 24-25 (Jan. 1, 1981) [hereinafter 1981 Marriage Law]; General Principles of the Civil Code, art. 103 (Jan. 1, 1987) [hereinafter Civil Code]; Women's Protection Law, *supra* note 6, art. 41.

94. 1981 Marriage Law, *supra* note 93, art. 2.



the age of 40 had married according to their own choice.<sup>95</sup> The 1950 and 1981 Marriage Laws can be credited with bringing about this dramatic increase in free-choice marriages.

Nonetheless, the same statistics also reveal that over 20 percent of women under the age of 40 have entered into forced marriages, which, although they have been registered, are unlawful. One consequence of the waning influence of the government over people's daily lives has been a dramatic increase in unregistered "marriages,"<sup>96</sup> which are also unlawful even though both partners have freely consented to the union. Many union are unregistered because women have not reached the legal age and cannot be registered.<sup>97</sup> Also, many families simply wants to rid themselves of the expense of supporting their daughters, preferring instead to collect the brideprice as soon as possible. Unfortunately, even after couples reach the legal age, many simply never bother with a registration as in Chinese society the real 'marriage' occurs during a traditional, formal ceremony and banquet. Registration is viewed as merely a bothersome legal formality having no effect upon whether, in the public's view, the couple is married.

Serious consequences flow from unlawful marriages as neither partner can turn to the Marriage Law for protection in the event of separation. The law simply does not recognize common-law type marriages. Women are more at risk than men in this situation and rural women are particularly vulnerable. Many of them are in unregistered or non-consensual unions and they typically live in the men's villages or towns. They will find it difficult, if not impossible, to find justice in the courts, as it is unlikely that anyone from the man's village or town would support a woman's claims against the claims of the local man and his family. Thus, if couples in unlawful marriages go to court to divide up their wealth, the woman is likely to lose. Without the support of the Marriage Law, the woman will have to prove a contractual or other right to a share of their property. The local courts would be more sympathetic to the local man and give the women little or none of the couple's assets, especially if those assets consist of property held in the man's village, such as land or a business. As outsider, the woman would find it difficult

---

95. Preliminary Analysis Report, *supra* note 44.

96. E.g., Fazhi Ribao [Legal Daily], Feb. 28, 1990, at 3. Most unregistered marriages are in the countryside (up to 57% in one region) but there still exists a substantial number in urban areas (e.g., between 15-20% in Harbin, Heilongjiang Province).

97. Twenty for women and twenty-two for men. 1981 Marriage Law, *supra* note 93, art. 5.

for her to prove that any of that property belongs to her, even if her labor has contributed to the property's value. It is possible, however, if there was a long-term relationship and children, that the property might be divided more evenly between the two parties.<sup>98</sup>

Women face other problems that are hidden in the neutral language of the Marriage Law. All mothers, married or not, are treated the same with regard to child custody decisions.<sup>99</sup> Thus, breast-feeding mothers are guaranteed custody of the infant<sup>100</sup> but otherwise women must compete with fathers for custody. Rural women, whether in lawful or unlawful marriages, are disadvantaged by patrilocal residence patterns and patrilineal descent practices that prevent women from accumulating wealth, which in turn prevents them from arguing that they are equally able to support their children. Urban women, who are statistically more likely to divorce and who do have more financial independence, still may fail to obtain custody, or are forced to give up custody, because they have no place to live after divorce. The reason for this is simple. Until recently, work units, which have the responsibility of providing workers with housing, could legally refuse to allocate housing to women or else make it exceedingly difficult for women to obtain housing.<sup>101</sup> At most, a work unit would allocate a bed in a dormitory for unmarried female employees. The only other alternative for divorced women is to live with their parents.<sup>102</sup> This discriminatory housing practice has caused many women to lose their custody battles to fathers who have housing.

Another facially-neutral provision of the Marriage Law more obviously reflects the government's sexual bias against women. Persons married to someone who is "on active service" in the military cannot obtain a divorce without the spouse's consent.<sup>103</sup> This benefits men almost exclusively as men constitute the overwhelming majority of members of the military, which means that military wives do not have

---

98. See, e.g., Lun Woguo Weifa Jiehun, Wuxiao Xuangao Zhidu [A Discussion About Unlawful Marriages and the Announcement of a System for Invalidating Such Marriages], 1 *Funü yu Jiating* [Women and Family] 22-25 (1990).

99. *Id.*

100. 1981 Marriage Law, *supra* note 93, art. 29.

101. Women Wake Up to Legal Rights, *China Daily*, Jan. 4, 1993, at 4; E. Honig & G. Hershatter, *Personal Voices: Chinese Women in the 1980's* 140-41, 225-26 (1988).

102. I do not know what happens in child custody cases in the countryside. Peasant women probably face even more discrimination because the courts are located in the man's community and might be exceedingly ill-disposed to give custody, especially of a son, to a woman who would no longer live in the man's village or town.

103. 1981 Marriage Law, *supra* note 93, art. 26.

the same right of divorce as non-military wives have. Recent evidence from the non-military sector has shown that, in the majority of divorce cases filed in Beijing, the complainant is the woman.<sup>104</sup> Assuming that the same situation exists in the case of military divorces, then military wives are doubly harmed by this law: the majority of the military spouses denied the right to divorce are women and the majority of the spouses who would want to divorce are women. The effect of the law is to ensure the patriarchal structure of military marriages by giving men total control over their wives' freedom in marriage for the duration of the husband's military career.<sup>105</sup> This power of control is another expression of the CCP's desire, evident from the very beginning days of the Party, to avoid alienating men who may be called upon to enforce CCP rule.<sup>106</sup> Equality in marriage, as in work and education, means that some are more equal than others.

The Women's Protection Law only addresses women's housing problem. It offers two solutions. One, men and women are to be "treated equally when it comes to housing assignments, . . ." and women who feel that they have been discriminated against can now force their work units to allocate housing in a non-discriminatory manner.<sup>107</sup> Since implementation of the Women's Protection Law, a group of women has successfully resorted to this new legal protection to force its work unit to cease discriminatory housing practices.<sup>108</sup> Two, upon divorce, a husband must "do all he can to help the wife solve her housing problem."<sup>109</sup> Unfortunately, until housing becomes a commodity rather than a work-related benefit, divorced women's housing problems will not

---

104. In 1990, 30% of all civil cases in the Beijing Intermediate People's Court were divorce cases and 60% of all divorce cases were "initiated by women." *Divorces Top List of Civil Cases in Beijing*, China Daily, Apr. 12, 1991, at 3.

105. The Marriage Law also prevents men from divorcing their wives during pregnancy and until the child is one year old, unless the court decides that the divorce is "absolutely necessary." 1981 Marriage Law, *supra* note 93, art. 27. So, while military wives may never be able to divorce, husbands with pregnant wives must wait, at most, only a twenty-one month period for a divorce, and with the court's permission, even less time.

106. "[I]t is essential truly to understand the principle of protecting the marriage and family of members of the armed forces on active service and resolutely to oppose and destroy any unlawful conduct pertaining to their marriage and family." Li, *Post-divorce Problems in the Rearing and Education of the Children and in the [Division of the] Conjugal Estate*, Talks on the New Marriage Law 46 (1980), quoted in Michael Palmer, *The People's Republic of China: Some General Observations on Family Law*, 25 J. Fam. L. 41, 63 (1986-87).

107. Women's Protection Law, *supra* note 6, arts. 23, 50.

108. Women Wake Up, *supra* note 101.

109. Women's Protection Law, *supra* note 6, art. 44.

and cannot be solved. As a commodity, the couple's residence could be given to either party; as a work-related benefit, their residence will always belong to the husband. The divorced (or never married) woman's ability to obtain housing will depend upon the availability of housing in the woman's work unit.

The Marriage Law, therefore, does not in fact provide for sexual equality. Like the Education Law, it contains impediments to true equality in marriage and marriage-like unions for all women even though it appears to express no preference for one sex over another.

### *Inheritance Rights*

The Constitution,<sup>110</sup> the Civil Code<sup>111</sup> and the Marriage Law<sup>112</sup> guarantee the right of inheritance, but the meaning of that right is not obvious and must be interpreted in light of the Inheritance Law.<sup>113</sup> The Inheritance Law gives women and men the same right to dispose of their property in a will,<sup>114</sup> and in the absence of a will, it gives daughters and sons an equal right to inherit.<sup>115</sup> Widows and widowers as well have an equal right to inherit from each other's estate.<sup>116</sup> Especially favorable to women is the ability of widows who remarry to keep the property they inherited from their deceased husbands' estates,<sup>117</sup> whereas widows previously left their in-laws' homes empty-handed.

Although the Inheritance Law is facially neutral, the fact that rural men rarely move into their in-laws' homes or villages means that the Law has a disparate impact upon rural women.<sup>118</sup> While rural widows may have gained new legal rights of inheritance, they may not be able,

---

110. 1982 Const., *supra* note 17, art. 13.

111. Civil Code, *supra* note 93, art. 76.

112. 1981 Marriage Law, *supra* note 93, art. 18.

113. Law of Succession of the P.R.C. (Oct. 1, 1985) [hereinafter Inheritance Law], trans. in *Laws of the PRC*, *supra* note 75, at 169-175.

114. *Id.* art. 16.

115. *Id.* arts. 10, 13.

116. *Id.* arts. 10, 26.

117. *Id.* art. 30.

118. Most urban women should face fewer inheritance problems because urban families, until recently, did not own real property and the limited amount of cash and personal property they possessed was much easier to divide and distribute. Additionally, urban women are more likely to work and have their own work-related retirement benefits whereas rural women typically work on the land and have no such benefits.

as a practical matter, to exercise those rights. Daughters-in-law may face difficulties enforcing their statutory right to inherit directly from their in-laws.<sup>119</sup> A rural widow who remarries and leaves her deceased husband's village will find it difficult to take any family property that is tied to the livelihood of her husband's family, despite the fact that she may claim whatever she has inherited from her deceased husband and/or her deceased in-laws.<sup>120</sup> At most, she might sell her interest in the property to the family, but, more typically, she would simply be forced to abandon her property right.

As for inheriting from her own family, all of a rural family's property traditionally passes to the sons, notwithstanding legal provisions to the contrary, thus making it difficult for a woman to assert her legal right to a share. A married daughter would hesitate to take her share of her natal family's property because doing so would enrich her husband's family to the detriment of her own parents and male siblings.

These statutory rights of inheritance may be avoided by the execution of a will.<sup>121</sup> This was added, notes Louis Schwartz, in an attempt to resolve the conflict between the right of an individual to dispose of her or his own property and out of the desire to prevent generally discriminatory treatment of women. Schwartz points out that the majority of Chinese scholars have come down on the side of the right to dispose of property, leaving it to the "legal propaganda machinery" to change people's erroneous thinking.<sup>122</sup> In a weak attempt to address the problem of indigent widows, daughters and daughters-in-law, the drafters have added the provision that "the will should set aside a certain portion of the left-over property for inheritors who lack work ability and have no income for living."<sup>123</sup> It is unclear whether or not a court has the power to set aside a portion of the estate passed through a will or to render the will invalid if the will does not contain a provision for the support of a destitute wife, daughter or daughter-in-law. A literal interpretation would not give the court such powers as the clause appears to provide that, if there is 'left-over property' and, if an inheritor named in the will is destitute, then the court has the power to allocate that

---

119. Inheritance Law, *supra* note 113, arts. 10, 12.

120. 1981 Marriage Law, *supra* note 93, art. 12.

121. Louis B. Schwartz, *The Inheritance Law of the People's Republic of China*, 28 *Harv. Int'l. L.J.* 433, 453 (1987).

122. *Id.* at 454.

123. Inheritance Law, *supra* note 113, art. 19.

property to that person. Otherwise, the court has no power to reallocate property to a destitute wife, daughter or daughter-in-law.

The Women's Protection Law has attempted to clarify only one of these problems. It reaffirms a woman's right to property in her husband's village by stating that women have an equal allotment, during and after marriage, to the family's "responsibility farmland, or grain ration farmland and . . . housing sites" and that administrative sanctions can be imposed against anyone interfering with this right to an allotment.<sup>124</sup> This means that rural divorced women and widows (but not women in unlawful unions) have a legal right to stay on their share of the land or to sell their right to farm the land. However, the reality is that very few women will ever go to court to assert ownership of land located in the man's village, especially after divorce or widowhood. The patriarchal family within the patrilocal community will always have greater control of the family's assets and a greater perceived right to the land than a women can ever have, no matter what the law dictates.

The superficially even-handed approach of the Inheritance Law, then, fails to recognize and deal with the problems of traditional attitudes and practices, thereby failing to provide women with any real opportunity to equal treatment in inheritance. It does little to ensure that unmarried, divorced or widowed rural women will have a means or support, much less receive just compensation for their contribution to their natal family's and husband's families' wealth. The Law does not mandate or guarantee equal treatment; rather it permits testators to avoid the law's provisions by the stroke of a pen. In intestate estates, it requires women to enforce their rights by themselves against those who are closest to them and whose support is vital to their existence.

### *Violence Against Women*<sup>125</sup>

*Abduction and sale of women and children.* Until 1906, women and children were routinely sold as slaves, wives or concubines, usually without the intervention of law or society.<sup>126</sup> For example, families

---

124. Women's Protection Law, *supra* note 6, art. 30 (nuncun huafen fuzitian, kouliangtian, pizhun zhajiji) and art. 50(5).

125. For an introduction to the issue of violence against women in China, see Honig & Hershatter, *supra* note 101, ch. 8.

126. S. van der Sprenkel, *Legal Institutions in Manchu China: A Sociological Analysis* 27 (1977); see also E. Alabaster & Sir C. Alabaster, *Notes and Commentaries on Chinese Criminal Law* 189 (1968) ("the common practice of selling a wife" was illegal, but "winked at").

were permitted to sell their women and children in "times of distress."<sup>127</sup> One of the major accomplishments of the Communist revolution was the eradication of this practice. However, since the institution of the open-door policy and economic reforms, the sale of women and children has returned nationwide.<sup>128</sup> Women are now kidnapped or sold by their families for instant cash and each year, tens of thousands of Chinese women and children are sold (some in open-air markets),<sup>129</sup> raped, tortured, permanently crippled, forced into prostitution or left by their abductors with no choice but to commit suicide.<sup>130</sup>

One response to the problem has been to blame the victim. Women are chastised for being ignorant about their legal rights, for allowing their greed to let them be misled by conmen, and for their lack of feminine virtue. Despite the appearance in article after article of the many ways in which villagers and the rural men's families prevent sold, kidnapped and abducted women from returning home, those same articles often end with a statement lamenting the woman's role in bringing about her condition.<sup>131</sup> Until the government decides to tackle the status of women in the family and encourage, even demand, equality and non-discriminatory treatment of women and girls in the home and society, no amount of blaming the victim will solve the problem.

The villagers' attitude has made it especially difficult to detect and prosecute because villagers often protect the purchasers. Villagers are notoriously sympathetic to the plight of unmarried peasant men who cannot afford the expensive brideprice that is often demanded by the prospective bride's parents.<sup>132</sup>

---

127. Van der Sprenkel, *supra* note 126, at 27, 63 n.2 (citing P. Hoang, *Le Mariage Chinois au point de vue légal*, 14 *Variété Sinologiques* 127 (1915)); Alabaster, *supra* note 126, at 157-58, 183.

128. Gulau de Fei'e [Ancient Evil], *Wenhui Yuekan* [Cultural Collections Monthly] (Feb. 1989). The numbers are huge; 32,679 abducted women lived in one county of Anhui Province between 1980 and 1990, with 30,481 of them brought in from other provinces. *Rescuing Victimized Women, Protecting Innocent Children*, 8 *Shanghai Shehui* [Shanghai Society] 4-7 (Aug. 20, 1990) (on file with author).

129. CPPCC Exposes a Women Slaves Market on the Mainland, *Hsin Wan Pao* [Hong Kong New Evening News], Mar. 27, 1989 at 3.

130. Johnson, *Return of Medieval Evil*, *Time Magazine*, Nov. 11, 1991, at 25; *Sichuan Fazhibao* [Sichuan Legal News], Jan. 21, 1991, at 2.

131. See, e.g., *Causes of the Crime of Abducting Women*, *Renmin Gongan Bao* [People's Public Security News], Aug 16, 1991 at 3; *Rescuing Victimized Women*, *supra* note 128 at 70.

132. See, e.g., Gulau de Fei'e, *supra* note 128.

[P]ublic opinion tends to favor the buyers (especially in poor regions). When women who were bought flee, the public gets angry. The public regrets people being rescued, and accuses the rescuers of being 'wicked and unreasonable.' \*\*\* This situation has objectively provided market and haven for those criminals.<sup>133</sup>

In a typical case, local villagers forced the police to agree to return the rescued woman or keep her and compensate the buyer for his lost investment.<sup>134</sup> Punishments have been exceedingly light; the typical response has been a warning or reprimand.<sup>135</sup>

Gaps in the law have also contributed to the problem. Until recently, the law covered the situation where one person both abducted *and* sold women,<sup>136</sup> but not the situation where one person abducted a woman and another person sold her.<sup>137</sup> Even if one person both abducted and sold a woman, she or he was seldom punished. Instead, these criminals were often required to engage in self-criticism for participating in the commodity economy and/or to undergo some re-education,<sup>138</sup> despite the existence of provisions requiring imprisonment.<sup>139</sup> Abductors were treated harshly only during anti-crime campaigns when, if the abduction occurred under "especially serious" circumstances, they were executed.<sup>140</sup>

---

133. Causes of the Crime of Abducting Women, *supra* note 131, at 69.

134. Sichuan Fazhibao [Sichuan Legal News], May 8, 1990, at 3. The woman was eventually sent to her natal home and the villagers were not punished for interfering.

135. The villagers could have been sentenced to up to three years imprisonment for violently or with threats obstructing "state personnel from carrying out their functions according to law." Zhonghua Renmin Gongheguo Xingfa [The Criminal Law of the P.R.C.], art. 157 (Jan. 1, 1980) [hereinafter Criminal Law], trans. in Laws of the PRC, *supra* note 75, at 87-119. Alternatively, the villagers could have been sentenced to fifteen days' detention, a fine or a warning if they used non-violent means. Zhi'an Guanli Chufa Tiaoli [Security Administration Punishment Act], art. 19(7) (Oct. 22, 1957) [hereinafter SAPA] (on file with author).

136. Criminal Law, *supra* note 135, art. 141.

137. In Shandong Province recently, 150 people were released because they had not both abducted *and* sold any of the victims. Zhongguo Funübao [Women of China], May 6, 1991, at 3 (emphasis added).

138. *Id.*

139. Criminal Law, *supra* note 135, art. 141.

140. Guanyu Yancheng Zhongweihai Shehui Zhiande Fanzuifenzide Jueding [Decision Regarding the Severe Punishment of Criminal Elements Who Seriously Endanger Public Security], art. 1(3) (Sept. 2, 1983) [hereinafter Serious Endangerment Decision], trans. in Laws of the PRC, *supra* note 75, at 32-34.



The law also failed to criminalize sales by the women's families or purchases directly from the family, the kidnapper or the abductor. The only punishment for a man who purchased a woman and forced her to marry him was a void marriage and nothing else.<sup>141</sup> The law, in effect, gave thousands of potential purchasers the right freely to purchase women directly or to induce others to find women for them to buy.

Two of these gaps were closed with the passage of the Decision Relating to the Severe Punishment of Criminal Elements Who Abduct and Kidnap Women and Children (the "Abduction Decision").<sup>142</sup> The Abduction Decision makes it clear that abductions and kidnappings are not domestic matters and that persons who use violence or coercion to interfere with rescues should be punished according to existing law.<sup>143</sup> The Decision might have some effect upon deterring villagers from using violent means but it will have little impact upon villagers' willingness to use equally effective, but passive, means to prevent rescues. The focus of the Decision, unfortunately, is not on the woman. From a woman's point of view, it makes no difference whether villagers use violence or not; either way the villagers are accomplices whose actions deprive her of her freedom. One reason for the government's failure to consider the problem from the woman's point of view arises from the dual nature of the policy towards women and criminal violence within the domestic sphere. On the one hand, it is apparent that there is a desire to protect women, but on the other hand, there is an even greater desire to minimize any infringement upon the right of a patriarchal community to resolve its own 'domestic' affairs.

The Abduction Decision did, however, close the enforcement gap that previously permitted someone who abducted a woman but did not sell her to avoid punishment. The scope of prohibited activities has been broadened to include all persons who abduct, buy, sell, escort *or* transport women or children for the purpose of selling them.<sup>144</sup> Whereas, the law previously only included the category of abduction, the

---

141. Jiehun Dengji Banfa [Marriage Registration Method], art. 9 (Mar. 15, 1986), reported in 1-35 Zhongguo Renmin Gongheguo Guowuyuan Gongbao [State Council Bulletin] 183 (1986). The regulation also refers to possible criminal sanctions, presumably for crimes such as rape, but I did not come across any such cases reported over the years 1985-1990.

142. Guanyu Yancheng Guaimai, Bangjia Funü, Ertongde Fanzuifenzide Jueding (Sept. 4, 1991) [hereinafter Abduction Decision], reported in 22 Hong Kong L.J. 81-83 (1992).

143. *Id.* art. 4. This was done by incorporating the pre-existing provisions for interfering with government officials into the Decision. See SAPA, *supra* note 135.

144. Abduction Decision, *supra* note 142, art. 1.

Abduction Decision divides the offense into two categories: (1) abduction and/or selling an abducted woman or child<sup>145</sup> and (2) kidnapping women or children for the purpose of selling them.<sup>146</sup> Now, each person in the chain who kidnaps *or* abducts women or who buys or sells abducted or kidnapped women will be tried and punished (except under certain circumstances discussed below).<sup>147</sup>

Despite the seriousness with which the Decision now treats this crime, two glaring exemptions remain: one is an explicit exemption benefitting the ultimate purchaser of abducted or kidnapped women (and children) and the second is an implicit exemption in cases of direct sales and purchases not involving abductions or kidnappings. The explicit exemption provides buyers (who are predominantly, or perhaps exclusively, men) of kidnapped or abducted women with a means to avoid any criminal liability whatsoever if they “do not prevent the women from returning to their original domicile in accordance with their wishes and do not mistreat the children they have bought or prevent their rescue.”<sup>148</sup> This exemption could be used to exonerate purchasers from all liability if, at some point, they permit the women to return home. It is not unreasonable to imagine that all abducted or kidnapped women would desire to return home from the minute they are abducted, kidnapped or purchased until the time they finally are able to leave the home of the complete stranger they are forced to marry. As described in one article, “[a]fter they buy women and bring them home, quite a few buyers tie them up and beat them, rape them and then marry them, coercing them to become wives.”<sup>149</sup> Obviously, every action taken by the buyer, including the very act of purchasing the woman, would have been against the woman’s will. The only circumstance under which a buyer should be exempted from criminal punishment under this exemption would be the case of the good samaritan who buys and returns the woman without having harmed her physically. This is a totally unrealistic scenario as purchases are made by poor peasant men

---

145. *Id.* Abduction does not involve any force, coercion or narcotics and brings an 8-10 year prison term.

146. *Id.* art. 2. Kidnapping involves force, coercion or narcotics and carries a term of ten years to life. Both abductions and kidnappings carry the death penalty in “especially serious” cases. *Id.* arts. 1, 2.

147. *Id.*

148. *Id.* art. 3. I call this the “poor unmarried male peasant” exemption as such men are the main, or even the sole, beneficiaries of this loophole in the law.

149. *Rescuing Victimized Women*, *supra* note 128, at 71.

whose only interest is self-interest, that is, to find a wife who will give them a son.

The only reasonable interpretation then is that the exemption applies to all ultimate purchasers, even to those who are not good samaritans. Under this interpretation, the exemption is a license for men to purchase women, try them out and return them if they change their mind or fear being reported to the authorities. It treats women as commodities, much like goods purchased in a store that are returnable if defective. It also protects the purchaser whose 'wife' does not want to, or is afraid to, speak out against her 'husband.' One commentator, while conceding that "the drafters have arguably come down too heavily on the side of the men," has suggested that "[i]n some respects, this is a sensible result" for cases where the abducted woman wants to stay with her 'husband.'<sup>150</sup> More than simply coming "down too heavily" on the man's side, this exemption expresses the view that women's rights are subordinate to the rights of the patriarchal and patrilineal family.

In fact, women who are "returned" by their purchasers may find that, not only will there be no criminal charges brought against the ultimate purchaser, but that they have been stripped of their right to sue the purchaser for damages, despite the fact that their rights under the Women's Protection Law<sup>151</sup> and the Civil Code<sup>152</sup> have been violated. The exemption could be used to defeat a woman's claim for damages. By stating that the man's actions are not criminal, the exemption could be interpreted to mean that the woman's rights have not been violated.

The Abduction Decision ignores the vulnerable position of the women who are kidnapped or abducted and taken to live in remote towns or villages in other provinces. The overwhelming majority of these women are ignorant, illiterate or semi-literate and come from poverty-stricken communities.<sup>153</sup> Without money, or a way to return to their

---

150. A.E.W. Connor, Commentary: Standing Committee Passes Two Criminal Law Amendments, 22 Hong Kong L.J. 68, 75-76 (1992).

151. Women's Protection Law, *supra* note 6, art. 48. Article 49 requires the woman to sue under the Civil Code in this type of case.

152. Civil Code, *supra* note 93, art. 119 (limits recovery to actual direct or indirect damages for physical injury), and art. 120 (limits recovery to an apology and compensation for provable losses in cases of loss of reputation or honor).

153. Zhuang Ping, On the Social Phenomenon of Trafficking in Women in China, 26 Chinese Educ. and Soc. 33, 35-36 (1993), originally in *Shehuixue Yanjiu* [Sociology Research] 101 (1991); A Simple Analysis of the Crime of Abducting and Selling Women and Children, Shanghai Shehui [Shanghai Society] 1-4 (July 20, 1990) (on file with author).

natal homes, they are trapped. They are in an especially tragic situation if they become mothers, as leaving would probably mean abandoning the children.<sup>154</sup> Without the aid of local government officials or help from an outsider, rural women have no choice other than to 'consent' to the 'marriage,'<sup>155</sup> thereby abandoning their right to sue for violations of the Marriage Law or to bring charges under the Criminal Law.

The second exemption is implicit in the Decision's silence about cases involving direct sales and purchases between women's families and the unmarried men themselves. While the Abduction Decision defines 'abducting and selling' to include 'abducting, buying, selling,' it is clear from other language in the Decision that the women or children must first have been abducted or purchased "for the purpose of selling them" before the punishment for selling or buying becomes effective. This would exclude purchases and sales made directly between the purchasers (typically men) and the woman's family (typically rural) as the transaction does not involve an abduction or contemplate a subsequent sale.<sup>156</sup> In these situations, the only crimes with which the seller or buyer could be charged are (depending upon the circumstances) rape, hooliganism, intentional injury, unlawful detention, etc.

The Abduction Decision's silence is revealing, especially in light of the fact that the Decision was meant to remedy the inability of existing law to address the increasing trade in human beings.<sup>157</sup> The fact that this serious gap still exists cannot be accidental or due to ignorance as the media is full of stories about families that have sold their daughters. Connor notes that many commentators, prior to promulgation of the Abduction Decision, "argued that buying had not been made specifically criminal" because of the "poverty and backwardness" of peasant villages.<sup>158</sup> Those peasant villages are patriarchal societies in which fathers traditionally hold absolute authority over their children. The Decision intentionally upholds the right of fathers to sell their daughters. It says that fathers (and mothers) can treat their daughters as

---

154. I met a woman who had waited 16 years to escape Inner Mongolia where she had been sold into marriage by her uncle. In escaping, she had to leave her two children, whom she will, in all likelihood, never see again.

155. Cases have been reported of women slipping notes to visitors from outside the village (Sichuan Fazhibao [Sichuan Legal News], Aug. 9, 1990 at 4) and, in one case, a Public Security official took it upon himself, in his individual capacity, to rescue women when government officials failed to act (Zhejiang Fazhibao [Zhejiang Legal News], Aug. 15, 1991, at 2).

156. Abduction Decision, *supra* note 142, art. 1.

157. Connor, *supra* note 150, at 74-75.

158. *Id.* at 75.

commodities because girls have no rights within their natal family. Instead of recognizing the daughter's dilemma, the government has legalized the view of the majority of the peasant population that direct purchases and sales of women is strictly a private domestic matter under the control of the father.

The government's insensitivity to the abducted or kidnapped woman's plight is also evident in the lack of coordination between the Abduction Decision and the Marriage and Inheritance Laws. None of the thousands of marriages forced upon abducted and kidnapped women are recognized by law.<sup>159</sup> The problems discussed earlier about the plight of women in unlawful unions applies to these women also. The failure of the Abduction Decision (or any other law) to deliver these women from a legal limbo only further increases their vulnerability.

The Women's Protection Law could have resolved these problems, but did not. Instead, its language harkens back to pre-Abduction Decision law in that it only addresses those situations where someone both abducts *and* sells a woman<sup>160</sup> and ignores the situation of direct sales and purchases. In so doing, the government passed up an opportunity to implement the Constitutional prohibition against "[u]nlawful deprivation or restriction of citizens' freedom of person by detention or other means . . . ."<sup>161</sup> The Women's Protection Law only recognizes a violation of a woman's right if she has been abducted or kidnapped and has not been set free by her purchaser. Only then will she have a right to a civil remedy for infringements of her "lawful rights and interests."<sup>162</sup> The underlying message of the Law confirms the message carried in the Abduction Decision, which is that women's rights are can be subordinated to the power of men to control women.

*Prostitution.* Prostitution has also been steadily increasing since the institution of market reforms, especially in the more affluent southeastern provinces.<sup>163</sup> The majority of the women reportedly enter the profession voluntarily,<sup>164</sup> but those reports fail to link prostitution to

---

159. 1981 Marriage Law, *supra* note 93, arts. 3, 4, 7; Marriage Registration Method, *supra* note 141.

160. Women's Protection Law, *supra* note 6, art. 36.

161. 1982 Const., *supra* note 17, art. 37.

162. Women's Protection Law, *supra* note 6, art. 48.

163. China Launches Anti-Prostitution Campaign, *Beijing Rev.*, Dec. 16-22, 1991, at 23.

164. Don't Let a[n] Historically Ugly Phenomenon Be Revived, *Minzhuyu Fazhi* [Democracy and Law], Jan. 12, 1991, at 32.

the disproportionate rise in female unemployment.<sup>165</sup> For example, in Shenzhen, where a high concentration of prostitutes is located, at least 70 percent of the women who have come from other provinces are jobless (and presumably penniless), making them vulnerable to prostitution rackets.<sup>166</sup> Many other women and girls are kidnapped or abducted and then forced into prostitution.<sup>167</sup> Chinese sociologists and other commentators typically attribute the rise in prostitution to decadent Western influence, the breakdown of the traditional family, disparity in wealth between the urban and rural areas and increased mobility of the rural population.<sup>168</sup> The response has been to attempt to 'rehabilitate' the women in reform through labor camps rather than by finding them alternative forms of employment or sending them home. By one report, in late 1991, 560,000 prostitutes were confined to re-education camps.<sup>169</sup>

The focus on prostitution as a criminal, rather than an economic and social problem, has resulted in a series of unsuccessful legal campaigns to stem the tide. Originally, the law only punished those who forced women into prostitution.<sup>170</sup> Later, as prostitution increased, luring into, or sheltering women in, prostitution for the "purpose of reaping profits" was criminalized, and the penalty for luring, sheltering or forcing women into prostitution under "especially serious" circumstances was increased to the death penalty.<sup>171</sup> Unfortunately, these changes did little to stop the growth and spread of prostitution, so the actual act of prostitution, "visits to prostitutes," soliciting and sheltering prostitutes and being a john or client were added to the list of crimes. Criminalizing those acts

---

165. See, e.g., *The Social Background of Prostitution*, 68 *Shanghai Shehui* [Shanghai Society] 38 (Oct. 20, 1990).

166. *Prostitution in Shenzhen*, *Ming Pao* [Ming Pao Daily], Nov. 11, 1991, at 6.

167. See, e.g., *Farmers Run Huge Brothel*, *S. China Morning Post*, July 22, 1993, at 10; *China Launches Anti-Prostitution Campaign*, *supra* note 163; *Zhejiang Fazhibao* [Zhejiang Legal News], Oct. 3, 1991, at 1.

168. *China Launches Anti-Prostitution Campaign*, *supra* note 163, at 24; *Social Background of Prostitution*, *supra* note 165, at 65.

169. *China Launches Anti-Prostitution Campaign*, *supra* note 165, at 25. I assume that penalties are assessed and punishments carried out only against the women as, although there were statements about johns being arrested, I was unable to find similar statistics regarding the punishment of johns. It could be that their punishment is limited to the payment of fines. See, e.g., *Don't Let a[n] Historically Ugly Phenomenon Be Revived*, *supra* note 164, at 85.

170. *Criminal Law*, *supra* note 135, art. 140 (imposing anywhere from a three- to ten-year sentence).

171. *Serious Endangerment Decision*, *supra* note 140, art. 1(6), modifying *Criminal Law*, *supra* note 135, art. 169.

had little, if any, effect, partly because the punishments were so light.<sup>172</sup>

In its latest effort to use the law as a tool to combat prostitution, the Standing Committee promulgated a Decision Relating to the Strict Prohibition of Prostitution and Patronizing Prostitutes (the "Prostitution Decision").<sup>173</sup> The Prostitution Decision created the new criminal offenses of organizing or introducing others into prostitution and assisting in organizing others for prostitution, increased prison terms across the board and increased fines to up to 10,000 yuan.<sup>174</sup> It also reduced punishments against those who lure, shelter or introduce others into prostitution under 'minor' circumstances.<sup>175</sup> This will probably have little effect upon the mushrooming of prostitution as the inflow of poor girls and women from the countryside continues unabated and the organization of prostitution by triads continues to grow. Until the economic and social problems underlying prostitution are solved, criminal laws will have little or no effect.

Prostitutes are also being blamed for the recent increase in the incidence of venereal diseases. The Prostitution Decision mandates a five-year maximum term for persons who, knowing they are infected with syphilis, gonorrhoea or other serious venereal diseases (such as "AIDS"), engage in prostitution or patronize prostitutes.<sup>176</sup> The Decision appears to be neutral in that it is equally applicable to men/customers and women/prostitutes. However, punishments will surely be limited to the prostitutes. Just as there were over a half a million prostitutes, and few johns, in reform through education camps in 1991, women/prostitutes and not men/customers will be the target of the anti-venereal disease campaign. The Decision's implicit message is that

---

172. SAPA, *supra* note 135, art. 30 (fifteen days of detention, and, in more serious cases, an unspecified term in a labor reform camp and/or a fine of up to 5,000 yuan).

173. Guanyu Yanjin Maiyin Piaochang de Jueding (Sept. 4, 1991), trans. in 22 Hong Kong L.J. 78-81 (1992).

174. *Id.* Ten years to life for organizers (art. 1), three to ten years for those who assist (art. 1), five to ten years for forcing others into prostitution (art. 2), up to five years for luring, sheltering or introducing others into prostitution (art. 3), and death for those who organize or force under especially serious circumstances (arts. 1, 2).

175. *Id.* art. 3.

176. *Id.* art. 5. The first arrest under this Decision of a prostitute with venereal disease was made in 1992. The nineteen-year old girl was portrayed as using her venereal disease as a weapon to revenge a rape at age 14, fitting the image the government seeks to portray of prostitutes and the need for a special venereal disease law directed solely at them. *S. China Morning Post*, Nov. 24, 1992, at 11.

certain bad women are the root of the evil and should be punished. The neutrality of the language masks the misogyny of the message. It is saying that men who are increasingly willing and able to pay for sex, who have multiple sex partners and who pass on venereal diseases to their wives and girlfriends are reprehensible, but they not the source of the problem. Women are.

The Decision's focus on the prostitute-john situation means that the government is unwilling to recognize (or deal with) the fact that venereal diseases can be spread from a man to his wife, girlfriend or male lover (or vice versa). It is only when the man infects a prostitute that he can be punished, provided, of course, that the prostitute can prove that she was disease-free before this particular client (assuming she could ever find him once she became aware of being infected). As a practical matter, it is obviously much easier to prove a case against the woman as prejudices against prostitutes make it easy to assume that they are the transmitters and carriers of diseases rather than the men. The discriminatory impact of this provision will surely be felt almost entirely by women as it will be very difficult for them to prove that they were infected by any particular man.

The Decision reduces the extremely serious problem of venereal disease and AIDS to blaming a few "bad" women for spreading the diseases while avoiding the truth about the many ways in which such diseases are actually being spread among the public. If the real goal were to punish persons who knowingly transmit venereal diseases, the government would have enacted a law of general application but it has not done so. If the real goal were to eradicate venereal diseases, it would have offered public health strategies rather than point the finger at certain women as the source. It cannot seriously be contended that, if prostitutes are free of venereal diseases, venereal diseases will disappear in China, or that the rate of the diseases' spread will be appreciably reduced among the general population. For example, most AIDS in China is reported among drug addicts, not among prostitutes.<sup>177</sup> Thus, AIDS-free prostitutes will not result in an AIDS-free PRC. The Decision is simply evidence of the how the patriarchal nature of Chinese society permits discrimination against women who are perceived as "bad" women because they do not conform to the male-defined image of the virtuous woman/wife.

---

177. HIV Carriers Pass 1,000, S. China Morning Post, June 25, 1993, at 9.



*Rape.* The incidence of rape is also on the rise in China.<sup>178</sup> The size of the increase is difficult to determine due to underreporting, either because the victim (or her family) is unwilling to report the rape or testify at trial or because the matter is settled privately through illegal settlements with the rapist or his family.<sup>179</sup> Underreporting may also be partly attributable to the fact that the punishment for rape can be execution.<sup>180</sup> Evidence available from other parts of the world indicates that girls and women are more likely to be raped by an acquaintance or family member than by a stranger, which would explain victims' hesitation to report rapes if reporting could result in a family member or an acquaintance being executed.

Under Chinese law, rape involves sexual relations with girls under fourteen or sexual relations with girls or women fourteen or older involving violence, coercion or other means.<sup>181</sup> "Violence" means physical assault, kidnapping or any other action that threatens the personal safety or freedom of the victim; "coercion" requires a special relationship between the defendant and the victim, such as exists between a girl and her stepfather or natural father, or the use of superstition; and "other means" involves the uses of drugs, alcohol, fraudulent medical treatment or sexual intercourse with a sleeping or ill victim.<sup>182</sup> The law seems to be straightforward, but the interpretation of the law is not.

First, the status of non-consensual sexual intercourse in marriage is now unclear. As was the case for women throughout the United States and the United Kingdom until recently, women in China have traditionally been considered by law to have given blanket consent to sexual intercourse with their husbands at any and all times from and after marriage. However, in the first case of its kind, a court in Henan Province recently undermined that notion, albeit only in certain highly-particularized circumstances.<sup>183</sup> The court found that a women who had obtained court approval for divorce and whose husband planned, conspired and prepared to have, and did have, sexual intercourse with her

---

178. Honig & Hershat, *supra* note 101, at 277.

179. See, e.g., Zhejiang Fazhibao [Zhejiang Legal News], Feb. 13, 1992, at 4; Liaoning Fazhibao [Liaoning Legal News], Nov. 28, 1990 at 2.

180. Criminal Law, *supra* note 135, art. 139.

181. *Id.*

182. Guanyu dangqian banli qiangjian anjianzhongjuti yingyong falu de ruogan wentide jieda [Answers to some questions about how to apply the law in actual rape cases] (Apr. 26, 1984), reprinted in Law Collection, *supra* note 48, at 177-179.

183. Tianjin Fazhibao [Tianjin Legal News], Jan. 17, 1991, at 2.

against her will and consent, had been raped. The scope of the decision is quite limited. It does not cover women who are cohabiting with their husbands or even those who have separated from their husbands. Neither does it include wives who have filed for divorce but have not yet received court approval for the divorce.

The case provoked much controversy. One Chinese commentator argued against the decision on the grounds that, because the parties were still legally married, the victim had a "marital duty" towards her estranged husband and the husband had a "right of cohabitation" with her until the divorce was finalized.<sup>184</sup> The commentator claimed that, at most, the husband could have been charged with insult, humiliation or abuse of his wife. It remains to be seen whether other courts will follow the lead of the Henan court or adopt the type of solution suggested by the commentator. In China's civil law system, cases have no precedential authority, although other courts might decide to consider the legal reasoning of an analogous or similar case.

Second, the definition of rape is tied closely to traditional notions of how a woman is expected to behave and the paternal role of society to protect women. In law and society, women are expected to refrain from pre-marital affairs and men are not. The law treats certain consensual sexual relations between a man and a woman as akin to rape. A man who deceives several unmarried women into consenting to have sexual intercourse with him can be charged with hooliganism (*liumangzui*).<sup>185</sup> According to this view of women, unmarried women are passive participants and men are the active participants in sexual relations. Women who choose to engage in pre-marital sexual relations are treated as victims if the man turns out to be a scoundrel. The purpose obviously is to protect a woman's virginity as a man who has affairs with married women is not guilty of a crime despite the fact that his behavior in both situations is the same. The protective, paternalistic nature of the law robs women of the ability to make decisions concerning their own sexuality simply because they are unmarried. A woman's autonomy to make decisions is overridden in order to protect women from their own stupidity or gullibility. The law effectively declares the woman's consent null and void, presumably on the assumption that if she had known what a rogue the man was, she would not have consented. As she did not know, then the government has the

---

184. Shenzhen Fazhibao [Shenzhen Legal News], Nov. 7, 1991, at 3.

185. Answers to some questions, *supra* note 182, art. 3(1).

responsibility, just like a father in a shotgun wedding, to protect her. Men do not receive equal protection, however, as the law respects the right of men to be seduced into having pre-marital sexual relations with roguish women. The legal double standard promotes gender stereotyping of male and female sexuality and is meant to scare men into abstaining from being sexually active prior to marriage (except, of course, with married women or prostitutes) and to encourage unmarried women to avoid pre-marital sexual relations altogether prior to marriage. The law's message is clear: a woman's sexuality before marriage is not the woman's to control (unless, of course, the seducer marries her and then her consent to premarital sex is valid).

Third, a rape charge may also be reduced to hooliganism under some circumstances. For example, in one reported case, it appears that the rapist's good reputation in the community was enough to reduce the sentence to hooliganism, despite the fact that the man had raped two female subordinates, one of whom was only fifteen years old.<sup>186</sup>

Last, rape charges will not be brought if, after the rape, the victim later voluntarily has sexual relations with the man.<sup>187</sup> In other words, a man who, for example, kidnaps or buys a woman and rapes her, and then forces her to marry him can argue that she 'voluntarily' had sexual relations with him. Or a man who rapes his girlfriend, can claim it was not rape if the woman later consents to having relations in the hopes that he will marry her if she consents. Chinese women are under tremendous pressure to prove their virginity on their wedding night and so any woman who is raped by her boyfriend prior to marriage is bound to do anything to convince him to marry her, including having further sexual intercourse. In fact, a man who plans to marry a woman who refuses to engage in premarital sex may be encouraged to rape her in order to reduce the costs to his parents for a wedding banquet, as large and elaborate banquets are only necessary when the bride is a virgin.<sup>188</sup> This exception then could actually encourage a man to rape his girlfriend.

The rape creates categories of permissible and impermissible behavior for women. All women should be protected from stranger rape. Virtuous women should remain untouched by anyone until marriage and

---

186. Sichuan Fazhibao [Sichuan Legal News], Apr. 10, 1990, at 4.

187. Answers to some questions, *supra* note 182, art. 3(2).

188. See, e.g., Xiao Zhou, *Virginity and Premarital Sex in Contemporary China*, 15 *Feminist Studies* 279 (1989).

married women or women whose virtue has been compromised by pre-marital sexual relations are permitted to control their own sexuality. By classifying sexual intercourse as rape, non-rape, or hooliganism according to the relationship between the defendant and the victim, the law and the legal system ignore the fact that all instances of non-consensual sexual intercourse violate the woman's right to physical integrity. Again, the patriarchal view of male rights and female subordination within the family and personal relations has limited the definition of 'women's rights.'

*Battered women.* Historically, Chinese husbands had the legal right to batter their wives, subject to punishment only in extreme cases.<sup>189</sup> While the current government has carried out intensive campaigns to eliminate rape, prostitution and the purchase and sale of women and children, it has never had a similar campaign to eradicate the practice of wife battering. Consequently, there is no reason to believe that the incidence of wife abuse diminished after the Communist takeover. There is little data on the incidence of the crime. Most cases are reported only when a woman has been driven to kill, maim or attack her abusive husband.<sup>190</sup> However, a recent report on the situation in Shanghai shows that 29 to 33 percent of all domestic disputes between 1991-92 "involved physical violence" and another 1993 study shows that 21.2 percent of urban wives and 31.4 percent of rural wives experienced violent quarrels.<sup>191</sup>

Wife-battering is covered by a chapter of the Criminal Law entitled "Crimes of Disrupting Marriage and the Family," which provides for sentences of up to two years in prison in cases of particularly "odious" physical abuse and sentences of up to seven years if the violence results in "serious injury or death."<sup>192</sup> If the husband (or any other family batterer) is careful not to inflict an odious blow or one that does not

---

189. See, e.g., Alabaster, *supra* note 126, at 186-90; Van der Sprenkel, *supra* note 126, at 106-07.

190. See, e.g., Guo, *An Analysis of 100 Cases of Criminal Domestic Violence*, 26 *Chinese Women and Society* 14 (1993), originally in *Qingshaonian Fanzui Yanjiu* [Studies on Criminality Among Young People and Juveniles] 8 (1991); Sha Fu [Killing Husbands], *Falü yu Zhengzhi* [Law and Politics] 12 (August 1992) (55% of all victims killed by women in one county were the women's husbands); *Zhejiang Fazhibao* [Zhejiang Legal News], Nov. 21, 1991, at 2; *Liaoning Fazhibao* [Liaoning Legal News], Dec. 1, 1990, at 2; *Sichuan Fazhibao* [Sichuan Legal News], Sept. 13, 1990 at 3.

191. Report on Human Right in China 21 (U.S. Dept. of State, 1993).

192. Criminal Law, *supra* note 135, art. 182.

produce a serious injury or death, the government will not prosecute him; the victim must prosecute. The Criminal Procedure Law provides for private prosecution of criminal cases where the injuries are considered to be minor.<sup>193</sup> If the victim is successful in her prosecution, the government will then punish the batterer. In one such case, a court ruled that a wife's broken eardrum was a "minor injury" and, thus, the wife personally had to prosecute her husband for criminal battery.<sup>194</sup> The husband was sentenced to a one-year prison term. The process and the result would have been different if the husband had broken a stranger's eardrum or if the wife's eardrum had been broken by a non-family member. The government would have prosecuted the husband or the non-family member, in both cases, and the sentence could have been greater.

This law, like many others discussed in this paper, is written in sex-neutral language, but the social reality means that the law has a discriminatory impact upon women. In fact, the law is very similar to status-based Qing laws in which the punishment for battering a stranger was much greater than for battering a family member.<sup>195</sup> The only difference in the modern version is that the language has changed, though the effect has not. Although the modern Criminal Law does not refer to status, the effect of separating the crime of battery based on whether or not the victim and defendant are members of the same family effectively creates a hierarchy of crimes based on status relations. A comparison of the various degrees of battery inside and outside the family shows that the law treats violence within the family more leniently than violence outside the family.<sup>196</sup>

---

193. *Zhonghua Renmin Gongheguo Xingshi Susongfa* [Criminal Procedure Law of the P.R.C.], arts. 126-28 (Jan. 1, 1980) [hereinafter *Criminal Procedure Law*], trans. in *Laws of the PRC*, supra note 75, at 120-149.

194. *Liaoning Fazhibao* [Liaoning Legal News], Jan. 6, 1990, at 2.

195. If the perpetrator had a higher status than the victim, the punishment was milder than in a case involving the same act by the lower-status perpetrator against a higher-status victim. Alabaster, supra note 126, ch. 5. For example, a husband's sentence for killing his wife was less severe and more easily commuted than a wife's sentence for killing her husband. *Id.* at 186-93.

196. (a) Intentional but minor injury, under non-odious circumstances: three years maximum if battered by a stranger; a private suit with a short sentence if battered by a family member.

(b) Maltreatment under flagrant circumstances: maximum of two years if done by family member.

(c) Serious injury under non-odious circumstances: three to seven years if caused by a stranger; no punishment stipulated if caused by family member.

(d) Battery resulting in death under non-odious circumstances: minimum seven years if caused by a stranger; no punishment stipulated if caused by a family member.

The sex-neutral language does not avoid the charge that the law is discriminatory. Generalizing from available evidence, most batterers are men and most victims are women. This is consistent with the findings in other countries. Thus, imbedded in the hierarchical structure of the law is the implicit message that a certain amount of violence against wives is tolerable and acceptable. The 'family violence' law supports the traditional patriarchal structure by encouraging Confucian notions of family 'harmony' in which wives must obey their husbands. It also encourages traditional concepts of social 'harmony' by punishing strangers more harshly than family members.<sup>197</sup> It cannot be honestly claimed that this special battery law was necessary as family members who batter could just as easily have been treated the same as other batterers. Women's rights are again subordinated for the purpose of achieving other goals.

*One-child policy and female infanticide.* The One-Child Policy (the "Policy") has never officially been codified but it, nonetheless, has the effect of law.<sup>198</sup> It was adopted in 1979, thereby reversing Mao's twenty-year policy of promoting births to increase the labor pool. The Policy is intended to decrease the size of the labor force and number of mouths to feed, thereby hopefully increasing the people's standard of living.<sup>199</sup> Although the Policy is stated in sex-neutral terms, its unintended effect has been to legalize particular types of violence against women, baby girls and female fetuses. It is enforced through coercive and punitive measures such as involuntary birth control (IUD insertion), involuntary sterilization, involuntary abortions, and fines, demotions at work, and termination of privileges.<sup>200</sup> The impact of enforcement is discriminatory as between two to three times as many women as men are

---

(e) Serious injury or death under odious circumstances: death if caused by a stranger; two to seven years if caused by a family member.

Criminal Law, *supra* note 135, arts. 134, 182; Serious Endangerment Decision, *supra* note 140, art. 1(2).

197. This special right of violence is used in an ingenious way. For some men use "violence as a substitute for divorce." Men may physically abuse their wives, while encouraging them to take their own lives. Honig & Hershatter, *supra* note 101, at 292-93. Death by suicide is blamed on the wife; divorce, on the other hand, involves a loss of face for the man and his family.

198. The policy is strictly applied only to Han Chinese who constitute the overwhelming majority of the population. Non-Han Chinese can have more than one child, although that number, too, is controlled.

199. Human Rights in China, *supra* note 29, at 49-50.

200. Chang, *supra* note 3, at 258-263.

sterilized,<sup>201</sup> only women bear the pain (and danger) of forced abortions, and women are the main focus of invasive enforcement tactics carried out in work units, communities and homes. Lastly, rural dwellers' preference for sons and the unnaturally low rate of female births lead to the conclusion that more female than male fetuses are aborted. The introduction of the ultrasound scanner throughout China has served only to increase the abortion of female fetuses. We will probably never know the actual number of female fetuses that have been identified by the use of ultrasound and then aborted, but the number could run into the millions.<sup>202</sup>

While the discriminatory impact of the Policy is not necessarily caused by intentionally misogynistic policies, the discriminatory impact of numerous local regulatory exemptions is. Each province has the authority to draft exceptions to the Policy to fit local conditions. Unfortunately, this has resulted in implementation of many local exceptions that permit families to have a second, hopefully, boy child. Numerous regulations permit people to have a second child when the male lineage is threatened. For example, couples in Sichuan Province can have a second child if the husband is from a rural area, lives with his wife's family and is the "the only one of several brothers in rural areas who can have children," or if the couple lives in certain rural areas with labor shortages and have "only" a daughter.<sup>203</sup> Couples in Heilongjiang Province can have a second child if the wife's family has no sons.<sup>204</sup> While these exceptions may simply be interpreted as a means of controlling the number of second births, the language of the regulations makes it quite clear that the intent is to ensure the continuance of the patrilineal family structure. The only circumstances under which this type

---

201. *Id.* at 259; S. Hom, *Female Infanticide in China: The Human Rights Specter and Thoughts Towards (An)Other Vision*, 23 Colum. Hum. Rts. L. Rev. 249, 267 n.63 (1992).

202. *Lonely Nights Ahead for Nation's Bachelors*, S. China Morning Post, Mar. 2, 1993, at 10, citing China Daily (full cite not given in original); Nicholas Kristoff, *A Lost Generation: China Weeds Out Baby Girls*, S. China Morning Post, July 22, 1993, at 17; *Paper Says Scans Used Before Girls Aborted*, S. China Morning Post, June 22, 1993, at 10. In one county alone, ultrasound was used to abort 1,006 of 2,316 fetuses. Most, if not all, of the 1,310 fetuses that survived were probably male. In one city, 74.8% of all births in 1992 were boys, thus undermining the contention that female infanticide occurs only among the "backward" elements of the society. *Id.*

203. Sichuan Provincial Family Planning Regulations, secs. 8(2), (7), (9) (July 2, 1987), reprinted in Sichuan Ribao [Sichuan Daily News], July 4, 1987.

204. Heilongjiang Holds Family Planning Meeting, Heilongjiang Ribao [Heilongjiang Daily], Aug. 13, 1984, at 1.

of regulation permits a family to have a second child is when the male lineage is threatened with extinction. There is no similar provision to assure the continuation of the female lineage. The conclusion to be drawn from the language of these, and other similar, provincial-level regulations is that local and central governments agree that the only worthwhile heir is a male heir.

The Policy has also had a discriminatory effect on the ability of girls to be born and survive infancy. Victims of infanticide appear to be almost exclusively, or at least disproportionately, female.<sup>205</sup> As a result of female infanticide and abortions, a recent Chinese report has shown that by the year 2000, there will be approximately 70 million more men than women of marriageable age.<sup>206</sup> Statistically, approximately one-half of those men should have been women, which means that, by the year 2000, approximately 35 million girls will have been either aborted as fetuses, killed or permitted to die as infants. It is also possible that the birth of many of those infant girls are not registered so that the parents can claim that they do not yet have a child, thereby enabling them to obtain permission to have a second, hopefully boy, child.<sup>207</sup>

The existence of so many deaths is not accidental. It is the direct consequence of the effect that the traditional Chinese preference for male children has had upon the Policy. In rural areas, patrilineal communities and patrilocal residence patterns still predominate and the elderly still depend entirely upon their sons to support them in their old age. Quite naturally and rationally, couples want to make sure that the one child they are permitted to have is a son because sons do not marry out of the community. Couples who cannot fulfill the requirements for an exemption to have a second child and those who have obtained the exemption but end up with a second daughter are forced to resort to female abortion or infanticide (or unregistered female births) in order to try again for a son. These alternatives pose very little risk of punishment

---

205. Hom, *supra* note 201, at 256-57 nn. 26, 28, 29; Maria H. Chang, *Birth Control and Women's Rights in PRC*, China Spring Dig. 24, 27 (July/Aug. 1987).

206. *Lonely Nights Ahead for Nation's Bachelors*, *supra* note 202.

207. Girls whose births are unregistered cannot attend school or obtain any type of government-sponsored benefits, contributing to the high level of female illiteracy and unemployment.



despite that fact the law recognizes the crime of intentional killing<sup>208</sup> and can punish parents who refuse to support their children.<sup>209</sup>

The government, in the short-term, has very few incentives to turn the present situation around. Thirty-five million fewer girls by the year 2000 meets a short-term goal of reducing the population and, more importantly, will reduce the future population as there will be 35 million fewer women having babies. Thus, unless and until the shortage of women becomes a social problem affecting the country's stability (e.g., the present trafficking in women increases to dangerous levels of inter-provincial warfare), there is little reason to believe that the present Policy will be altered to protect women, girls and female fetuses. Again, women's rights have been curtailed in order to promote other policy objectives, including the support of the patrilineal structure of society.

*Women's Protection Law Reaffirms Government's Limited Definition of Equality and Women's Rights*

As previously discussed, the government recently had the opportunity to correct the country's discriminatory laws but failed to do so, except in the few areas already mentioned. The Women's Protection Law could have marked the beginning of an aggressive campaign to enforce a more egalitarian, non-sexist policy towards women, could have recognized the sexist assumptions implicitly and explicitly given expression in the law and could have proclaimed a new intolerance for sexual discrimination.<sup>210</sup> However, the government backed away from passing a truly revolutionary document and finally adopted a draft that reaffirmed its existing sexist policies. For example, the final version dropped the earlier proposal to require that 25 to 30 percent of the representatives to the National People's Congress would be women. The

---

208. Criminal Law, *supra* note 135, art. 132. The Constitution also prohibits maltreatment of children. See 1982 Const., *supra* note 17, art. 49. The Women's Protection Law (*supra* note 6, art. 35) prohibits "[d]rowning, abandoning or cruel infanticide in any manner of female babies." Neither law contains any criminal sanctions and so have no effect upon people's behavior. At most, a civil suit could be brought under the Women's Protection Law, but there is no one who would sue as the only persons who might have standing to sue are either dead (the infants) or the perpetrators (the parents).

209. Criminal Law, *supra* note 135, art. 183.

210. The Women's Protection Law was intended to perfect the law by consolidating into one law all the various provisions relating to women and by filling in the remaining legal gaps. *Zhongguo Funübao* [Women of China], Mar. 25, 1991, at 1; Thoughts on the Proposed Women's Law, *supra* note 77, at 3.

proposal was dropped in favor of the unenforceable requirement that national and local congresses "should have adequate numbers of women deputies."<sup>211</sup> It also dropped a proposal to set up a birth expenses fund that would have required all work units (instead of the mothers' work units only) paying for maternity leave expenses and thereby eliminating one of the disincentives to hiring women.<sup>212</sup>

In almost every other area, the language of the Women's Protection Law was lifted directly out of pre-existing laws. The most important new provisions are the new right of women to sue for monetary and non-monetary damages<sup>213</sup> (the Civil Code provides only for monetary damages) and the new ban on discriminatory housing practices. Even the women's new right to sue is limited because it does not provide a remedy for all infringements. It only covers infringements where another law or regulation provides a punishment or where someone interfered with a woman's right to redress, discriminated against a woman in hiring, firing, promotions or housing, infringed on a woman's right to an allocation of farmland or housing sites, or discriminated against women or girls in education.<sup>214</sup> Unfortunately, the Women's Protection Law is silent about discriminatory practices in other areas such as marriage, divorce, inheritance and criminal matters.

### PART III: WOMEN'S RIGHTS HAVE NO CHINESE CHARACTERISTICS

The survey of laws in Part II reveals the Chinese government's view of women's rights, equality, discrimination and liberation. The socialist view that women's liberation can be realized only through changes in women's economic conditions means that absolute legal equality is not a goal and that legal equality, in general, is not an absolute standard against which laws are to be judged. As a result, many laws set male-defined norms that contain the unquestioned assumption

---

211. Women's Protection Law, *supra* note 6, art. 10.

212. I wish to thank Jonathan Hecht for bringing this to my attention.

213. Women's Protection Law, *supra* note 6, arts. 48-52. Complaints under the Labor Protection Regulations are handled by the local labor department or the department in charge of the employer. Claims can be rejected but, if a violation is proven, no one has the power to force the work unit to (re)hire, train or promote the complainant, impose civil penalties or award damages. Women can appeal to the People's Court. The chances are small that a court would agree to hear a case after a decision has been rendered by the labor or other department. Labor Protection Regulations, *supra* note 53, art. 12.

214. Women's Protection Law, *supra* note 6, art. 50.

that women's "special characteristics" render women physically and intellectually inferior to men. It is also apparent that, within the patriarchal Chinese family structure, men control access to wealth, power and status and, as such, are perceived to be more important than women to the economic life of the family and the country. Biological determinism and a sex-biased approach to economic problems place women at risk, especially in difficult times. Women workers are the first called upon to make adjustments, either by shifting to less desirable and lower-paying jobs or by quitting work altogether. Women are expected to abandon their rights to property, to bear the brunt of the One-Child Policy, to sacrifice their right to an education and to abandon their rights when the (male-dominated) society dictates.

From the Chinese point of view, laws that treat women differently from men are 'special rights' that privilege women over men.<sup>215</sup> Women are not being treated unfairly merely because they are denied equal access to the same work and education as men, treated differently from men in the criminal law, and made to bear the social costs of childrearing and childcare, etc.; the law is merely recognizing and protecting women's special (i.e., non-male) characteristics. Implicit in the laws is the expectation that, for the greater benefit of society and social stability, women should be willing to give up (or not expect to hold) certain legal rights held by men, especially in light of the fact that inequality is counterbalanced by legal provisions in which women are 'protected' by men.

Such a view of women is familiar to Western women; Chinese and Western women's experiences are remarkably similar. Sexual discrimination may take different forms in the West and in China but the negative effect it has upon women and the privileges it grants to men is more or less the same. In conversations with Chinese women about problems in our respective countries, I find we are speaking a language that, when all the cultural differences are stripped away, is devoid of specific cultural content. Chinese women recognize immediately, from their own lives, the problems of women's double burden, the glass ceiling, tracking of women into "women's" work and men's hostility to women's demands for equality. The reason that we are able to communicate so easily about women's problems is the existence of a fundamental constant in both socialist and capitalist (and other) societies:

---

215. For a discussion of "special rights" treatment or different treatment approach in the law, see, e.g., Scales, *supra* note 67.

a patriarchal social and political order. Patriarchy is the glue that binds most women in the world together, that gives us a common language and a common goal. The specific manifestations of our oppression (and our solutions) will vary from culture to culture but our subjugated position is the constant source of our similarities. The foundation for our present similar situations can be found in our pasts. Women in both societies, up until the beginning of this century, were controlled by a rigidly and avowedly patriarchal society in which their every movement was dictated and designed by men and in which they were forced to rely upon men for all the necessities of life, including access to the legal system. Over the last century, laws in both societies have gradually been changed, with the most oppressive and blatantly sexist laws having been eliminated. Nonetheless, in both societies, sexism remains a constant in the law; it is simply more obvious in Chinese law.

For this reason, I reject the assertion that women's rights are relativist and contingent and support the universalist principles of women's rights contained in the Convention. At the same time, I recognize and support the necessity for the governments of different cultures to implement those principles within a specific cultural context. However, this does not mean that sensitivity to indigenous cultural values can be the basis for ignoring the universalistic principles or specific goals of the Convention. Much of the Convention is directed at eliminating many of those indigenous cultural values precisely because they undermine women's rights and subjugate women within a patriarchal society. The line between upholding universalist principles of women's rights and preserving non-sexist cultural values is one that must be drawn carefully by each country's legislature. Legislative drafters cannot use the excuse of sexism in society to excuse their failure to draft a law that takes social inequality into consideration. Simply drafting sex-neutral laws is not enough if the implementation of the laws has a discriminatory impact upon women.

Given the Chinese government's insistence that rights in the PRC must have Chinese characteristics and that the government has stated, in its latest report the United Nations on its compliance with the Convention, that it "has consistently adhered to the Convention . . . and has taken many corroborative measures to that end,"<sup>216</sup> I do not expect there to be any drastic improvements soon to the laws discussed in Part

---

216. China's Second Periodic Reports of States Parties, Addendum, CEDAW/C/13/Add. 26, July 13, 1989, at 2.

II in the near future. The focus of any effort, at most, will be upon the gap between "*de facto* and *de jure* equality of the sexes,"<sup>217</sup> which is blamed for existing discrimination, e.g., in employment.<sup>218</sup> In other words, the government's position is that formal legal equality, in conformity with the Convention, exists but the remaining sexual bias encountered by women stems from poor or improper implementation by persons who do not share the government's enlightened and unbiased view of women. This view clearly fails to recognize the role that law plays in legalizing, encouraging or supporting discrimination.

While it is true that serious gaps do exist between formal legal equality and enforcement, the more serious and dangerous problem for women arises from the gap between the Chinese definition of women's rights and the Convention's basic principles of equality of treatment and result. Hom has pointed out that, although the rights granted in the Women's Protection Law "echo rights set forth in the Women's Convention \*\*\* these women rights are still clearly woman/human rights 'with Chinese characteristics.'"<sup>219</sup> This observation applies equally to other rights granted to women as apparently, in the Chinese view, women's rights are not tainted by human rights principles, such as those that form the basis for international conventions. China has consistently refused to become a party to the Universal Declaration of Human Rights or to any of the other basic international human rights instruments because it is adamantly opposed to the idea of any fundamental human rights arising from the autonomy of the individual. Apparently, the government has taken (and continues to hold) the view that the Convention is a benign instrument devoid of universalistic human rights principles. Perhaps it believed that, because the world's preoccupation with China and human rights abuses is narrowly focussed on political rights, no one would look at its implementation of a document dedicated to the less-important rights of women.

Nonetheless, the Convention clearly sets forth standards that are founded on universalist human rights' standards. The opening paragraphs of the Convention expressly affirm that the role of the Convention is to supplement existing international human rights conventions, namely the Universal Declaration of Human Rights and the International Covenants on Human Rights. It also states that human rights are based upon the

---

217. Id. at 16.

218. Id. at 5.

219. Hom, *supra* note 201, at 284.

universalistic principle that “all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth” in the Convention. By acceding to the Convention, China explicitly agreed to adopt, as regards to women, girls, female infants and female fetuses, the universalistic principle underlying the Convention, to recognize the definition of discrimination contained in the Convention, and to implement the specific equal rights and anti-discrimination laws, policies and practices required by in the Convention.

In this regard, China has agreed, among other things, that the legal protections of the rights of women must be “on an equal basis with men.”<sup>220</sup> It must take “[a]ll appropriate measures,” including legislation, to implement the following objectives: to guarantee women “the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men”<sup>221</sup> and to achieve “equality of opportunity and treatment.”<sup>222</sup> Further, it has agreed to take measures to eliminate “prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.”<sup>223</sup>

China has thus placed itself in the position of having adopted individual-based human rights standards for women that conflict with its own contingent, relativist and programmatic human rights standards and its own deeply-entrenched sexist traditions and practices. It has adopted the inconsistent positions of “maintaining a rigid Marxist/socialist conception of rights as contingent and relative to a particular system, culture, and stage of development and yet adopt[ed] as domestic norms an international document which sets forth universalist standards for rights for women.”<sup>224</sup> China may still argue that it can adopt laws and practices that conform to its own view of rights, as some of the Convention’s language is vague and other important language is missing. But, even then, all signatories are constrained by a commitment to reaching the ultimate goal of attaining “equality of opportunity and treatment.”<sup>225</sup>

Given the Chinese relativist and contingent view of rights, and the male-dominated government’s preference for a male-privileged society,

---

220. Convention, *supra* note 5, art. 2(c).

221. *Id.* art. 3.

222. *Id.* art. 4(1).

223. *Id.* art. 5(a).

224. Horn, *supra* note 201, at 304.

225. Convention, *supra* note 5, art. 4(1).

it is not surprising that the laws discussed in Part II fall so far short of meeting the Convention's goal of "equality of opportunity and treatment." It could not be otherwise as the Chinese definition of impermissible discrimination is diametrically opposed to the following principle established in the Convention:

[T]he term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.<sup>226</sup>

The Chinese view of women's rights is much more narrowly focused than the Convention's, which explains the failure to develop a legal system or promote cultural attitudes in the form or having the substance envisioned by the Convention. As revealed in Part II, many Chinese laws fail to realize the above ideal in that they expressly discriminate in a manner that privileges men in direct violation of fact that "[t]he Convention requires suspicion of any gender-based distinction; only where differential treatment is required to effectuate equality should it be tolerated."<sup>227</sup> Other facially-neutral laws are biased in favor of men because enforcement within a sexist society has the effect of privileging men over women. Neither type of law accords with the Convention.

In addition to violating the general principles of the Convention, Chinese laws also violate numerous specific provisions of the Convention. The Convention contains an extensive list of very specific types of legislation that must be adopted by signatories.<sup>228</sup> In these areas, where the language is clear, China has no alternative but to comply. China has agreed, but failed, to meet the following Convention requirements:

---

226. Id. art. 1.

227. McKenzie, *supra* note 3, at 36.

228. How quickly they must adopt such legislation is not clear as the Convention speaks vaguely of "appropriate measures," which acknowledges that some countries might have to move at a slower pace than others in satisfying the demands of the Convention. Convention, *supra* note 5, arts. 2, 3, 5-14, 16.

- To repeal all discriminatory criminal laws<sup>229</sup> and “to suppress all forms of traffic in women and exploitation of prostitution of women”;<sup>230</sup>

- To eliminate discrimination in education, ensuring women the same educational opportunities as men;<sup>231</sup>

- To eliminate discrimination in employment, ensuring women the same rights to work, including the same employment opportunities;<sup>232</sup>

- To safeguard women’s reproductive functions and women during pregnancy in types of work proved to be harmful to them;<sup>233</sup>

- To eliminate discrimination in health care services, including family planning;<sup>234</sup>

- To “modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.”<sup>235</sup>

As long as the wide chasm remains between the Chinese view and the Convention’s view of women’s rights, improvements in the legal status of women in China will not improve. The laws discussed in Part II are perfectly attuned to the government’s policies regarding the economy, patriarchy and women, while falling far short of the Convention’s requirements. The consequences for women, if policies are not changed dramatically, are disastrous. Women will increasingly be marginalized in the labor market and relegated to the role of mother and wife. The commodization of women will continue apace with economic reform in which men have privileged access to power and money and women’s issues will increasingly be ignored by those in power.

There are many concerned Chinese scholars who write about women’s problems and they will, assuredly, continue to write forceful and valuable essays. They may even have some influence upon policy.

---

229. *Id.* art. 2(g).

230. *Id.* art. 6.

231. *Id.* art. 10.

232. *Id.* art. 11.

233. *Id.* art. 11, secs. (1)(f), (2)(d).

234. *Id.* art. 12(1).

235. *Id.* art. 12(2)(f).



However, their ability to turn a critical eye to the continuing power of the patriarchal structure of society is limited because they are forced to analyze women's problems within the permissible contours of socialist academic discourse. Members of the Women's Federations will also continue to speak out for enforcement of women's rights whenever possible but their role is limited. The best work done by Women's Federations is in the areas in which they have power, which is, in responding to the problems of individual women, one at a time. Neither group, then, is in a position openly to confront sexist policies or the government's failure to implement the Convention. This became quite clear when the presence of women scholars and activists on the drafting committee for the Women's Protection Law failed to result in the promulgation of a revolutionary, non-sexist law for women.

Thus, without some outside voices exposing the patriarchal structure of the society and the privileged position that has been given to men, the focus of discourse about women's status and problems will remain upon women's inadequacies and lack of knowledge about their legal rights or upon the sexist activities of 'unenlightened' or criminal elements, rather than upon the patriarchal system itself. This is where, I believe, the international community can play an important role because it can challenge China's claimed compliance with the Convention. Scholars and women's organizations outside of China are in the position to discuss and debate the status of Chinese women and, ultimately, to bring the situation to the attention of human rights' organizations and other international organizations, including the United Nations.

One way this can be done is through the submission of reports on women's status under the Convention. States parties are obligated to submit a country report every four years on their progress under the Convention.<sup>236</sup> China has submitted two reports so far.<sup>237</sup> Country reports are reviewed by a United Nations Committee that, in turn, sends a report on each country's compliance with the Convention to the United Nations General Assembly.<sup>238</sup> The Committee's powers and resources are severely limited. For example, the Committee has no power to force a country to comply with the Convention's provisions or to order an independent investigation of a country's compliance. Its time to review

---

236. *Id.* art. 18.

237. China's Initial Reports of States Parties, CEDAW/C/5/Add. 14, May 25, 1983; Second Periodic Reports, *supra* note 216.

238. Convention, *supra* note 5, arts. 17-22.

each report thoroughly and engage in follow-up is limited by the backlog of cases it must review during its annual two-week (maximum) meeting.<sup>239</sup> Its reports are, predictably, incapable of bringing an unbiased view of women's situation in each country to the attention of the international community, because the basis for its report is usually only the materials submitted by each country.

Concerned parties can assist the Committee on a voluntary basis as the Convention does not limit the source of information upon which the Committee may base its report to the reports submitted by states parties. This means that independent non-governmental organizations and individuals may submit their own findings to the Committee for consideration. Hopefully, this would lead to more unbiased and accurate reports being submitted to the General Assembly. These reports would have a two-fold purpose. First, they should encourage the government to recognize that the preference for a patriarchal, patrilineal and patrilocal social structure is not simply a feudal remnant existing only in the minds of the peasants, but that it is a deeply imbedded belief still existing in the minds of those who create policy and draft laws. Second, it should bring problem areas in the law and in society that must be addressed in order to implement properly its obligations under the Convention.

Even though the difficulty of enforcing the laws at the local level would obviously remain a tremendous barrier to equality and require legal and non-legal methods to solve, such difficulty does not justify governmental inaction. Centuries of gender stereotyping based upon classifying certain attributes as male, and therefore positive, and other attributes as female, and therefore negative, will not disappear overnight. However, a first step in the right direction would be to eliminate the biases and sexist assumptions that exist in the laws. China must be encouraged to create a truly non-sexist equal legal environment in which equality of opportunity and treatment are the norm and discrimination is permitted only when necessary to effectuate equality, as that term is defined in the Convention. Until those fundamental changes are made, China's present laws will continue to send a very strong message to the public that traditional discriminatory practices and beliefs are permissible and even desirable, both in law and in practice.

---

239. *Id.* art. 20(1). For a more detailed discussion of the Committee's problems, see Andrew Byrnes, CEDAW's Tenth Session, 9 *Neth. Q. of Hum. Rts.* 332 (1991).