

**FAMILY PLANNING AND GENDER DISCRIMINATION IN THE WORKPLACE: AN
ASSESSMENT OF CHINA'S TWO-CHILD POLICY ON WOMEN'S EQUALITY AT
WORK**

by

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Abstract

Discrimination toward women in the workplace is a persistent issue. It desperately calls for ways to secure female workers' rights. China's two-child programme is intended to solve issues related to an ageing population. However, this strategy can result in a rise in instances of gender-based job discrimination. This research addresses the current shortcomings in Chinese law for tackling workplace gender inequality, including the absence of specific anti-discrimination legislation, an insufficient knowledge of the meaning and classification of discrimination, and a shortage of enforcement institutions. This research conducts a comparative analysis of China and Canada, focusing on Canada's civil rights and pay equity legislation. The final chapter makes several suggestions for reforming China's anti-discrimination legal framework, focusing on a quantitative review of Canada's anti-discrimination legislation.

Lay Summary

The family planning programme has been scrapped in China after the official adoption of the two-child policy five years earlier. The contentious two-child scheme has ignited debate in China and around the globe. Existing survey data indicate that some Chinese families, especially Chinese women, may opt out of having a second child. A key justification for such actions is to combat sexual sexism against women. The aim of this research is to examine the legal issues around occupational discrimination against Chinese women. It examines China's legislative provisions regarding workplace gender inequality and compares them to Canada's laws and legal institutions on the topic. This thesis makes many proposals for improving workplace anti-discrimination under Chinese rule.

Preface

Due to the growing global influence of the MeToo movement, I am also a strong believer in feminist theory. As a result, I began to pay attention to how Chinese women are treated in the workplace and to the extent to which Chinese laws protect women in the workplace. Gender inequality is not new in China, and the implementation of the two-child policy in 2015, widely regarded as a watershed moment in China's childbearing policy, may exacerbate pressure on Chinese women's professional lives.

Feminism is a developing subject in China, and pertinent research focuses on comparisons with the laws of several countries, including the United Kingdom and the United States. There are few studies examining the human rights laws in China and Canada in comparison. The purpose of this research is to examine Canadian laws pertaining to human rights protection, anti-discrimination against women, and pay equity. Learning how specialized enforcement agencies such as the human rights court and human rights commission contribute to women's workplace protection. China should take a page from Canada's book by enacting a specialized anti-discrimination legislation and establishing supportive implementing agencies. Additionally, the issues confronting China were studied through the lens of various feminist theories. I hope that after reading this thesis, the reader has a greater understanding of female sexism in the workplace in China.

Table of Contents

Abstract.....	iii
Lay Summary.....	iv
Preface.....	v
Table of Contents.....	vi
Acknowledgements.....	x
Dedication.....	xi
Chapter 1. Introduction.....	1
1.1 Background and Context: Gender-Based Social and Work Roles in China.....	3
1.2. Women’s Rights at Work: an International Foundation.....	5
1.2.1. International human rights law.....	7
1.2.2. International labor law.....	9
1.2.3. World Women’s Congress.....	10
1.3. China’s Adoption of International Laws on Women’s Rights at Work.....	11
1.4. Feminism and the Law: Theoretical Orientations.....	14
1.5. Women’s Rights and Discrimination at Work in China: Thesis Outline.....	19
Chapter 2. The Impact of the Two-Child Policy on Women’s Employment (In)Equality in China	22
2.1 A Brief History of the Family Planning Policy in China: Movement from a One-Child to Two-Child Policy.....	24
2.1.1. A Brief History of Family Planning in China.....	24
2.1.2. Women’s Attitudes towards the Two-Child Policy in China.....	26
2.2. The Impact of the Two-Child Policy on Women’s Social Positions in China.....	28
2.2.1. Influence of Traditional Opinions.....	29

2.2.2. Women’s Employment Inequality in China.....	29
2.2.3. Women’s Right to Education and Career Prospects.....	30
2.2.4. The Tension between Work and Family Life.....	31
2.3. The Impact of Childbearing Expectations on Gender discrimination in Employment in China.....	33
2.3.1. Gender discrimination in Employment: the Employer Perspective.....	33
2.3.2. The “Cost” of Maternity Leave.....	34
2.3.3. The “Costs” Associated with Women’s Employment as “Temporary”.....	35
2.4. Mapping Gender-Based Employment Discrimination in China: Women’s Experiences during the Employment Life Cycle.....	36
2.4.1. Gender-Based Discrimination in Recruitment.....	37
2.4.2. Gender-Based Discrimination during Employment.....	39
2.4.3. Gender-Based Discrimination: Impacts on Retirement.....	41
2.5. Conclusion.....	42
Chapter 3. Laws Addressing Employment Discrimination on the Basis of Sex in China: An Analysis of the Relevant Legal Frameworks and Processes.....	44
3.1. The Legal Framework Addressing Gender discrimination in the Workplace in China..	45
3.1.1. The Constitution.....	46
3.1.2. Women's Rights Protection Law.....	48
3.1.3. Labor Law and Labor Contract Law.....	51
3.1.4. Employment Promotion Law.....	53
3.2. Challenges in the Operation and Enforcement of Laws Addressing Gender Equality and Discrimination in the Workplace.....	55
3.2.1. Lack of Definition of “Discrimination”.....	58
3.2.2. Lack of Legal Consequences and Deterrent Effect of Discrimination Laws.....	59

3.2.3. Lack of Specialized Law Enforcement or Supervisory Body.....	61
3.3. Challenges in the Legal System and Access to Dispute Resolution in Instances of Gender discrimination in Employment.....	62
3.3.1. Mediation and Internal Resolution Measures.....	63
3.3.2. Labor Arbitration.....	64
3.3.3. The Lack of Coordination between Arbitration and Litigation Processes.....	66
3.4. Conclusion.....	69
Chapter 4: Canada’s Approach to Addressing Gender discrimination in the Workplace.....	71
4.1. Brief History of Canadian Human Rights Law.....	73
4.2. Canada’s Legal Framework on Sex Discrimination in Employment: An Overview.....	74
4.2.1. The Constitution.....	75
4.2.2. The Canadian Human Rights Act.....	76
4.2.3. Ontario Human Rights Code.....	79
4.2.4. Employment and Pay Equity Laws.....	80
4.3. Protection for Women at Work in Canada: A View of the Legal Process.....	83
4.3.1. Pregnancy as a prohibited ground of discrimination in employment.....	84
4.3.2. Initiating a legal complaint for pregnancy-related discrimination at work.....	85
4.3.3. The legal principles governing discrimination complaints in Canada.....	85
4.4. Classifying Discrimination in Employment: Direct, Indirect and Systemic Discrimination.....	87
4.5. Institutional Actors: the Role of Human Rights Commissions and Related Administrative Bodies in Canada.....	90
4.6. Conclusion.....	92
Chapter 5: Recommendations for China.....	94
5.1. Establishing a New Workplace Anti-Discrimination Law in China.....	96

5.1.1. Defining discrimination and protected grounds.....	97
5.1.2. Classifying discrimination.....	99
5.1.3. Reforming legal processes to address and remedy workplace discrimination..	100
5.2. The Need for a Dedicated Legal Administrative Enforcement Body.....	102
5.2.1. Anti-Discrimination Commission.....	104
5.2.2. Anti-Discrimination Tribunal.....	105
5.3. Improving Human Rights Education and Training.....	106
5.4. Conclusion.....	107
Bibliography.....	109

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My parents deserve special recognition for their spiritual and financial encouragement during my academic career.

Dedication

To My Parents

Chapter 1. Introduction

As of January 1 2016, China officially ended its one-child policy, in place for more than 30 years, and introduced a universal two-child policy.¹ This policy evolution was the result of a gradual transition that started in November 2013, with the Third Plenary Session of the 18th Communist Party of China Central Committee launching the “two-child” policy.² This policy was extended in September 2015, when China agreed to maintain the fundamental state policy of family planning, enhance the population growth strategy, fully enforce the policy of one couple having two children, and effectively address population ageing.³

It is well known that China's population ranks first in the world. However, the development of China's material wealth is not enough to support a huge population. Therefore, in 1982, the Communist Party of China incorporated the promotion of family planning⁴ into state policy, and family planning was officially carried out.⁵ For China, family planning plays a crucial role in controlling the rapid growth of population and improving the quality of population.⁶ With the implementation of family planning, China has made remarkable achievements in reducing poverty and developing economy. However, an aging population and increasing reliance on public pensions, coupled with gender imbalance in the population, and growing labor shortages, created new population and economic challenges. The sex ratio between men and women in China has always been more men than women. In the era of family planning, people are likely to give up if their first child is a daughter, and this has been the main reason why the family planning policy is not well received by some people.

The movement towards a two-child policy in China has sought to alleviate the problems

¹ Yi Zeng & Therese Hesketh, “The Effects of China’s Universal Two-Child Policy” (2016) 388:10054 *Lancet* 1930 at para 1935.

² *Ibid* at 1937.

³ *Ibid* at 1938.

⁴ Family planning was designated as a basic state policy in 1982 in China. The main content and purpose of the policy are to promote late marriage and childbirth, so as to control the population in a planned manner. Since its formulation, the family planning policy has had a positive effect on China’s population and development, but it has also brought about an aging population problem after decades. Therefore, some adjustments are made to family planning policy.

⁵ Isabelle Attané, “China’s Family Planning Policy: An Overview of Its Past and Future” (2002) 33:1 *Stud Fam Plann* 103 at para 5.

⁶ Jiang Quanbao, Li Shuzhuo & Feldman W. Feldman, “China’s Population Policy at the Crossroads: Social Impacts and Prospects” (2013) 41:2 *Asian J Soc Sci* 193 at para 1.

associated with an insufficient labor force, aging population, and imbalance in the population gender ratio, each of which created obstacles hindering China's economic development.⁷ However, the two-child policy's recent introduction means that limited data and research exists from which to establish whether it has met its objectives, and from which to evaluate the advantages or disadvantages of the impact made by the policy. Despite this, early signs indicate that the new policy is having an impact on women's employment.

This thesis investigates how the universal two-child policy has operated to entrench and increase gender discrimination in employment for women in China, focusing especially on discrimination in relation to their presumed family status and caregiving obligations. The realization of the two-child policy is a significant change for Chinese society. This thesis focuses on the impact of the two-child policy on women: whether women will face a more difficult position in the workplace as a result of this policy. This thesis provides an in-depth analysis of gender discrimination in the Chinese workplace, from before the enactment of the two-child policy, to the possible negative effects of the two-child policy after its implementation. The issue of gender discrimination is not the result of a single factor but is influenced by a combination of causes. This thesis further explains the manifestations of workplace discrimination in China. Firstly, it introduces the problem of workplace discrimination as a whole and then focuses on the lack of equal protection for men and women in the workplace in China's laws, presenting the existing gaps and irrationalities. After that, it discusses how Canadian law protects equality in the workplace in all aspects and whether other specialized agencies are used to support the implementation of the law to ensure its effectiveness. Ultimately, combining these experiences with the problems that exist in China, some suggestions are given.

Whether from the perspective of gender equality or national development, the impact of the two-child policy on women's employment, and on discrimination in the workplace is worthy of attention. If the problem of gender discrimination in the workplace aggravated by the two-child policy can be solved, both gender equality between men and women will be advanced and women will be less worried about having children so that the purpose of the state's two-child policy can be achieved.

Through an analysis of the employment impact on women under the universal two-child

⁷ Wang Feng, Baochang Gu, and Yong Cai. "The End of China's One-Child Policy" (2016) 47:1 Stud Fam Plann 83 at para 2.

policy, we can understand the dilemma of women's employment and discrimination against them in the workplace. This, in turn, facilitates the development of corresponding countermeasures to alleviate these problems that may operate to better implement the universal two-child policy and to promote gender equality.

1.1 Background and Context: Gender-Based Social and Work Roles in China

Women are important members in family life in China. Women's family status, lifestyle, economic status, as well as recognition and understanding of fertility, are directly related to the implementation, effects and results of China's new two-child policy. Therefore, when discussing population issues, we must draw specific attention to the impact of the policy on women. The historical one-child policy was seen by some as encouraging women's participation in paid labor. It is important to compare the one-child policy to help readers better understand the importance of the two-child policy. The one-child policy, which required a family to have only one child, is one of the family planning policies mentioned above. Family planning claims that having children in a planned manner under the macroeconomic control of the state, and its main content and purpose are to advocate late marriage and childbirth, fewer and better births, and to control high population growth in a planned manner, which has been established as a basic state policy. Moreover, China also enacted the *Population and Family Planning Law* for this policy. The two-child policy is a new family planning policy in China that allows a family to have two children. There was a gradual transition from the one-child policy to the two-child policy, initially allowing both spouses to have a second child if they were both only children, and then relaxing it to allow a second child if one of the spouses was an only child.

“One of the advantages of China implementing family planning policy is to liberate women from trivial household chores and unrestricted child-bearing to integrate into the social labor market for creating social value, so as to realize their own value of life.”⁸ Despite this, gender-based stereotypes and norms continued to operate to women's disadvantage in the paid labor force. “Due to the influence of traditional culture and the continuation of gender status inequality, the concepts of “men are stronger than women” and “breadwinning men and homemaking women” still continue till today.”⁹ “This principle meant that women sought to

⁸ Therese Hesketh, Xudong Zhou, Yun Wang, “The End of the One-Child Policy: Lasting Implications for China” (2015) 314:24 JAMA 2619 at 2619.

⁹ Alicia SM Leung, “Feminism in Transition: Chinese Culture, Ideology and the Development of the Women's

remain “inside” as “a spatial statement of virtuous femininity”.¹⁰ As such, the family planning policies in China have not, in practice, transformed women’s gender roles in relation to labor to the extent hoped, and many women remain at home as caregivers once they have a child.

Women in China often bear the heavy responsibility of taking care of their families. Thus, the introduction of the two-child policy may, in fact, be seen to put a yoke on women. It is of great significance to study what challenges the two-child policy will have for women, their role and participation in Chinese society and in the labor force. Some women do not intend to have a second child, but may feel obligated to do so, particularly when elders or their husbands want to have a second child. The process of another pregnancy may be difficult or dangerous, which may do major harm to their bodies or cause risks to their lives. In addition, due to the influence of traditional gender culture, husband and family is the most important thing for women, women not only engage in paid labor, but also take on primary responsibility for the family and caregiving. Women not only take care of children and their spouse, but also likely take care of the daily life of both their and their spouse’s parents.¹¹ A second child in the household will increase the pressure on women, resulting in a series of potential negative effects.

In this thesis, I analyze what impacts the new two-child policy may bring to bear on women's work and whether it will exacerbate employment discrimination. I demonstrate that the universal two-child policy will increase employment discrimination against women. Women who have no children when they apply for a job will likely suffer serious gender discrimination in the labor market, as enterprises may be unwilling to recruit female employees due to assumed associated costs with two maternity leaves. Women who have already given birth to one child may be assumed to be in an advantageous position. However, these women may easily become disadvantaged in the labor market following the introduction of the two-child policy, as they will face similar discrimination and barriers in hiring practices. In addition, women’s career progress will be further impacted by the two-child policy. More women are engaged in marginal or informal occupations. Especially in the period of pregnancy, employers may make excuses for female workers to transfer their positions, cut their pay, or simply dismiss them.

Movement in China” (2003) 20:3 APJM 359 at 359.

¹⁰ Lisa Rofel, “Liberation nostalgia and a yearning for modernity” in Gail Hershatter & Lisa Rofel, eds, *Engendering China: Women, culture, and the state* (Cambridge: Harvard University Press, 2005) 226 at 226.

¹¹ Xiao-Tian Feng, Dudley L Poston Jr, Xiao-Tao Wang, “China’s One-Child Policy and the Changing Family” (2014) 45:1 J CFS 17 at 29.

Discrimination in employment against women is a complicated problem that has long existed in society. The implementation of the universal two-child policy is likely to make this problem more prominent. Therefore, it is significant to study the legal issues attending discrimination in employment against women in relation to the universal two-child policy. This thesis will contribute to the insufficient body of research on discrimination in employment and feminism in China. At present, research on discrimination in employment conducted in China is still at an early stage, focus on defining and classifying discrimination in employment. Accordingly, faced with the universal two-child policy, it is necessary to analyze the characteristics of the legal issues related to the discrimination in employment against women, to deepen the research on legal issues related to discrimination in employment against women, to analyze the legal provisions on the discrimination in employment currently in effect as well as their deficiencies, and to deepen the research on anti-discrimination theory in China by learning from Canada's experience in protecting parity of treatment for women in the workplace.

In this thesis, I examine how the existing legal framework relating to labor, women's rights, and discrimination, fails to sufficiently prevent and protect against discrimination for women in employment in China. I document both doctrinal and operational gaps that facilitate continued employment discrimination against women. I engage in a comparative examination of Canadian anti-discrimination law in order to formulate recommendations to improve the law and its operation in China, and to advance gender equality for women at work and in society.

1.2. Women's Rights at Work: An International Foundation

As a contracting party of relevant international covenants on human rights, China has taken steps to fulfill relevant international obligations on anti-discrimination in employment against women as stipulated in the covenants. China has established a legal system of anti-discrimination in employment against women with certain positive achievements having already been achieved. Traditionally related to employment restrictions and unequal remuneration, gender discrimination in employment has long been a social problem facing that various countries all over the world. In order to eliminate discrimination and accelerate the realization of women's equal right to work, the United Nations has promulgated a series of international covenants on human rights, which require contracting parties to not only rectify deep-rooted gender imbalances in their legal systems, but also take affirmative measures to provide effective

legal protection for women.

International treaties play a positive role in promoting China's anti-discrimination legislation. In fact, the United Nations (UN) did not recognize the PRC for twenty-two years. After that, China began to gradually accede to various treaties against discrimination against women in the workplace. Examining the international law foundations for China's anti-discrimination and gender equality laws assists in establishing the legal foundation for and content of its obligations explored in this thesis.

In this section, I discuss three types of international legal obligations that China has undertaken through its participation at the UN: international human rights; international labor rights; and, international women's rights. There are many provisions on combating discrimination against women in employment in the field of international human rights law. Internationally, conventions and normative documents concerning women's labor rights have played a significant role in protecting women's rights and interests and promoting women's development, effectively promoting women's equal employment and the realization of employment-related rights.

First, I review international human rights covenants, focusing especially on the International Covenant on Economic, Social and Cultural Rights,¹² and the Convention on the Elimination of All Forms of Discrimination against Women¹³, which work to address discrimination and protect women's rights and interests. Second, I examine how the International Labor Organization (ILO) formulates labor standards, including in relation to maternity protection, special protection and so on. Third, I introduce the efforts that the World Conference on Women has made regarding the gender equality and the protection of women. The International Women's Conference, alternately referred to as the United Nations World Conference on Women, is a significant gathering of women's organizations from across the world. Women's issues have always been one of the priorities of the United Nations in the field of society and development, and it has so far held four World Women Conferences to promote the cause of women around the world. These began in 1975 in Mexico City, 1980 in Copenhagen,

¹² *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) [ICESCR].

¹³ *The Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) [CEDAW].

1985 in Nairobi, and 1995 in Beijing.¹⁴ Beijing's 1995 Fourth World Conference on Women was a watershed moment in the global agenda for gender equality. The Beijing conference drew on the political commitments made at three recent global women's conferences and reinforced five decades of legal progress in ensuring women's equality with men in law and practice.¹⁵ The four conferences on women set different themes and achieved different outcomes, which work together to raise women's status all over the world. "These conferences and treaties had a distinct influence on domestic laws concerning labor discrimination against women."¹⁶ These conventions and normative documents cover women's employment, labor remuneration, social security, and specialized labor protection for women workers.

Introducing the international laws and conventions in which China has participated enables a better understanding of China's involvement in the international anti-discrimination movements, the reasons why China is active in participating in these international covenants, and the positive effect of these international laws on the advancement of women's status in China. This sets an important foundation from which to explore China's own laws regarding anti-discrimination and gender equality at work, which is at the heart of this thesis.

1.2.1. International human rights law

The "International Charter of Human Rights" includes the Universal Declaration of Human Rights,¹⁷ the International Covenant on Economic, Social and Cultural Rights,¹⁸ and the International Covenant on Civil and Political Rights and its two Optional Protocols.¹⁹ The Universal Declaration of Human Rights is the founding statement of the international human rights charter scheme, stressing that both men and women worldwide have an equal right to possess the Declaration's fundamental rights and freedoms. Besides, with the development of

¹⁴ "A Plan of Action for Canada to Reduce HIV/AIDS-related Stigma and Discrimination" (2020), online: *UN Women* <www.unwomen.org/en/how-we-work/intergovernmental-support/world-conferences-on-women> [perma.cc/5CLP-K5QU].

¹⁵ "A Plan of Action for Canada to Reduce HIV/AIDS-related Stigma and Discrimination" (2020), online: *UN Women* <www.unwomen.org/en/how-we-work/intergovernmental-support/world-conferences-on-women> [perma.cc/5CLP-K5QU].

¹⁶ Jamie Burnett, "Women's Employment Rights in China: Creating Harmony for Women in the Workforce" (2010) 17:2 *Ind J Global Legal Stud* 289 at 289.

¹⁷ *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) X.

¹⁸ ICESCR, *supra* note 12 at.

¹⁹ *International Covenant on Civil and Political Rights (ICCPR)*, 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) at 171.

research, people understand that not everyone fits into the gender binary of man/woman.²⁰ Here I focus especially on the International Covenant on Economic, Social, and Cultural Rights, which sets out key obligations regarding work and non-discrimination, and the Convention on the Elimination of All Forms of Discrimination Against Women.²¹

The International Covenant on Economic, Social, and Cultural Rights [ICESCR] is an essential instrument of human rights theory and practice today. It specifies the rights of a person or a resident of a contracting state, such as the right to employment, the right to fair wages for equal work, the right to organize and enter labor unions, the right to rest and daily paid leave, the right to social protection, and the right to an adequate standard of living.²² “Traditionally, labor is considered to be a means of earning a living. Modern concepts promote the concept of labor as a means of human value, social needs, self-realization, and human personality development. Its essence involves protecting workers' rights to survival and growth.”²³

The ICESCR embeds non-discrimination guarantees in several ways through its content.²⁴ First, it requires that “[t]he States Parties guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”²⁵ This demonstrates that the general provisions of the ICESCR on equality and non-discrimination contain a requirement to prohibit gender discrimination and that the universal exercise of all rights contained in the Convention must not be based on gender-based discrimination. Second, Article 3 requires States to extend equal rights to ensure that men and women enjoy all economic, social and cultural rights contained in the Covenant.²⁶ Third, the ICESCR stipulates that women have equal rights with men to work and their rights related to work.²⁷ It also requires the State to take appropriate measures to guarantee the realization of this right. The right to work is regarded as an economic right; it is an essential guarantee for women's financial independence and self-

²⁰ Jessica J Cameron & Danu Anthony Stinson, “Gender (Mis) Measurement: Guidelines for Respecting Gender Diversity in Psychological Research” (2019) 13: 11 Soc Pers Psychol Compass e12506 at 37.

²¹ *CEDAW*, *supra* note 13 at.

²² *ICESCR*, *supra* note 12 at 2.

²³ Xixia Li, “Research on the Legal System of Anti-Female Employment Discrimination in China-- From the Perspective of International Human Rights Law” (2017) 1 HR 79 at 37.

²⁴ *ICESCR*, *supra* note 12 at 15.

²⁵ *Ibid* at 15.

²⁶ *Ibid* at 15.

²⁷ *ICESCR*, *supra* note 12 at 15.

development. Fourth, under the framework of the ICESCR, equal pay for equal work for men and women is an economic right related to the right to work. Article 7, paragraph 1, of the Convention contains a special provision that requires the State to guarantee “fair wages and equal pay for work of equal value without any discrimination, in particular to ensure that women enjoy working conditions not worse than those enjoyed by men and enjoy equal pay for equal work.”²⁸

The *Convention on the Elimination of All Forms of Discrimination against Women* [CEDAW] is legally binding and contains internationally recognized principles and measures aimed at fighting for and safeguarding women's equal rights. It is not regulated in political, social, economic, cultural, and public affairs. Giving women equal rights in all fields is regarded as the “International Charter of Women's Rights.” Article 1 of the Convention defines “discrimination against women” as “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.”²⁹ Article 11, paragraph 1, of the Women's Convention, specifically stipulates women's employment and labor rights and requires the State Parties to take all appropriate measures to eliminate discrimination against women in the profession to ensure equal rights to work, same rights to employment opportunities, free choice of occupation, the right to employment, the right to equal pay for same work (including allowances), the right to social security, and the right to maternity protection.³⁰ This provision establishes and strengthens many women's rights in relation to their employment and in society.

1.2.2. International labor law

International labor standards play a role in coordinating, guiding, and regulating labor laws. Within international labor law, equality in rights and treatment between women and men with respect to work are included in many instruments. Relevant content and rights include: equal employment opportunities for men and women, fair treatment, elimination of employment and occupational discrimination, special protection for female employees, and maternity protection.

²⁸ *Ibid* at 15.

²⁹ CEDAW, *supra* note 13.

³⁰ CEDAW, *supra* note 13.

Employment and Occupational Discrimination Convention No. 111 (1958) defines discrimination as “any distinction, exclusion or preference based on race, color, gender, religion, political opinion, ethnic origin or social origin, which has the effect of canceling or impairing equal employment or professional opportunities or equal treatment.”³¹ The purpose is to promote equal employment and career opportunities and eliminate discrimination based on race, color, sex, religion, ethnicity, and social origin.

International labor standards also exist in relation to women’s rights and interests in the workplace. There are, first, standards regarding equal pay for equal work, namely under *Convention No. 100 on Equal Remuneration for Men and Women Workers*, and *Work Recommendation No. 90*.³² There also exist international labor law instruments regarding maternity protection. Convention No. 3 of 1919, *Convention on Women’s Work Before and After Childbirth*,³³ was the first standard in this regard, which was later revised by Convention No. 103 of 1952, the *Maternity Protection Convention*,³⁴ and again at the end of 2000 with the *Maternity Protection Convention No. 183*.³⁵ The purpose of such standards is to ensure that female employees enjoy maternity leave and are eligible for cash allowances and medical care.

Complementing the ICESCR and CEDAW, ILO instruments also prohibit discrimination on the basis of sex in employment, promote gender equality in employment, including with regard to pay, and offer special protection to women regarding maternity.

1.2.3. World Women’s Congress

Drawing out from international legal instruments that seek to protect and advance women’s rights and interests, the United Nations has convened four world conferences on women, and each conference has set out important objectives on issues such as gender equality and development. The First World Conference on Women held in 1975 adopted the “Mexico Declaration” and “World Action Plan”, which defined equality between men and women.³⁶ The Second World Women’s Congress was held in 1980,³⁷ and the General Assembly adopted the

³¹ *Discrimination (Employment and Occupation) Convention, C111*, 25 June 1958, ILO (entered into force 15 June 1960) at 1 [DEOC].

³² *Ibid* at 1.

³³ *Equal Remuneration Convention, C100*, 29 June 1951, ILO (entered into force 23 May 1953).

³⁴ *Maternity Protection Convention*, 15 June 2000, ILO (entered into force 7 February 2002) .

³⁵ *Ibid*.

³⁶ *World Conference of the International Women’s Year, 1975*, UN Doc E/CONF.66/34.

³⁷ *1980 World Conference on Women, 1980*, UN Doc A/CONF.94/35.

United Nations Women’s Program of Action for the Second Half of the Decade, with special emphasis on employment, health and education as important components of development, with a view to achieving the goals of equality, development and peace at an early date. In July 1985, the third conference was held in Nairobi, the capital of Kenya. The conference adopted the Nairobi Strategy, which called for equality and the elimination of all forms of discrimination against women, including women’s labor and society.³⁸ Fair job opportunity, equal compensation for equal jobs, equal labor standards, equal opportunities for technical training, sufficient social care, and unemployment benefits are also included in the defence of rights and interests.

In September 1995, the Fourth Women’s Congress adopted the “Beijing Declaration” and the “Beijing Program of Action” in Beijing.³⁹ “By lobbying to host this conference, China showed both a continuing dedication to improving relations with the international community and an interest in promoting women's rights in China. Though the primary goal of the conference was development and peace, a secondary goal was to address gender-related employment problems.”⁴⁰ The World Women's Movement's priorities and objectives for the next five years were explicitly defined, and policymakers were encouraged to make political promises to take steps to end all forms of violence against women and to pursue the lofty goals of equity, prosperity, and peace.⁴¹

Together, international human rights and labor laws, coupled with the specific objectives and commitments made through the World Conferences, establish a robust international legal foundation for the protection and advancement of women’s rights at work. The next section examines how the international legal foundation has been adopted in China, and challenges that remain.

1.3. China’s Adoption of International Laws on Women’s Rights at Work

The realization of the rights contained in international conventions, such as the ICESCR and CEDAW, depend largely on national adoption by member states, and therefore on the social

³⁸ *Ibid.*

³⁹ *Beijing Declaration and Platform of Action*, GA Res 50/203, UNSCOR, 1995, UN Doc A/CONF.177/20 [BDPA].

⁴⁰ YongQing Fang, “Women’s Development in Hebei Province, PRC” in Cherlyn S Granrose, ed, *Employment of Women in Chinese Cultures: Half the Sky* (Cheltenham: Edward Elgar Publishing, 2005) 157 at 163.

⁴¹ *BDPA*, *supra* note 39.

and economic development of the contracting countries and their domestic legal, judicial, and administrative measures. This section examines how these international instruments exist and operate within the Chinese legal system. I examine the legal quality of international law in China, the layered motivations that have given rise to its adoption and implementation of international norms regarding women's rights at work in national law and policy, and operational challenges that have arisen in this process.

China ratified the ICESCR and CEDAW on March 27, 2001, and November 4, 1980, respectively. Similarly, it signed the International Labor Organization *Convention for Equal Remuneration for Equal Work* in 1990, signaling renewed interest in the status of working women.⁴² However, China's "Constitution", "Legislation Law", and other related laws do not address how to apply international law. Therefore, there are different legislative practices in reality. For example, the "General Rules of Civil Law" and "Civil Procedure Law" and other laws stipulate the priority application of international treaties. However, there are a large number of laws that do not provide for the application of international treaties or foreign law.⁴³ In practice, the ICESCR and CEDAW cannot be directly applied in China. They must be written into domestic law by the National People's Congress and its Standing Committee in order for the rights and obligations to be law in China.

China's foreign engagement and adoption of domestic regulations may act as a expressive function in transmitting public policy goals and interests, and the policy message conveyed by legislation can have implications for society that are equivalent to or greater than the substance of the law.⁴⁴ When required to decide whether to ratify an international covenant, every country will consider its domestic economic, political, social, and cultural conditions and China is no exception.⁴⁵ Generally speaking, several factors influence this assessment in China, including changes in Chinese people's traditional ideas, trends in international law, and advancement of the status of Chinese women. Since the reform and opening up, China has always aimed to keep

⁴² Xun Zeng, "Enforcing Equal Employment Opportunities in China" (2006) 9 U PA J LAB & EMP L 991 at 991.

⁴³ Li, *supra* note 23 at 37.

⁴⁴ ⁴⁴ Crystal Roberts, "Far from a Harmonious Society: Employment Discrimination in China" (2012) 52:4 Santa Clara L Rev 1531 at 37.

⁴⁵ Xiaobing Zhang, "China's Ratification and Implementation of the Convention on the Elimination of All Forms of Discrimination against Women" (2016) 6 HR 57 at 37.

pace with international society, and the ideology must also keep up with international trends. For example, China acknowledged the problem of gender discrimination in employment situations and stated that the government was dedicated to solving these problems through legislation such as the Law on the Protection of Rights and Interests of Women.⁴⁶ Relatedly, it has become an international trend to participate in all kinds of international covenants on human rights and formulate anti-discrimination laws. The performance of a country in human rights protection has become an important criterion to evaluate the country.

Advancement of women's rights in China have also been the result of women's movements within China. Under the influence of prevalent women's movements and the spread of feminist theory, Chinese have gradually developed their own standpoints and positions in a series of ideological trends. Some Chinese scholars, inspired by feminist ideas, have also carried out women's movements and put forward their demands. The advanced views on women put forward by the movement of encouraging women's education and abolishing foot binding, as well as the translation of western feminist thought, not only reflected the strong desire of Chinese women at that time to fight for freedom and gender equality, but also indicated that Chinese women's consciousness of right and self-consciousness that had been suppressed for thousands of years began to awake.⁴⁷ These women rights fighters carried out a series of women movements, which not only raised women's social status, but also made it possible for China to participate in international covenants and join international organizations.

China's participation in the international community is beneficial to China. First of all, ratifying the instruments canvassed above has become an important channel for China to keep up with international society, as well as the way in which China can accept international supervision. China has signed many international treaties and joined many international organizations to cooperate with other countries in the world. In turn, these groups can monitor whether China actually fulfils their promises. For example, if China is committed to promoting gender equality, China must seriously consider whether its current domestic laws can be implemented and push forward the legislative process to fulfill their commitments. Secondly, the ratification of the instruments urges China, as a contracting party, to be active in performing the obligations

⁴⁶ Christine M Bulger, "Fighting Gender Discrimination in the Chinese Workplace" (2000) 1 BC Third World LJ 345 at 37.

⁴⁷ Roberts, *Supra* note 44 at 37.

stipulated in the covenants, implementing the aims and purposes of the covenants, and eliminating discrimination against women by legislative, judicial and enforcement means. Finally, the ratification of the instruments enables China to respect and protect women's rights from a higher point of view, in a bid to speed up gender equality, fight against gender discrimination, and respect and protect human rights in China.

However, implementation and enforcement of the relevant international obligations has created some challenges. “Although China has ratified these international conventions, they have proven less than effective due to enforcement problems.”⁴⁸ Absent adoption into national law, resort must be had to international bodies for enforcement. Despite being technically enforceable through the International Court of Justice, the International Labor Organization must “often resort to soft power, such as public shaming or providing incentives for compliance such as funding or technology.”⁴⁹

As this and the previous section establishes, there is firm grounding, both within international and domestic law, for China’s commitment to gender equality and women’s rights at work. However, as Chapters 2 and 3 will explore, there remain significant challenges for women experiencing discrimination in employment in China. Before engaging in this substantive analysis, the next section reviews the theoretical approach I adopt in relation to gender equality, feminism and the law.

1.4. Feminism and the Law: Theoretical Orientations

Although there are many discussions about feminism that have been conducted in China, few of them integrate feminism with jurisprudence and law. In addition, China lacks the environment for people to explore feminist jurisprudence. Feminism is a new topic for Chinese society; only in recent years, when the Metoo movement was launched, has the topic of feminism been discussed more in society. Compared to Western countries, feminist-related legal studies in China is young, few people study related theories, and few schools offer special courses on these topics.

As a result, the theories of feminism only have limited influence on Chinese jurisprudence. It is hoped that the integration of the theories of feminism and the jurisprudence of China can

⁴⁸ Burnett, *supra* note 16 at 289.

⁴⁹ Roberts, *supra* note 44 at 37.

enable people to better understand equality and difference. Feminism is an indispensable theoretical basis for research on the protection of women laborers' rights and interests. This section sets out the theoretical orientation I adopt for this thesis, reviewing the history of feminism and the law, and discussing several key theories of feminism that inform this thesis: liberal feminism; cultural feminism; radical feminism and anti-essentialist feminism.

Feminist movements are social movements that are created to eliminate sex discrimination and oppression, and to achieve sex equality in all aspects of life. Feminist movements can be divided into three generations which are often referred to as three "waves" in the academy. "Early feminists and the original feminist movement during the 19th and early 20th centuries are often referred to as "first-wave feminism". This "wave" focused on attaining basic legal rights, including voting rights and property rights, for women. The feminist movement from 1960 until the 1980s is generally referred to as "second-wave feminism."⁵⁰ Second-wave feminism broadened the debate on sex equality to include issues such as domestic violence and equality in the workplace. Third-wave feminism, the current movement, seeks to advance a more inclusive approach to feminism and sex equality. "They accused second-wave feminism of being elitist and ignoring groups such as women of color and transgender women. Third-wave feminists began to apply feminist theory to a wider variety of women, who had not been previously included in the feminist activity."⁵¹ "Under these new feminism ideas, the awareness of women's rights in the West has been rapidly revived and strengthened because of the massive civil rights movements."⁵² The feminist movement reached a climax again.

Within and across these movements, different theories of feminism emerged. This thesis adopts a view of feminism that draws on cultural feminism and radical feminism. Each of these conceptions respond to limitations associated with liberal feminism. Here, I discuss each of these theories and their dominant perspective regarding gender equality and the law. I then go on to discuss how these theories reveal certain challenges and issues as reflected in the law, and social context of women in the workplace, in China.

⁵⁰ Charlotte Krolokke & Anne S Sorensen, "Three Waves of Feminism: From Suffragettes to Grrls" in, Charlotte Krolokke & Anne Scott Sorensen, eds, *Gender Communication Theories and Analyses: From Silence to Performance* (California: SAGE Publishing, 2005) 1 at 24.

⁵¹ Edward Burlton Davies, *Third Wave Feminism and Transgender: Strength Through Diversity* (London: Routledge, 2018) at 37.

⁵² Ming Zhao, "Viewing China's Legislation from the Perspective of Gender Equality in Feminist Jurisprudence" (2009) 3 *J Chin Women's Stud* 10 at 37.

Liberal feminist jurisprudence emphasizes the commonality of men and women, i.e., the equality of men and women, with its demand to downplay so-called biological differences, changing “equality” to “parity” as well as equal treatment to parity treatment. In particular, it seeks gender neutrality in law, which means that the rights of men and women should be regulated in exactly the same way, and refuses to legally recognize the inherent biological differences between men and women. Concurrently, it argues that gender-specific provisions in the law represent a “legal” denial of women’s rights and a restriction of their freedom under the guise of protecting them. Within liberal feminism, the concept of gender equality centres on women having equal legal rights as men, and adopts a formal equality approach under law. They believe that women can achieve equality without revolutionary reforms of social structures and institutions being carried out. In addition, they hold that the state and the law will eventually become arbiters of gender neutrality and protect the interests of both women and men, which is in line with the view of liberalism that the society is progressing constantly.⁵³ Liberal feminism presumes that once discriminatory rules are changed, opportunities of and for equality will appear, leading naturally to gender equality. “Based on this kind of equality, liberal feminist jurists reject any legal differentiated treatment and special protection given to pregnant women,”⁵⁴ and think that protective legal provisions formulated on account of women's pregnancy, childbearing, or parenting actually emphasize the difference between men and women, which is not beneficial to women’s employment.

Cultural feminism amends the definition of “equality” proposed by liberal feminism and “they think that equality does not merely mean giving women the same treatment as men.”⁵⁵ The completely same treatment given to two different individuals is actually unequal, for men and women are different. At present, laws are male-dominated standards, and it is necessary to give women special protection under certain conditions. According to cultural feminism, a vision of equality that is blind to sex will cause greater inequality to both sexes. As such, cultural feminism aligns more closely to a conception of substantive equality, which is attentive to the ways in which difference requires different treatment to create fairness or equity in outcomes. “Based on this theory, cultural feminism advocates maternity leave for female employees in

⁵³ *Ibid* at 37.

⁵⁴ Jenny Morgan, “Feminist Theory as Legal Theory” (1988) 16:4 *Melbourne UL Rev* 743 at 26.

⁵⁵ Cheri Kramarae & Dale Spender, *Routledge International Encyclopedia of Women: Global Women's Issues and Knowledge* (London: Routledge, 2000) at 26.

terms of the welfare of pregnant female employees, which will be conducive to giving women workplace care and realizing real equality in practice.”⁵⁶

“Since the second wave of feminism sprung up in the 1960s, radical feminism has become the center theory of a number of analyses related to feminism.”⁵⁷ It criticizes liberal feminism for placing an inordinate amount of emphasis on the "metamorphosis" of women into men, oblivious to the importance of women's conventional roles.⁵⁸ Contrary to liberal feminism, which emphasizes the similarities between men and women, radical feminism advocates that men and women are fundamentally different, and belong to gender classes with irreconcilable interests. “It is precisely the relationship between men and women based on male dominance and female subordination that leads to gender inequality.”⁵⁹ “Radical feminists assert that society is a patriarchy in which the class of men are the oppressors of the class of women.”⁶⁰ Radical feminists believe that state, laws, and policies all are men’s protective tools directly used to maintain their dominant position and women’s subordinate position. According to radical feminism, the society, rules, and regulations are all instruments utilised by men to preserve their superior status and women's inferior role. Radical feminism anticipates the abolition of patriarchal dominance and the establishment of a female-centered culture and process.

The central ideas of the above-mentioned theories of feminism, and their differences, provide guidance in assessing and evaluating laws related to women’s rights at work, including in relation to equal protection or special protection models, and the content of substantive rights for women in the workplace. “Although these theories appeared under different historical backgrounds, with their core concepts not completely integrating with each other and even conflicting with each other,”⁶¹ because of the common goal, they all share a basic premise that current society is based on a male-centered patriarchal society, which results in women being oppressed and discriminated against. Therefore, they will have a common inspiration for the formulation of anti-gender discrimination laws in spite of their different views and methods.

⁵⁶ Zhao, *Supra* note 53 at 37.

⁵⁷ Ellen Willis, “Radical Feminism and Feminist Radicalism” (1984) 9/10 Soc Text 91 at 26.

⁵⁸ Tong Rosemarie, *Liberal feminism, Feminist thought: a comprehensive introduction* (London: Routledge, 2000) at 26.

⁵⁹ Zhao, *Supra* note 53 at 27.

⁶⁰ Alice Chols, *Daring To Be Bad: Radical Feminism in America 1967-1975* (Minneapolis: University of Minnesota Press, 1989) at 48.

⁶¹ Yue Zhao, *Research on the Legal Protection of Labor Rights and Interests of Female Workers in China* (Master thesis, Beijing: China Youth University of Political Studies, 2016) 26.

The theories of feminism mentioned above are instructive for the implementation of the principle of equality between men and women in Chinese legislation, especially as regards the discussion of formal equality and substantive equality. While formal equality was of historical significance for women to achieve the same legal status as men under the law, the limits of liberal feminism are illustrated in the outcomes that result from continued reliance on gender-neutral laws. Meaningful gender equality in practice requires substantive equality rights for women, which acknowledge the difference between women and men, in line with cultural feminism. This, in turn, requires legislators to formulate laws and regulations to protect women's human rights based on women's actual needs and interests, and taking equality of results as the aim. To encourage women who face unfair development circumstances to provide equitable development opportunities as men, it is both fair and appropriate to accord women specific legal rights and care in order to achieve gender equity in reality. This is reinforced by radical feminist jurisprudence, which demonstrates that gender inequality against women is systematic and a result of patriarchy.

In sum, liberal feminism and a reliance on formal equality may be an important first-step to equal recognition under the law. However, it is insufficient to realize equality for women in practice. Rather, cultural feminism, which emphasizes the difference between women and men, and radical feminism, which unpacks the patriarchal system that operates to oppress women, work together to illustrate a vision of substantive equality that is attentive to institutional, social and legal structures needed to guarantee specific rights for women under law.

With the rise of women's internal differentiation consciousness, feminism also further differentiated and entered a stage of diversification. Feminism began to emphasize the differences within the female group and the diversity of female individuals. People start to argue that whether women have common characteristics that can be used to describe the female group. Now anti-essentialist feminism has become a core theory in Canada. Anti-essentialist feminism is a theory against essentialist feminism. "Gender essentialism holds that there is some property (or properties) necessary to my being a woman, like being nurturing, or being oppressed, or having a uterus."⁶² Gender essentialism believes that there are common characteristics between women and their experiences, and these qualities connect all women together. Anti-essentialist

⁶² Charlotte Witt, "Anti-Essentialism in Feminist Theory" (1995) 23:2 *Philos Top* 321 at 321.

feminists object to the claim that women can only be called women if they have certain characteristics. “Anti-essentialism holds the point that there is no single category “female” pointing instead to the varying perspectives resulting.”⁶³ Anti-essential feminism has broadened the scope of equality from “men and women” to “women and women”. “Anti-essentialists maintain that sex and gender categories are limiting and fail to include the unlimited variety of difference in human identity and impose identities rather than simply note their differences.”⁶⁴ Anti-essentialists emphasize the need to account for different perspectives of different groups of women than from the perspective of a single group of women in crafting law and policy. Therefore, when seeking to pass laws to protect women, it should not just be considered women as a single group, but the differences between individuals and intersectional characteristics should be fully considered. Moreover, the reasons why different people are treated in a discriminatory manner may vary greatly. For instance, the same discrimination in the workplace may well not be the result of a single factor, but the result of a combination of reasons or factors, so the design of the law should also take into account individual differences.

1.5. Women’s Rights and Discrimination at Work in China: Thesis Outline

This thesis examines the ways in which China’s family planning policies impact women’s experiences of discrimination in employment, and investigates the current limitations and challenges of the legal approach to address gender discrimination in employment in this regard. This first introductory chapter has set the context for this investigation and analysis.

Chapter 2 explores the history and social context of family planning policies in China, and analyses how such history and policies impact women’s experiences of discrimination in relation to employment in China. This chapter unfolds from two different perspectives. First, I discuss the evolution of family planning policies in China, examining the gradual shift from one-child policy to two-child policy in recent years. Second, I analyze the prevalence and experience of gender discrimination suffered by working women in China. I describe various ways in which discrimination and unfair treatment manifest for women in the workplace, exploring these in relation to career stages: job search, remuneration, the promotion at work, retirement age and the

⁶³ Cynthia Grant Bowman & Elizabeth M Schneider. “Feminist Legal Theory, Feminist Lawmaking, and the Legal Profession.” (1998) 67:2 Fordham L Rev 249 at 249.

⁶⁴ Nancy Levit, “Feminism for Men: Legal Ideology and the Construction of Maleness” (1996) 43:4 UCLA L Rev 1037 at 1037.

requirements on claiming pension. Furthermore, I argue that, based on this analysis, enacting the two-child policy is likely to reinforce and increase discrimination against working women in China. I explain why this is a concern and why gender discrimination against women is likely to be exacerbated following introduction of the two-child policy.

Chapter 3 builds from this analysis of experiences of discrimination to examine the legal framework governing gender discrimination and women's rights at work in China. This chapter analyzes how China's current legal framework governing workplace discrimination is constituted, and how it is applied in practice. There are three main lines of inquiry in this chapter. The first part introduces China's domestic laws against gender discrimination in the workplace. At present, there are no specific laws against workplace discrimination in China, and relevant articles are scattered across different areas of regulation. I discuss five primary areas of law: the Constitution, the Labor Law, the Labor Contract Law, the Employment Promotion Law, and the Law on the Protection of Women's Rights and Interests. The second part analyzes how these laws operate in practice, and identifies several challenges, including lack of clarity in legal definitions, a lack of clarity in legal responsibility, and a lack of specialized law enforcement body to oversee the operation of relevant laws. Finally, the third part analyzes relevant dispute resolution processes, and identifies several procedural challenges that limit access to justice under existing processes.

Having identified the scope, content and limitations of China's existing legal approach to addressing gender discrimination in employment, Chapter 4 takes up a comparative examination of Canadian law in order to identify and analyze potential best practices and recommendations for law reform. I examine the theoretical basis and orientation of Canadian law as regards equality between women and men, and analyze how this translates to legal doctrine and operation under the federal and provincial *Human Rights Act* and *Pay Equity Act*. I study how Canada defines gender discrimination in the workplace, the burden of proof and legal responsibility to prevent discrimination, remedies and penalties, and institutions and dispute resolution processes to deal with these issues. Through the comparative analysis of legislation, law enforcement, judicial and other aspects between China and Canada, this chapter identifies useful recommendations to improve the legal framework and its operation in China addressing gender equality and gender discrimination at work.

Finally, Chapter 5 details the set of recommendations and solutions proposed based on the

comparative analysis undertaken in Chapter 4.

Chapter 2. The Impact of the Two-Child Policy on Women's Employment (In)Equality in China

In the past, China has caused widespread controversy because of its family planning policy. Since the implementation of China's family planning policy, there have been accusations that the Chinese government is forcing people to have only one child. Some people believe that it is against human.⁶⁵ Several decades have passed, and the family planning policy, also known as the one-child policy, has been entirely replaced by the two-child policy. In October, 2015, China announced that the iconic one-child policy had finally been replaced by a universal two-child policy. This is regarded by the academic community as a typical major change in 36 years.⁶⁶ This is a huge shift in China's population policy. Fertility policies are not stable. These are continuously adjusted and improved, which is a dynamic process. Therefore, China's population policy is regularly adjusted, along with China's social and economic development. Like many countries in the world, China has an aging population. China's economic level and population growth are seriously inconsistent. According to the China Development Foundation's China Development Report 2020⁶⁷: Development Trends and Policies for Aging Population, there were 130 million citizens aged 60 and over in 2000, accounting for 10.3 percent of the total population. Additionally, there are 88.27 million individuals aged 65 and over, representing 7% of the overall population. In 2010, there were 178 million elderly people aged 60 and over, accounting for 13.3% of the total population, and 118 million elderly people aged 65 and over, accounting for 8.9% of the total population. At the end of 2019, China's elderly population totaled 254 million, or 18.1 percent of the total population, while the elderly population aged 65 and over totaled 176 million, or 12.6 percent of the total population.

Under the trend of population aging, the supply of labor is declining, social productivity is insufficient, and the economic growth rate is declining.

⁶⁵ Martin King Whyte, Wang Feng & Yong Cai. "Challenging Myths About China's One-Child Policy." (2015) 74:1 Chin J 144 at 144.

⁶⁶ Zeng, *supra* note 1 at 1935.

⁶⁷ "Actively Respond to the Aging Society -- China Development Report 2020 Released" (11 June 2020), online: CDRF <www.cdrf.org.cn/jjhd/5450.htm> [perma.cc/9MK7-VELH].

This chapter examines the impact of China's shift from the one-child to two-child policy on women's participation and experiences from application to retirement in the workplace. This chapter explores the on-the-ground context and experience of issues attending gender discrimination in employment in China. In doing so, it illustrates the challenges sought to be remedied by law, and sets a foundation for the next chapter, which takes up a detailed examination of the current laws attending gender discrimination in employment in China.

In the first section, I explain how the Chinese childbirth policies have evolved since their inception. I introduce China's major changes in birth policy in recent years, from the one-child policy to the two-child policy. I describe the process of the development and transformation of China's birth policy and explain why China has changed to a two-child policy. I discuss why the implementation of the two-child policy is not as effective as expected. I examine how the two-child policy has induced social debate about the gender-based discrimination which women are subjected to in the workplace. I explore women's attitudes towards the two-child policy and the reasons behind it.

In the second section, I analyze how the two-child policy has impacted social understandings about women and their roles in Chinese society. I discuss the influence of traditional opinions, and illustrate how the two-child policy entrenches traditional ideas about gendered divisions of labor, creating impacts on women's equality in the workplace, access to education, and the enduring tension between work and family life that shapes their choices about both.

In the third section, I examine how the two-child policy has impacted gender discrimination in employment from the employer perspective. I unpack how perceived costs are used to legitimate discriminatory treatment against female employees and job candidates. I discuss how costs are framed in relation to monetary costs associated with maternity leave, and also in relation to time and productivity, both as concerns of individual women employees who take maternity leave, as well as in the broader workforce.

Finally, in the fourth section, I describe the experiences of discrimination that women are subject to in their workplaces at different stages, including during recruitment, during their period of employment, and on retirement. This sets the stage for understanding where there are legal gaps that may work against women's equality in the workplace, a subject which the next

chapter takes up.

2.1 A Brief History of the Family Planning Policy in China: Movement from a One-Child to Two-Child Policy

In this section, I briefly detail the chronology of China's movement from a one-child to two-child policy for family planning. I outline some of the dominant concerns two-child policy has given rise to for women in China, particularly in relation to their employment prospects and potential for further discrimination in employment.

2.1.1. A Brief History of Family Planning in China

China's excessive population was treated as an obstacle that had adverse effects on the country's development. Therefore, it should control the population growth. Additionally, demographic increase must be consistent with economic growth. If population increase exceeds the availability of essential living resources, this would have an adverse effect on the development of people's living conditions. Meanwhile, it will aggravate the contradictions such as more people and less land and difficult employment, etc. as well as affect the development of education and national economy. Therefore, the Chinese government formulated a family planning policy. The family planning policy asked each family to only one child. The one-child policy was introduced in 1979 by the Chinese Government to improve poverty. The government believed that controlling population is necessary.⁶⁸ In 1982, the PRC Constitution⁶⁹ designated the one-child policy as a "fundamental national policy."

China has accumulated fewer births since the family planning policy was introduced. This result significantly reducing the pressure on the resources and environment caused by the rapid population growth and promoting economic and social development. However, it has also resulted in an imbalance in China's population. First, there are fewer newborns and a growing elderly population. In addition, the family planning policy has reduced the risk of childbirth for women, and the probability of female death due to childbirth has decreased.⁷⁰ In addition, each

⁶⁸ Hesketh Therese & Wei Xing Zhu, "The One Child Family Policy: The Good, the Bad, and the Ugly" (1997) 314: 7095 BMJ 1685 at 1685.

⁶⁹ Ellen Keng, "Population Control through the One-Child Policy in China; Its Effects on Women" (1997) 18:2 Wome's Rts L Rep 205 at 205.

⁷⁰ World Health Organization, UNICEF, UNFPA, "The World Bank Trends in Maternal Mortality: 1990 to 2010"

family could only have one child, and many intended parents preferred a boy. The culture of preference for boys has existed in ancient feudal society since long ago in China, and many people believes that only boys can ensure the continuation of the entire family. They may have an abortion if the first pregnancy is a girl, resulting in a higher male-to-female ratio in the population.

Because of the rapid transition from high fertility to low fertility, the main concern of the Chinese population is no longer the rapid population growth. China is concerned that this demographic dividend is disappearing as the population decreases due to prolonged population control and reduced availability of labor, which can no longer be used to help the country's economic development. In 2012, China's 'total dependency ratio of population'⁷¹ (refers to the ratio of the number of people of non-working age to the number of people of working age in the overall population) decreased from 34.4% in 2011 to 34.9%, and rose to 35.3% in 2013.⁷² In 2012, China's working-age population declined severely for the first time in quite a long time, with the number of working-age people aged 15 to 59 dropping by 3.45 million and 2.33 million in 2013.⁷³ The increase of the total dependency ratio of population and the decrease of the absolute number of working-age population indicate that China's demographic dividend is changing and disappearing.⁷⁴ Against this backdrop, China began to reconsider its basic population policy, gradually liberalized its population control, and formulated a two-child policy. The two-child policy will not only optimize the age structure of the population and protect labor force, but also stimulate consumption and guarantee sustained economic growth. Therefore, the economic development will not be affected by the shortage of labor force and the increase of labor cost.

China's "two-child policy" has gone through three stages. China permitted families in which both parents were the only children to have a second child in the first stage, in 2011. Only

(2016), online (pdf): *World Health Organization* <apps.who.int/iris/bitstream/handle/10665/44874/9789241503631_eng.pdf;jsessionid=D15D5413E6E1F9D9D324F983BD759757?sequence=1> [perma.cc/BXW8-LRDJ].

⁷¹ The total dependency ratio of the population is the ratio between the number of non-working-age people and the number of working-age people in the total population. It is the manifestation of the social demographic dividend. The lower the total dependency ratio, the higher the demographic dividend.

⁷² Hongmin Yin & Lifang Guo, "Transformation of Construction Industry Economic Growth Mode Under the Background of Demographic Bonus' Disappearing" (2015) 36:6 *Constr Econ* 21 at 37.

⁷³ *Ibid* at 37.

⁷⁴ *Ibid* at 37.

China's ethnic minorities were previously permitted to have a second child. On November 15, 2013, the Third Plenary Session of the Communist Party of China's Eighteenth Central Committee introduced a policy encouraging couples with at least one only child to have two children.⁷⁵ In the third and final stage, the Chinese government officially implemented the two-child policy, available to all families to solve the problems of aging people and relieve the heavy burden of society in 2015. Article 18 of the amendment to the population and family planning law clearly states: “the state encourages couples to have two children.” The law came into effect in 2016, marking the end of China's 36-year-old one-child policy.

2.1.2. Women’s Attitudes towards the Two-Child Policy in China

The two-child policy is an essential adjustment and improvement made by China's fertility policy to adapt to the situation of the population and economic and social development since the beginning of the 21st century. Additionally, it is a critical strategic option for the country's demographic growth. As soon as the new policy was released, it immediately aroused great attention from the public. “Do you want to have a second child?” has become the most popular question to more than one billion Chinese people. However, this is a question not easily answered by individual women in China. As will be further discussed below, given the current workplace environment in China, choosing to have another child will bring negative effects to their career development. A second child also comes with additional financial and time costs for women, adding to their burden. Nonetheless, older family members such as grandparents may wish women to have another child, especially if the first child is a girl. All these factors add pressure to women’s decision-making under the new two-child policy.

The purpose of the two-child policy is to increase the number of young people, maintain a reasonable size of the labor force, delay the rate of population aging, and improve the demographic structure, so as promoting sustainable and healthy economic development. Although the two-child policy hoped to improve the structure of Chinese population, it has failed to produce the expected results. [B]y May, 2015, only 1.45 million (13.2%) of 11 million eligible couples applied for permission to have a second child.⁷⁶ The reasons for this low uptake are

⁷⁵ Zeng, *supra* note 1 at 1935.

⁷⁶ “Press conference of National Health and Family Planning Commission” (2015), online: *National Health and*

highly complex and have sparked widespread discussion. There are various reasons for this, including economic, cultural, political, and social factors. Here, I explore women's reasons and attitudes towards the two-child policy, linking the reticence to have a second child to the potential for negative career impacts. By reading the extensive empirical research literature on the responses of female groups to the two-child policy, from which I have analyzed and compared to draw my views. Surprisingly, people, especially the attitudes held by women towards the two-child policy is negative.

Many women are unwilling to have a second child due to pressure and conflict between work and household economics.⁷⁷ They expect to gain economic independence and a sense of self-identity from work like men do. The enforcement of the two-child policy has only served to intensify the conflict between career development and family status. Women are fearful of losing their jobs and the opportunities to be promoted. The extensive empirical research literature on women's responses to the two-child policy, show a widespread belief that the two-child policy will make gender discrimination worse in the workplace, a large majority of women suppress their fertility desires for career development. According to the data released by the World Bank, female employees account for 65% of the total job market in China.⁷⁸ Women make up a large proportion of the workforce in China, and their opinions should be more valued in policy development.

Women, especially those who are unmarried, have been subject to gender inequality in the workplace for quite a long time. "In China, women may face discrimination in every aspect of their social life."⁷⁹ Stereotypes about women manifest in various aspects of life, for example, family status, career, education, preference for sons and others.⁸⁰ In employment, the introduction of the two-child policy may create additional disadvantage for women due, for

Family Planning Commission <www.nhc.gov.cn/xcs/s3574/201504/bec348723e1343d9b6822366ac16bb25.shtml> [perma.cc/5SY2-2VRU].

⁷⁷ Yanxia Zhao, "Research on the Influencing Factors of Career Women's "Second Child" Birth Choice" (2019) 3:8 *Comp Study Cultural Innovation* 192 at 192.

⁷⁸ "Rate of women entering job market higher in China than in US and Japan" (10 December 2018), online: *Global Times* <<http://www.globaltimes.cn/content/1131175.shtml>> [perma.cc/9ECZ-PEXL].

⁷⁹ "Gender Equality And Women's Development in China" (22 September 2015), online: *The State Council Information Office of China* <<http://www.scio.gov.cn/zfbps/ndhf/2015/Document/1449896/1449896.htm>> [perma.cc/8473-KSN9].

⁸⁰ UN Report of 2014

example, to the fact that employers bear part of the cost of maternity leave, despite a maternity insurance system in China⁸¹. Consequently, implementation of the two-child policy has only exacerbated hidden disadvantages for women in employment. In addition, since women in higher education generally have their first child between 30 and 32 years of age, if they have another child, they will be between 34 and 36 years old. Most were in their 40s when their second child born was in kindergarten.⁸² A second childbirth may leave them needing to quit their posts to fulfill family duties, which hinders career development for women and makes it more difficult for them to have an improved social status. This can cost them the best employment opportunities. As such, women are forced to confront the tension and conflict caused by the need for a balance between childcare and work.

This section briefly reviewed the history and evolution of family planning policies in China towards the now-implemented two-child policy. This policy has given rise to concerns amongst women about further discrimination in employment, and created a situation where many women perceive conflict and tension between their family and work lives. The next section unpacks these tensions, analyzing how the two-child policy impacts women's employment prospects, higher education, and family status.

2.2. The Impact of the Two-Child Policy on Women's Social Positions in China

This section analyzes how the two-child policy impacts women's status and experiences in China, particularly in relation to their potential careers and the tension between work and family life. I first discuss the influence of traditional opinions on women's position in Chinese society. I then discuss how the policy exacerbates existing employment inequality for women in China. Second, I discuss how it influences women's choices regarding higher education and career prospects. Third, I discuss how this functions to lower the social status of women in their household.

⁸¹ Maternity insurance: A social insurance system whereby the state and society provide medical care, maternity benefits, and maternity leave to women workers during pregnancy and childbirth when the labor is temporarily interrupted, i.e., it provides the necessary financial compensation and medical care to workers who give birth. China's maternity insurance benefits consist of two main categories: maternity allowance and maternity medical treatment. Besides, its purpose is to help working women recover their ability to work and return to work by providing them with maternity benefits, medical care, and maternity leave.

⁸² Quancheng Song & Qingying Wen, "The Significance, Current Situation and Problems of the Implementation of the Policy of Single Second Child Population in China" (2015) 31:1 J Nantong Univ Soc Sci Ed 122 at 122.

2.2.1. Influence of Traditional Opinions

“In traditional feudal China, reproduction was the main criterion to measure the value of women, and the seeds of sexism had long been planted. The division of labor pattern of “men in charge of the outside and women in charge of the inside” keeps women separated from work for a long time. Even in modern times, traditional gender discrimination continues to impact women's employment.”⁸³ Although, in the 21st century, gender discrimination are rarely recognized in public, and the law clearly stipulates equality between men and women. But the feudal idea that men are superior to women still lingers in the subconscious of many people. Society's definition of women tends to ignore women's innovative spirit and creativity, and expectations of women center on gentle obedience to tradition. Social norms position women to focus more on the family, which has a profound influence on the Confucian cultural society represented by China. “Confucius believed that the woman's place was in the home to take care of her husband and to raise sons.”⁸⁴ “Confucius emphasized the need for women to be quiet, obedient, neat, chaste, and hard-working within the home, all of which furthered women's seclusion and isolation in Chinese society.”⁸⁵ These ideas can, and do, influence women's internal thoughts and narratives, as well, which may be accepting of these entrenched norms. As a result, women may underestimate their own abilities, blindly identify with the image created by society for them, and believe that family is the most important for them. For other women, challenging such prevalent and entrenched norms can be equally difficult.

2.2.2. Women's Employment Inequality in China

China's “Law for the Protection of Women's Rights and Interests” clearly stipulates that women have the same right to employment as men.⁸⁶ Employers have a duty to safeguard women's wellbeing and wellbeing at work and to avoid assigning workers to hazardous employment. Women have the right to enjoy employment, but they also have an moral obligation to reproduce and nurture the next generation. In the advent of the two-child policy, some

⁸³ Qiwen Tang, “Reasons and Solutions for Female Employment Discrimination in the Background of the Universal Two-Child Policy” in *6th International Conference on Humanities and Social Science Research* (Shenzhen: Atlantis Press, 2020) 38 at 38.

⁸⁴ Fang, *Supra* note 40 at 163.

⁸⁵ Lin Yutang, *My Country and My People* (New York: Reynal & Hitchcock, 1935) at 153.

⁸⁶ *Law on the Protection of Women's Rights and Interests of the People's Republic of China*, NPC 1992, c22 [LPWRIPRC].

enterprises are reconsidering the impact this will have vis-à-vis female employees. As an example, an employer is concerned about whether a female worker they recruit who has not had children will have two births in the first years of employment so that the woman will work for a short period at the unit. For this reason, many employers do not want to hire such a worker because they believe that are paying more in time and money costs. This may make it more challenging for women to both enter employment, and return to the workplace following childbirth.

This shift may result in a retreat of women from the workforce. Engels once said that the prerequisite for the advancement of women's social status is to go out of the small family environment into the general environment of the workplace.⁸⁷ On the contrary, the “full-fledged two child” policy may cause women in society to retreat from the workplace back into the family environment.

In addition, in light of child care and family duty expectations, some women choose stable and uncompetitive occupations. These expectations and the employment choices flowing from them have, over time, led to a wider lack of ambition for women to pursue higher education, which has, in turn, affected the process of women 's socialization. Especially in rural areas with strong traditional values that favor men over women, most parents will think that under the influence of this policy, the central role of women is to take care of two children at home, as long as they are able to do housework.

Women tend to work in jobs that reflect gender-based stereotypes about the traditional temperament of women, such as kindergarten teachers and nurses. It does not mean that women choose their job independently. Choices are often constrained by systems, structures, attitudes, limitations. The two-child policy may operate to further entrench the gendered divisions of labor both within the household and the workplace.

2.2.3. Women’s Right to Education and Career Prospects

The right to education is a basic citizen's right. Article 46 of the Constitution stipulates, “Chinese citizens have the right and obligation to receive education.”⁸⁸ Women's cultural and educational rights are equal to men's, which is the premise of women's equal competition with

⁸⁷ Friedrich Engels, *The Origin of the Family, Private Property, and the State* (New York: Penguin, 2007) at 12-32.

⁸⁸ *Constitution of the People’s Republic of China*, NPC 1982, c 46 [CPRC].

men in the workplace. A lack of education will directly lead to disadvantage in the labor market. If women cannot fully enjoy the right to education, it will inevitably affect their economic independence and employment prospects. This recognizes the fundamental importance of education, which has a great impact on a woman's life and is the basis for the realization of other rights.

The two-child policy will likely affect women's rights to education. First, female college students may choose to marry and have children early, in order to enter the labor market without the question of marriage and child-bearing hanging over their heads. In this scenario, some women will give up the opportunity to continue their education, such as by undertaking a masters or doctoral degree. This, in turn, limits the overall career trajectory and employment prospects for these women, excluding them from professions and occupations requiring post-baccalaureate education.⁸⁹

The introduction of the two-child policy creates similar effects for women who already have jobs, but wish to improve their education and update their knowledge. With the full implementation of the two-child policy, the progress of many women in pursuing higher education will be slower, and fewer women will pursue higher positions in their workplace. After giving birth to their first child, women had the opportunity to learn to improve their vocational skills. The possibility or desire of having a second child will further reduce these opportunities, particularly given family duty expectations of women in China.⁹⁰

2.2.4. The Tension between Work and Family Life

Women in China face a difficult choice between family and work. It is generally understood to be a woman's responsibility to raise children at home. "At the same time, the demands of the elders in the family are often in conflict with the fertility desire of the women."⁹¹ Some women do not want to have a second child. "However, the elders with traditional family values tend to think that more children are better and they urge women to have a second child."⁹² Under the encouragement of new national policies and at the request of many elders in the family,

⁸⁹ Qianqian Cheng et al, "An Empirical Study on the Fertility Desire under the Two-children Policy——Taking Guangzhou as an Example" (2019) 19:5 Mod Hosp 633 at 633.

⁹⁰ *Ibid* at 633.

⁹¹ Wen Xiao, Shumeng Li & YuXuan Zhong, "The Influence of the Universal Two-Child Policy on the "Birth" and "Rise" of Career Women" (2017) 18 Labor Secur World 24 at 24.

⁹² *Ibid* at 24.

women often do not have a meaningful choice to decide whether to have children, which has a direct influence on their career development.

In recent years there has been a social ethos that encourages women to return to the home around the world. It is believed this can be beneficial to the education and healthy development of children. Actually, high quality child care is beneficial to children and women. Therefore, women do not need to care for children in home. Even this research is not focus on childcare policies. Childcare policies are part of a package of reforms which support women in workforce. But I think it's very dangerous. Many women who have a second child give up going back to work and stay at home because of financial pressure and concern for their children. “Returning women to the family is a trap” is a new concept that fully opens up in the context of the second child.”⁹³ Due to the long-term trajectory of women's separation from society after giving birth to their second child, women lack a certain degree of social competitiveness. “Returning women to the family” has appeared in society, but after returning to the family, women have no jobs and no source of income, increasing dependence on their husbands, and moving women into a “marginalized” position.

“In real life, the fact that women are in a marginalized position is not a result of women's status but a result of a more severe female employment environment in the process of further adjusting the fertility policy.”⁹⁴ If women do not have independent income, the power of their voice in the family will become smaller. This may be further compounded in situations where she is devalued within the home, such as by her husband, because she does not earn income and the productive value of her domestic labor is not recognized.

The long-term absence of women from the labor market further negatively impacts their ability to rejoin that market at a later date. When the children are old enough and these women want to find work again, they may find that she is not competitive, does not meet job requirements, and faces substantial difficulty in improving or adapting her skillset and qualifications.

Having canvassed the various ways in which the two-child policy may operate to negatively impact women’s employment access and equality in China, the next section goes on

⁹³ Wang Yizhi, “A Brief Analysis of Women’s Rights and Interests Protection under the Background of Universal Second Child” (2016) 2 Leg Forum 192 at .192

⁹⁴ *Ibid* at 192.

to examine how expectations concerning childbearing impact an employer's "cost calculations", leading to gender discrimination in employment on this basis.

2.3. The Impact of Childbearing Expectations on Gender discrimination in Employment in China

Under the background of the universal two-child policy, women's employment discrimination has deepened in China. Women's lower productivity during pregnancy and delivery, extended maternity leave, and the welfare policy of paid leave all contribute to the discrimination against women in employment. In the face of a difficult employment situation and economic pressure, more women and families are afraid to have children even though the two-child policy is open to all.

This section analyzes the causes of gender discrimination against women in the workplace. From an employer perspective, heightened costs and burdens are used to justify continued discrimination against women in employment, including in relation to recruitment and during their employment.

2.3.1. Gender discrimination in Employment: the Employer Perspective

The workplace is regarded as one of the most prominent places for gender discrimination and is also a place where discrimination cases occur frequently. The current labor market is dominated by private enterprises. Pursuing full benefit, as the market economy's primary body, is essential for businesses to improve their productivity and sustain sustainable growth, and it serves as the market economy's regulator.⁹⁵ Women's working time and the cost of special requirements, such as in relation to maternity leave, are often seen as contrary to the company's goal of maximizing benefits during the development process.

The implementation of the two-child policy may exacerbate these impacts on women. One of reasons that employers center discriminatory treatment is physiological difference between men and women. Women physiologically perform the task of childbirth and parenting the next generation, which ensures that women's employment position is less secure than men's, and women are physically weaker than men. This notion of physiological difference often becomes

⁹⁵ Tang, *supra* note 83.

the reason for employers' contempt for women's rights. Business owners will also take these factors into account and are more inclined to hire fewer female employees to reduce the cost of time and money.

2.3.2. The “Cost” of Maternity Leave

In China, the maternity leave system is mainly stipulated in Article 7 of the *Rules on the Labor Protection of Female Employees*: Female workers are entitled to 98 days paid parental leave, which includes 15 days of antenatal leave. In the event of a traumatic birth and childbirth, an additional 15 days of parental leave would be given. Female workers who have more than one child in a single birth shall be given an additional 15 days of maternity leave for each additional child.⁹⁶ Therefore, when the rights of female employees are violated, it can take the following methods to protect their legitimate rights and interests: First, the employers can appeal to the competent department of the enterprise or labor supervision department. Second, it can apply for arbitration to the labor dispute arbitration committee. Third, if it is not satisfied with the decision of the labor administration department or the arbitration award, female employees can sue in the people's court.

Maternity leave policies create employment costs for employers. “According to the relevant policies of Zhejiang Province, female employees have 128 days of maternity leave, including 98 days of necessary leave and 30 days of incentive leave. The allowance provided by the 128-day maternity leave comes from the company's monthly employee maternity insurance costs.”⁹⁷ As such, there are direct financial costs to employers for each employee who takes maternity leave, creating a disincentive to employ women who an employer expects will take maternity leave.

There are also indirect costs caused by job vacancies when an employee takes maternity leave. This includes not only the maternity leave pay for the employee on leave, but also time and monetary costs for recruiting and training replacement workers to fill vacancies during a maternity leave. Further, after an employee returns from maternity leave, the employer may be required to pay her wages for breastfeeding. The implementation of the two-child policy will be

⁹⁶ *Rules on the Labor Protection of Female Employees*, 28 April 2012, DSCPRC No 619, article 7.

⁹⁷ Shuibin Meng et al, “Explore the Causes of Employment Discrimination against Women in Enterprises under the Universal Two-Child Policy” (2008) 11 Leg Forum 10 at 10.

seen as increasing all of these costs for employers, creating a basis for further discrimination against women in employment.

2.3.3. The “Costs” Associated with Women’s Employment as “Temporary”

Relatedly, employers may see women’s participation in the workforce as temporary, creating additional costs and risks associated with a lack of stability in the workforce, and thus creating further incentive against employing women. The staffing of vacant positions left by female employees on maternity leave is seen as a significant management problem. Often, jobs require consistency among employees or members of a project team. “For example, some research projects require researchers to be involved from start to end. Such projects requires women to work long hours. Female staffs choose to give a birth and take care child for one or two years may affect the whole project⁹⁸ This is one of the reasons why women who have a second child may have difficulty finding a job or getting promoted. “Reducing staff mobility is conducive to reducing the company's employment costs.”⁹⁹

Hiring female employees will inevitably (or, at least, be seen to inevitably) lead to further interruption of work if they have a second child. “The employer needs to find new staff to replace them and those new staff are not familiar with the work, which will reduce the work efficiency.”¹⁰⁰ In addition, for some women who return to work after maternity leave, their career motivations and general life expectations will have changed. They may focus greater energy and time on their family, or may even leave their job altogether.

In sum, employers perceive women’s role or expectations concerning childbearing as “costs” that negatively impact the enterprise in many ways. This creates a foundation from which gender-based discrimination against women in employment unfolds in myriad ways and at various stages of employment in China. With this context in mind, the next section how employment discrimination manifests for women in China. This sets a stage for a deeper examination of the current legal framework regarding employment and gender discrimination.

⁹⁸ Xiao, *supra* note 91 at 24.

⁹⁹ *Ibid* at 24.

¹⁰⁰ Hang Gao, “A Study on the Employment Impact of the Two-Child Policy on Female Labor Force” (2019) 33:7 *Businessman* 90 at 90.

2.4. Mapping Gender-Based Employment Discrimination in China: Women's Experiences during the Employment Life Cycle

Employment discrimination is a new concept in Chinese law. It was not until 2005 that the standing committee of the National People's Congress (NPC) of China ratified the ILO's core convention, the *Discrimination (Employment and Occupation) Convention*,¹⁰¹ that employment discrimination began to be identified consistently in China. According to the ILO *Convention*, discrimination refers to “any distinction, exclusion or preference which, based on race, color, sex, religion, political opinion, national origin or social origin, has the effect of abolishing or undermining equality of opportunity or treatment in employment or occupation.”¹⁰² In other words, discrimination means mistreating someone on the basis of an identity characteristic they possess and that cannot be changed. Any distinction, exclusion, restriction, and preference made based on gender is gender discrimination in employment.

As Chinese culture develops and living standards rise, an increasing number of Chinese pursue economic independence and personal freedom through work opportunities. However, the phenomenon of sex discrimination in employment continues to hinder women's employment and development. There is also discrimination in employment services. For example, rural women find it challenging to enjoy various employment information, vocational guidance, and skill training provided by government employment service agencies. China has been gradually improving the status of women in recent years. However, gender discrimination remains in employment, and other, settings.

The implementation of the universal two-child policy has made employment discrimination for women even worse as the job market has become very competitive. “In fact, China's current job market is not short of talents, nor lack of women willing to give up the idea of having a second child for the sake of career. Therefore, under such market competition mechanism, women's right to choose is often in great conflict with reality.”¹⁰³

This section describes the experiences of employment discrimination women face in China. It unfolds from a temporal perspective to elaborate on the various difficulties facing Chinese women, from joining the workforce to reaching the end of their career. It is split into three phases:

¹⁰¹ *DEOC*, *supra* note 31 at 1.

¹⁰² *Ibid* at 1.

¹⁰³ Xiao, *supra* note 98 at 24.

recruitment; employment; and, retirement.

2.4.1. Gender-Based Discrimination in Recruitment

The most prominent manifestation of gender-based employment discrimination in China arises in the context of job searches and recruitment. “According to the 2015 Gender Equality White Paper¹⁰⁴, more than 72 per cent of Chinese women have a distinct feeling that they are denied the job opportunity and the chance of promotion because of their gender.”¹⁰⁵ Gender-based discrimination at this phase manifests in various ways, often focused on particular requirements in the job advertisement and interviews, and, at times, explicitly in relation to assumed family planning.

In Chapter 3, I will focus on China’s legal provisions on human rights and discrimination. Moreover, I will first briefly introduce the relevant legal background in China in order to better help readers understand this part. There is no law specifically addressing discrimination in China, nor is there a specific human rights law, except for individual provisions in the *Labor Law*,¹⁰⁶ the *Employment Promotion Act*¹⁰⁷, and the *Protection of Rights and Interests of Women*.¹⁰⁸ Among them, the most significant one is the *Labor Law*, which establishes the principle of equal employment and prohibits discrimination. However, anti-discrimination provisions do not constitute a large part and are not the main issue addressed by the *Labor Law*. It means that the *Labor Law* also does not formulate more detailed regulations on employment discrimination, such as the definition is not classified, the criteria for judging discrimination, and other issues. Also, these issues will be described in Chapter 3.

“Employment discrimination during recruitment generally takes two forms, explicit

¹⁰⁴ 2015 marked the 20th anniversary of the UN Fourth World Conference on Women held in Beijing. The Chinese government issued a white paper to comprehensively introduce China’s policy measures and unremitting efforts to promote gender equality and women’s development. The white paper *Gender Equality and Women’s Development in China* is about 11,000 words in length, detailing the Chinese government’s policy measures and remarkable achievements in the areas of institutional safeguards, women and the economy, women and education, as well as women and health, etc. for gender equality and women’s development. See: “*Gender Equality and Women’s Development in China*” (22 September 2015), online: The State Council Information Office of the People’s Republic of China < <http://www.scio.gov.cn/zfbps/ndhf/2015/Document/1449894/1449894.htm> > [perma.cc/EGM2-8SYT].

¹⁰⁵ Hui Yang, “Urban Women’s Gender discrimination Issues in Employment”, online: *Women of China* <<http://www.womenofchina.cn/html/report/144652-1.htm>> [perma.cc/C5EU-FMDB].

¹⁰⁶ *Labor Law of the People’s Republic of China*, NPC 1994, [LLPRC].

¹⁰⁷ *Employment Promotion Law of the People’s Republic of China*, NPC 2007, [EPLPRC].

¹⁰⁸ LPWRIPRC, *supra* note 86 .

discrimination and implicit discrimination.”¹⁰⁹ Explicit discrimination is giving direct unfair treatment on the basis of a particular identify characteristic, such as gender. For example, in some recruitment advertisements in China, the employer makes it clear that they prefer male applicants even there is no reason why this position is not suitable for women. “Even now, the phrase “prefer to hire” or “hire only” is often used in job ads. According to a labor magazine survey, 26 percent of job ads explicitly state “men only.”¹¹⁰

In the recruitment process, the employer may also take into consideration factors such as marital status, fertility status, and willingness or desire to bear children of the female applicants, which affects the competitiveness of female applicants. To make themselves more competitive, some women will attempt to resolve the marriage and childbirth “problems” before applying for jobs. Many women choose to get married and have children directly following graduation, and then apply for jobs so employers no longer have hesitations about these two aspects. Other female applicants choose to accept employment conditions prohibiting marriage or pregnancy for a particular period. For example, many employers ask female applicants in the interview process: Do you have a boyfriend now? Are you planning to get married in a few years? How many children do you want to have? More employers will ask female applicants if they are willing to arrange their planned parenthood according to the company's plan. Such explicit questions can put pressure on female workers, who may be forced to accept absurd conditions in order to get a job.

Increased education and awareness of women’s rights have marked the start of movement away from explicit gender-based discrimination hiring. In order to avoid unnecessary legal disputes, many companies have gradually stopped excluding women from employment in such explicit and direct ways. Nonetheless, although reduced, explicit discrimination remains, and is an essential part of the protection of women's employment equality to be addressed.

Unlike explicit discrimination, implicit discrimination appears to set the same conditions for all groups, but creates conditions that are difficult for women to achieve, resulting in an unequal position for women in employment. “Implicit discrimination means that seemingly

¹⁰⁹ Therese Macan & Stephanie Merritt, “Actions Speak Too: Uncovering Possible Implicit and Explicit Discrimination in the Employment Interview Process” in Gerard P Hodgkinson & J Kevin Ford, eds, *International Review of Industrial and Organizational Psychology* (New Jersey: Wiley Blackwell, 2011) 293 at 293.

¹¹⁰ Jiefeng Lu, “Employment Discrimination in China: The Current Situation and Principle Challenges” (2009) 32:1 *Hamline L Rev* 133 at 133.

neutral rules or standards cause undue adverse consequences in terms of opportunities and treatment for people with specific characteristics, resulting in discrimination against a particular group.”¹¹¹ “For instance, rather than outright rejecting female candidates, employers can employ proactive initiatives such as requesting applicants to be “very good at playing soccer.”¹¹² Setting gender requirements in recruitment advertisements is a common phenomenon. “There are many forms of gender discrimination in the workplace, such as the requirements for women's age, education, height, and appearance. Most of these requirements are not related to job positions' responsibilities and are not necessary for the job position.”¹¹³

In practice, implicit discrimination is more widely applied than explicit discrimination in employment settings in China. Because of its apparent neutrality, implicit discrimination is more difficult to identify than explicit discrimination. “Implicit discrimination is not based on conditions, but on results, which potentially have adverse consequences for an individual or a group of people.”¹¹⁴

2.4.2. Gender-Based Discrimination during Employment

Women in China are disproportionately subjected to two types of workplace harassment. To begin, women often experience horizontal sexism and segregation in the workplace.¹¹⁵ Horizontal discrimination applies to women's difficulties accessing occupations classified as “male,” such as manual labour such as drivers and porters, as well as jobs of elevated social standing and technical designations such as physicians, attorneys, and university professors. Although certain occupations are classified as “women's employment,” they are typically identical to those who stress feminine and nurturing qualities, such as domestic service, nursing, kindergarten teachers, and the majority of service workers.

Women also face vertical segregation and discrimination in employment.¹¹⁶ Vertical distinction applies to men and women working in the same sector, where men often hold a higher

¹¹¹ Macan, *supra* note 109 at 109.

¹¹² Lu, *supra* note 110 at 133.

¹¹³ *Ibid* at 133.

¹¹⁴ Jie Chen, *Equal Protection or Invisible Discrimination Study on the Anti-employment Gender discrimination System in America* (Master thesis, Xiamen: Xiamen University, 2017) at 37.

¹¹⁵ Robert M Blackburn et al, “Explaining Gender Segregation” (2002) 53:4 BJS 513 at 513 .

¹¹⁶ Maria Charles, “Deciphering Sex Segregation: Vertical and Horizontal Inequalities in Ten National Labor Markets” (2003) 6:4 Acta Sociol 267 at 267.

job and earn a higher income, whereas women work in lower-level positions that do not need technology, earn lower wages, and do not advance rapidly. Employers also compensate individually for equal jobs performed by men and women. For instance, a part-time work for a woman in lieu of a full-time job, or a job with a subdivision or a separate name in order to assert that the man and woman have distinct jobs with distinct earnings.

Occupational segregation has long been a significant concern for feminists. Feminists' anxiety over gender inequality created by workplace gender disparity has focused around whether the female population is heavily clustered in low-skilled, low-wage, and low-social-status professions.¹¹⁷ Feminists have analyzed the causes of gender segregation from many perspectives, including cultural and institutional perspectives.¹¹⁸ They demonstrate how women's occupational segregation is based on traditional gender roles: women are primarily responsible for childbearing, childrearing, and family management. Male and female is a mode of gender division of labor that patriarchy adheres to. This pattern continues in the labor market, where men naturally gravitate toward high-skilled, well-compensated occupations due to their inherent advantages.¹¹⁹ Due to family role constraints and insufficient investment in human capital, women are frequently forced to seek jobs that accommodate their family and caregiving responsibilities, which are frequently low-skilled and low-paid. Thus, the so-called "male" and "female" occupations have established the occupational gender division in society and reached an absolute consensus: those in "male" occupations, whether the employer or male staff, will actively or inadvertently oppose female entry; men who enter "feminine" occupations are viewed differently by society.¹²⁰

At the same time, due to the primary responsibility of raising children and taking care of the family, it is complicated for women to obtain information which results in a disadvantage position for women in terms of employment information, work experience and technical skills.

Employers treat economic rationality as their most important goal: Employers are more

¹¹⁷ Xianguo Yao & Sisheng Xie, "The Economic Effect of Occupational Segregation -- An Analysis of Occupational Gender discrimination in China's Urban Employed Population" (2006) 36:2 J Zhejiang U H & Soc Sci 73 at 73.

¹¹⁸ Hedi Hartmann, "Capitalism, Patriarchy, and Job Segregation by Sex" (1976) 1:3 Signs 137 at 137..

¹¹⁹ Yao, *supra* note 117 at 73.

¹²⁰ *Ibid* at 73.

inclined to select men for careers and jobs requiring a high degree of competence, expertise, and obligation, on the one hand. In the other hand, due to the nature and stage of their employment, as well as their relative lack of knowledge and experience, female workers are more likely to work in marginal departments with low ability standards, limited development space, and less advancement opportunities.

2.4.3. Gender-Based Discrimination: Impacts on Retirement

The retirement age of women in China is 50 years old, and that of men is 60 years old in law. This is considered as the statutory retirement age that women generally aged 50 years old should quit their positions. Regardless of unwillingness, they have to do so all the same. All over the world, the average retirement age difference between men and women is 4.41 years, while in China, the difference between male and female workers is 10 years. Clearly, the gap between the retirement ages of men and women in China is higher than the world average.¹²¹ Furthermore, China 's pension system is benchmarked against working hours, which means that because women tend to work fewer hours than men, women will receive less pension than men after retirement. In Liaoning province, men received an average pension of 2,386 yuan per month, while women received only 1,714 yuan, a gap of 40%.¹²² According to the 2016 report on the Women's Labor Market, less than 30 percent of the 85 countries surveyed have a gender difference of more than 10 percent between male and female state pensions, including China.¹²³ The earlier women retire, the greater the difference wage gap between women and men. This is especially true for some highly educated women who start to work later due to longer education.

In addition, early retirement is also a waste of female power. According to United Nations statistics, women accounted for 54% of the global population aged 60 and over in 2010 and 61% of the global population aged 80 and over in 2015. ¹²⁴ According to statistics, the average life expectancy for men is 73.64 years, and 79.43 years for women in China.¹²⁵ Compared with men, women face greater pension pressure due to their longer life expectancy. Women live longer than men, but work fewer hours than men, which is clearly a paradox. It is a waste of female value to take women out of work at 50, when they are still a productive and creative.

¹²¹ Jia Lin, "Legal Analysis and Institutional Arrangement of Retirement Age" (2015) 6 LCS 5 at 24.

¹²² Jiang Su, "The Gender Gap in China's Pension System" (2019) 9 TF 112 at 112.

¹²³ *Ibid* at 112.

¹²⁴ ¹²⁴ *Ibid* at 112.

¹²⁵ *Ibid* at 112.

2.5. Conclusion

When the two-child policy was first implemented, there were more than 150 million one-child families in China. The policy shift ignited serious debate about the potential social repercussions, such as whether the population could surge in light of the number of eligible couples of child-bearing age who might have a second child. After the implementation of the policy, people from all walks of life began to pay attention to the problems and challenges brought about by the “two-child policy.” For example, women of child-bearing age are often discriminated against for having a second child in their career development. Women's willingness to have a second child or the possibility of having a second child has become an obstacle to women's employment or promotion. In addition, women's reproductive rights, life and health rights, marriage and family rights, and women's social status are also being challenged. “In the context of the new fertility policy, how do women balance fertility and employment? How to weaken employment discrimination and create an inclusive employment environment? It has become an urgent issue of people's livelihood and society[.]”¹²⁶

The protection of women's rights received renewed attention from legal professionals in light of the “two-child policy”, with particular consideration given to how to protect women's employment rights in this new context, and in light of increasing discrimination on this basis. The introduction of the two-child policy has increasingly highlighted the inadequacy of relevant supporting policies, laws, and regulations, and the lack of specific supporting measures.

At present, and as examined in this chapter, the costs associated with the two-child policy are mainly distributed at the individual employer and employee levels. Economic disincentives on the employer have led to abandonment and exclusion of women in employment. Employers' goal to maximize profits is seen as at odds with the numerous costs perceived to arise for female employees who bear children, including direct maternity leave costs, as well as ripple effects, both monetary and production-oriented, on the enterprise.

As a result, women face discrimination both in obtaining employment and also during their employment. Women who become pregnant may experience further adverse treatment. Pregnant women may be transferred to inappropriate positions or have their bonuses reduced. Employers may find other unreasonable and illegal ways to force female workers to resign, or even pay a fee

¹²⁶ Tang, *supra* note 83 at 38.

to dismiss female workers. Some women have to delay or give up having a second child in order to save their jobs. These examples illustrate that the issues resulting from the two-child policy in terms of its impacts on women's employment equality require legal reform and intervention.

In China, employment discrimination has become one of the essential factors that seriously affect women's equality. It exists in the entire process of female employment from they start to work until retirement. The next chapter goes on to analyze consequential impacts on, and failings of, the current legal framework in light of the two-child policy, examining how the current laws governing women's rights and employment do, and do not, adequately address the discrimination arising from the two-child policy as analyzed in this chapter.

Chapter 3. Laws Addressing Employment Discrimination on the Basis of Sex in China: An Analysis of the Relevant Legal Frameworks and Processes

Chapter 2 addressed the history of China's two-child policy and the effect it has had on women's perceptions of workplace harassment. This chapter discusses the current status of China's employment discrimination regulations. I analyze how China's current legal framework to address employment discrimination is not sufficient to provide meaningful protection and prevention of gender discrimination at work. I first review the existing legal framework in China, and then discussed how the laws operate in practice, illustrating the myriad challenges arising in the operation of the law. I analyze identified issues within China's existing legal framework in doctrine, in enforcement or operation on the ground, and in administrative of justice and access to remedies.

In the first section, I set out China's laws against gender discrimination in the workplace. In order to understand the full complement of laws promoting gender equality and non-discrimination in employment, I discuss an array of rights and obligations that are contained in several different laws and regulations in China. I analyze laws relating to gender discrimination in the workplace under: the Constitution, the Law on the Protection of Women's Rights and Interests, the Labor Law, the Labor Contract Law, and the Employment Promotion Law. I describe and demonstrate how these laws work together to protect women's labor rights and guarantee equality between men and women in the workplace.

In the second section, I analyze how the laws described in the first part work in practice, how effective they are, and what limitations and challenges arise in their operation. In particular, I establish three key problems with the implementation and operation of these laws. First, I identify a legislative gap in defining and responding to gender discrimination in employment. At present, there is no clear definition about what workplace discrimination is under the various relevant laws, nor an identification of forms of workplace discrimination. Second, there is a lack of clear legal consequences for discrimination in the workplace. There is no uniform standard for defining employer obligations, assigning legal responsibility, and gathering evidence to meet the burden of proof in cases of workplace discrimination. These all contribute to a lack of effective deterrent effect under the law. Third, there is no specialized law enforcement agency or

administrative body in China to enforce relevant laws against gender discrimination in the workplace, further creating conditions in which employers may act with impunity.

In the third section, I discuss access to, and effectiveness of, existing dispute settlement procedures. At present, the dominant approach in addressing instances of gender discrimination in the Chinese workplace is: one conciliation, one arbitration and two deliberations. This process requires labor disputes to first be mediated at the organization level (one conciliation). Failing resolution at that stage, parties may submit the dispute to a labor dispute arbitration committee (one arbitration). If one party refuses to accept the outcome at arbitration, it may then bring a suit to the people's court, with the possibility of appeal from the first instance judgment (two deliberations). As I discuss, this dispute resolution process is lengthy, costly, and potentially ineffective both at an individual level to provide a meaningful remedy and at a systemic level to change behaviors and conditions.

3.1. The Legal Framework Addressing Gender discrimination in the Workplace in China

This section sets out and doctrinally analyzes China's current legal framework addressing gender discrimination in the workplace. Relevant laws are located in several disparate areas of regulation under the Chinese legal system. The first is the Constitution that guarantees citizens' basic labor rights and equal rights. Second is the Law on the Protection of Women's Rights and Interests, which specifically protects women's rights and interests. The third is the Labor Law, which identifies specific labor rights, and the Labor Contract Law, which regulates the signing of labor contracts. Fourth, there are employment promotion laws that promote employment.

As I discuss in greater detail in this section, each of these areas of law provide some recognition of women's rights in the workplace. The Constitution guarantees women's equal right to work mainly through the provision of basic equality rights. However, as it is the foundation of the state, this right is framed generally, and other specific laws are needed to implement these basic rights. The Labor Law mainly protects women's right to equal employment, including in relation to employment opportunities and workplace treatment. The Labor Law also protects women's employment and job security during childbirth, pregnancy and lactation. The Labor Contract Law prohibits employers from minimizing their responsibilities and damaging the rights of employees through standardization of the Labor Contract. Since labor laws protect all workers, women are also protected. No one can infringe the rights of female

workers. The Employment Promotion Law aims to standardize the workplace environment, creating a fair environment for all workers, providing equal employment opportunities and treatment, and requiring the state to take strong protection measures to help workers find jobs. Finally, the Law on the Protection of Women's Rights and Interests directly focuses on the protection of women. It safeguards women's civil, cultural, and educational rights, labor and social security rights, property and personal rights, as well as marriage and family rights.

Within each of these areas, laws concerning gender discrimination in employment in China may be divided into two conceptual frameworks: first, laws that guarantee equal protection and rights regarding employment to both sexes; and, second, laws that afford special protection to women's rights in employment. Feminist legal theory brings an important and sharp lens to understanding discrimination against women. However, the influence of feminist theory on Chinese law has been limited to date. There are few studies combining feminist theories with jurisprudence. In this chapter, I use feminist legal theory, especially cultural and radical feminist theory as explained in my Introduction chapter, to examine China's laws addressing discrimination against women in the workplace.

This section first outlines the relevant laws in each of the identified areas above. I then analyze how the relevant laws promote anti-discrimination and equality for women in relation to employment. I comment on the particular form of equality advanced by each area of law, illustrating the ways in which a reliance on formal equality may limit the effectiveness of the doctrine in advancing equality and non-discrimination for women, particularly as it relates to family status and child-bearing, in the workplace

3.1.1. The Constitution

A brief introduction to the validity of the *Constitution* in China and how it operates is in order to better help the reader understand Chinese law. The *Constitution* is the fundamental law of the country and it sets out general norms and principles for making specific laws. What is more, Constitutional review in China is the responsibility of the National People's Congress and its Standing Committee. The National People's Congress is the highest organ of state power and legislature in China. However, China does not have a constitutional court, and specialized courts such as the Constitutional Council are responsible for handling cases of unconstitutionality. In contrast to countries such as the United States and Canada, China's ordinary judiciary authorities

are not allowed to conduct the constitutional review, Chinese courts cannot directly cite constitutional provisions as a basis for adjudication in their review, and the Constitution is not justiciable, nor can the courts accept and try cases brought by parties based on the constitution. Although this system has been controversial, China's constitutional oversight system is a complex issue. Those issues are beyond the scope of this thesis.

“Most of the significant provisions regarding labor issues were provided in the 1982 Constitution.”¹²⁷ As the fundamental law of our country, the Constitution is the basis for making other laws. “Article 42 provides that “Citizens of the People's Republic of China have the right as well as the duty to work.”¹²⁸ This article shows that labor rights are not only the rights of the Chinese people but also the obligations of the Chinese people to the country and society. Every citizen who has the ability to work has an equal right, and duty, to work. As long as citizens have the ability to work, regardless of gender, ethnicity, and property status, they have the right to participate in labor and receive labor compensation, the right to choose occupations and employers that meet their characteristics. The right to work is related to the security of citizens' lives and the exertion of workers' personal abilities. It is also a significant issue for social and economic development and social stability.

The Constitution also guarantees the rights of women explicitly. For example, Article 48 of the Constitution clearly states that “Women of the People's Republic of China enjoy equal rights with men in political, economic, cultural, social and family life. The state protects the rights and interests of women, applies the principle of equal pay for equal work for men and women alike and trains and selects cadres from among women.”¹²⁹

However, the legal provisions on gender equality are general in nature under the Constitution, given its purpose and function within the legal system. The principal regulations do not provide a basis for specific implementation, such as in the context of employment discrimination. “These principles still need to be extended and implemented in practice by specific department laws or other forms of regulations.”¹³⁰ For instance, Article 42 states the principle of equality: “Citizens of the People's Republic of China have the right as well as the

¹²⁷ Susan Tiefenbrun, “China's Employment Laws and Their Impact on Women Working in China” (2017) 23:2 UC D J Intl L Pol'y 253 at 253.

¹²⁸ *CPRC*, *supra* note 88 at 46.

¹²⁹ *Ibid* at 46.

¹³⁰ Tiefenbrun, *supra* note 127 at 253.

duty to work.”¹³¹ However, the principle is generally used to provide guidance to other specific laws and regulations. In practice, constitutional provisions cannot be directly invoked as a basis for adjudication, so it can be argued that such a principle requires more detailed and specific laws to complement it. Moreover, the effect of such a principle is limited in practice.

The provisions of the Chinese Constitution on the equal rights of men and women are a manifestation of formal equality (or liberal) feminism. “Formal equality posits that men and women should be treated the same in all aspects of life, including in respect of access to employment and conditions of employment.”¹³² Formal equality feminism, as a branch of formal equality theory, focuses on providing equal entitlement to rights and benefits under law, regardless of sex, as a means to achieve this equality. It further focuses on equal treatment under the law, regardless of sex. As a foundational law in China, the Constitution clearly requires that men and women have equal treatment in the workplace. “However, as critics of formal equality feminism argue, true equality requires a consideration of the gender differences between men and women in order to achieve women's emancipation.”¹³³ As such, the promotion of formal equality under the Constitution does not translate to substantive equality for women in practice. The Constitution does not adopt certain appropriate, reasonable, and necessary measures to deal with the de facto differences between women and men in economic, social, and cultural aspects in accordance with specific situations and actual needs. Rather, specific laws are needed to achieve this goal.

3.1.2. Women's Rights Protection Law

The Law on the Protection of Women's Rights and Interests is a special law that explicitly protects women's rights and interests. It has more comprehensive rules on gender equity in jobs than the Constitution does, and its stated aim is to safeguard women's legal rights and advance gender equality. The Law on the Protection of Women's Rights and Interests is China's first relevant law which takes women as its primary subject, and comprehensively protects women's rights and interests. This legislation safeguards women's rights and interests by establishing a national policy on gender equity and defining the roles of people's governments at all levels in

¹³¹ *CPRC*, *supra* note 88 at 46.

¹³² Li Wang, “The Double Dimension of Equality: Formal Equality and Substantive Equality” (2011) 2 *Theoretical I* 58 at 58.

¹³³ Weiwei Li, “Application and Development of the Principle of Equality in anti-Discrimination Law - Also on Anti-Discrimination Legislation in China” (2009) 27:1 *Tribune Pol Sci L* 126 at 126.

protecting women's rights and interests. The Federation and local women's federations at all levels represent and safeguard the interests of women of all nationalities and walks of life following the law and the Constitution of the All-China Women's Federation.¹³⁴

“The law stipulates that women enjoy the following six rights: political rights, cultural and educational rights, labor and social security rights, property rights, personal rights, and marriage and family rights.”¹³⁵ Political privileges provide the freedom of women to handle public relations across a variety of platforms and forms; women have equitable voting and electoral rights with men; and the state systematically cultivates and hires female leaders. The All-China Women's Federation and local women's federations at all levels advocate for women's participation in political decision-making, administration, and oversight of state and social affairs. Cultural and educational rights include: equal rights with men in terms of enrollment, further education, graduation allocation, degree-granting, and study abroad; ensuring that school-age women, children, and adolescents receive compulsory education; eliminate illiteracy and semi-literacy among women; organize women to receive vocational education and practical technical training; Women are given the freedom to participate in science, technical, literary, musical, and other forms of culture on an equal footing with males. Labor and social security rights include the prohibition on discriminating against women in hiring or raising employment standards for women on the basis of gender; equal pay for equal work for men and women; equal promotion; special protection through menstruation, pregnancy, childbirth, and lactation; wage equality; protection against dismissal; and equality under the national retirement system.

The Law on the Protection of Women's Rights and Interests has proposed many more detailed and specific regulations during pregnancy and breastfeeding, special labor protection and a maternity insurance system. Officially implemented as early as 1992, it has made progressive achievements in women's rights and interests protection in 6 major aspects, including political rights, cultural and educational rights, labor and social security rights, property rights, personal rights, marriage and family rights, encouraged women development and eliminated various discrimination against women. Although this law still needs to be further improved, as a special law enacted in China with the protection of women's rights and interests, it is of great significance to women's rights and rights protection in my country.

¹³⁴ *LPWRIPRC*, *supra* note 86 at 22.

¹³⁵ *Ibid* at 22.

The legal definition of equality for men and women may be classified in two ways: One is institutional equity, which ensures that men and women are treated equally under the law. Substantive equality is the other. Substantive representation should take a multifaceted approach, recognizing and addressing the distributional, recognition, systemic, and exclusive injustices faced by out-groups, rather than focusing only on the right to fair rights, equal opportunity, and equal outcomes. The Law on the Protection of Women's Rights and Interests advanced a vision of substantive equality in relation to work, It proposes some provisions grounded on special protection for women, like the 26th article stipulating that women shall be under special shelter during their menstruation, pregnancy, maternity and lactation period.¹³⁶ It building importantly on the limits of formal equality associated with the more general guarantees under the Constitution.

Some feminists support formal equality, such as liberal feminists. They believe that as long as men and women are treated same in law, discrimination in the workplace can be eliminated. They advocated establishing gender-neutral laws. For example, the Constitution states that all people should be treated equally and enjoy the same rights. These rules are expressions of formal equality. But with the development of feminist theory, the theory of formal equality has been questioned. "Gender-neutral laws ignore the physiological differences between men and women are in an unfavorable situation in terms of the possession of cultural, economic and political resources caused by historical and realistic reasons, causing it to finally hinder the realization of real gender equality."¹³⁷ Formal equality in such conditions is far from enough, cannot really eliminate discrimination in the workplace.

Substantive equality sees the difference between men and women. Legislators are expected to enact legislation and regulations to safeguard women's civil rights that are founded on women's real needs and the direction of consequence equity, so order to compensate for the equality women have suffered as a result of their disadvantage. To ensure that women have equitable development opportunities as men, it is fair and appropriate to have special care and security for women by legislation, which is indeed the only way to achieve gender equality. According to the radical feminist analysis of patriarchy, the cause of gender inequality is the

¹³⁶ *LPWRIPRC*, *supra* note 86 at 2 s 26.

¹³⁷ Zhao Ming, "The Enlightenment of Feminist Jurisprudence on Gender Equality to Chinese Legislation" (2009) 3 *J Chin Women's Studi* 10 at 10.

discriminatory social structure and social relations. The purpose of taking protective measures is to construct substantial equality.¹³⁸ The Law on the Protection of Women's Rights and Interests not only stipulates the same rights and treatment for men and women, such as equal pay for equal work, but also provides protection for the special rights and interests of female workers, such as the rights of female workers during pregnancy.

3.1.3. Labor Law and Labor Contract Law

The “Labor Law” and “Labor Contract Law” are two laws that specifically address the rights and interests of workers. The "Labor Law" and "Labor Contract Law" were drafted in conjunction with the Constitution with the objective of safeguarding workers' legitimate rights and desires, modifying labor relations, developing and sustaining a labor structure compatible with the socialist market economy, and encouraging economic growth and social change. They are designed for all Chinese staff. They safeguard all staff, even female workers. While there is no specific chapter on women's labor rights, many have protections for women's labor rights.

“The Labor Law, passed in 1994, provides Chinese women with additional labor protections.”¹³⁹The labor law is made for the state to adjust the labor relations and the social relations. This campaign to eliminate gender-based workplace discrimination was primarily motivated by foreign pressure on China to recognize the presence of discrimination and enact laws prohibiting it.¹⁴⁰ The Labor Law is a fundamental law in China. It is an essential aspect of China's anti-discrimination legislation. It provides provisions for the protection of women's equal employment rights by prohibiting discrimination in relation to employment opportunities, treatment in the workplace, pay, services, and safety.

First, the Labor Law prohibits discrimination in relation to employment opportunities; workers enjoy equal employment. “The provisions of Article 12 establish the basic principles of anti-employment Discrimination.”¹⁴¹ Article 13 further stipulates: “Women shall enjoy the equal right, with men, to employment. With exception of the special types of work or post unsuitable to

¹³⁸ *Ibid* at 10.

¹³⁹ *LLPRC*, *supra* note 106.

¹⁴⁰ Christine M. Bulger, “Fighting Gender Discrimination in the Chinese Workplace” (2000) 20:1 BC TW L J 345 at 345.

¹⁴¹ *LLPRC*, *supra* note 106 at 12.

women as prescribed by the State, no unit may, in employing staff and workers, refuse to employ women by reason of sex or raise the employment standards for women.”¹⁴² This article explicitly emphasizes the equal rights of men and women. Second, workers' right to obtain equal pay for equal work is guaranteed. “Article 46 and Article 48 stipulate that the distribution of wages should follow the principle of distribution according to work, implement equal pay for equal work, and specify the minimum wage.”¹⁴³ Third, employment services and employment safety discrimination are prohibited, and workers are guaranteed the right to participate in vocational training, sign valid labor contracts, and participate in social insurance. “These are regulated in Chapters 8, 3, and 9 of the Labor Law.”¹⁴⁴

The Labor Law also provides job protection for women in relation to child-bearing and maternity leave. The Labor Law stipulates (Article 29) that “during the period of maternity, pregnancy and breastfeeding of working women, the employing unit shall not cancel its labor contract.”¹⁴⁵ “In addition, the Law also provides special provisions on the special protection of women and juvenile workers (Article 58).”¹⁴⁶

The Labor Contract Law also protects the rights of employees by regulating labor contracts. The labor contract law is designed to solve problems that can arise from a lack of knowledge or power by workers, including women, when negotiating terms and conditions of employment. “The Labor Contract Law adds sanctions for employers who do not create written contracts with their employees, do not honor the terms of the contract, or impose excessive probationary periods, etc.”¹⁴⁷ This law has particular benefits for women, many of whom who work for years without a contract.¹⁴⁸ Thus, while this law appears facially neutral in application, it ameliorates a problem that disproportionately affects women in the workplace in China.

Labor law and Labor Contract Law stipulate equal treatment of men and women in the workplace, and establish formal legal equality. These laws further advance substantive equality for women. For example, the special protections extended to working women who are pregnant or breastfeeding ensure that they have equality in employment security and outcome through a

¹⁴² *Ibid* at 13.

¹⁴³ *Ibid* at 46-48.

¹⁴⁴ *Ibid* at 8, 3, 9.

¹⁴⁵ *Ibid* at 29.

¹⁴⁶ *Ibid* at 58.

¹⁴⁷ Tiefenbrun, *supra* note 127 at 253.

¹⁴⁸ *Ibid* at 253.

law designed uniquely for them. Similarly, the Labor Contract Law, while facially neutral, solves a problem known to acutely affect women in the workplace. These approaches complement the formality equality guarantees under the Constitution by recognizing the different situations of men and women in the workplace. This aligns with a cultural feminist approach, which emphasizes the differences between men and women, including in relation to child birth and caregiving. As set out in Chapter 3, these differences require specific attention under law to provide special protection for women and ensure they are not treated unfairly in the workplace on this basis.

In contrast to the general equal rights of the Constitution against discrimination, labor law and labor contract law have more detailed provisions on equal rights. These laws involves equal employment rights in the workplace and some special protections for women's labor rights. Although the provisions on anti-gender discrimination in the workplace are not detailed and complete enough and not perfect, there is no denying that these two laws are important expressions of equal rights of Constitution in the field of labor.

3.1.4. Employment Promotion Law

The Employment Promotion Law is an essential law against employment discrimination. Although the primary purpose of the Employment Promotion Law is to help people find jobs, it contains several provisions prohibiting discrimination in the workplace. Article 3 establishes the principle that “laborers shall enjoy equal employment and the right to choose their jobs by law, and employees shall not be discriminated against based on ethnicity, race, gender, religious belief, etc.” A particular chapter is provided to stipulate “fair employment”. Articles 25 and 26 obligates the people's governments at all levels to “create a fair employment environment, eliminate job discrimination, and draw up policies and take measures that give support and assistance to people encountering employment difficulties. Employers shall provide equal employment opportunity and equal employment conditions to workers and shall not practice employment discrimination.”¹⁴⁹ In addition, “Articles 27-31 make special provisions for women, ethnic minorities, persons with disabilities, carriers of infectious disease pathogens, and rural migrant workers to enjoy equal rights without discrimination.”¹⁵⁰ Article 27 of the Employment Promotion Law stipulates: “The state shall guarantee that women enjoy the same right to work as

¹⁴⁹ *EPLPRC*, *supra* note 107 at 25,26.

¹⁵⁰ *Ibid* at 27-31.

do men. Except for the types of work and positions stipulated by the state, hiring units cannot refuse to hire women or raise the employment standards for women based on their sex. When hiring female workers, hiring units are not allowed to set marriage and childbirth restrictions on female workers in the labor contract.”¹⁵¹

The Employment Promotion Law is a manifestation of substantive equality, focusing on ensuring equality for women and other marginalized groups under the law. Doctrinally, it aims to ensure equality in practice by specifically prohibiting discrimination against women and other groups in employment settings, including in relation to hiring practices and conditions of employment. Although the Employment Promotion Law includes some provisions about discrimination against women, it is unlikely to be an effective law to prevent discrimination against women. For example, article 3 of the Employment Promotion Law enumerates prohibited grounds of discrimination, but does not explain the concept of employment discrimination. The Employment Promotion Law does not specify the categories of employment discrimination, burden of proof, punitive measures and so on. It is impossible to rely solely on the employment promotion Law to combat gender discrimination in the workplace. It is not a law that truly addresses gender discrimination in the workplace. China still needs to establish a systematic, comprehensive and specific law on employment discrimination.

“In fact, it is not difficult to find that China's existing equal employment laws and regulations are only a passive strategy to simply respond to various employment problems in the workplace.”¹⁵² When China enacted these laws, it did not realize the importance of workplace discrimination, nor did it consider these problems and take the initiative to solve them. But as society has developed and gender discrimination in the workplace has become more prominent, these laws have failed. “This is also a microcosm of the immature equal employment right in China, which shows that the cause of equal employment right in China still has a long way to go.”¹⁵³

The above description and analysis of the legal framework in China establishes a focus on formal equality, but with some attention paid to substantive equality and particular needs of

¹⁵¹ *Ibid* at 27.

¹⁵² Xiong Li & Jun Liu, “The Dilemma of Equal Employment in Employment Promotion Law”, (2010) 25:2 J Henan U Econ L 1 at 37.

¹⁵³ *Ibid* at 37.

women in the workplace. Although the majority of legislation explicitly state that men and women are equivalent, the Rule on the Protection of Women's Rights and Interests takes into consideration the distinctions between men and women and creates laws that are based on women.

Working in concert, the formal guarantee of equality under the Constitution is complemented by specific women's rights, as well as specific rules governing labor and employment contexts. However, as the next section will examine, further challenges exist in the operation and enforcement of those laws in practice.

3.2. Challenges in the Operation and Enforcement of Laws Addressing Gender Equality and Discrimination in the Workplace

To assist readers unfamiliar with China's judicial system in comprehending the following, I would like to begin by providing a quick overview of the preceding system and its implementation. China's judiciary structure is made up of national judicial institutions (courts), national prosecutorial organs (procuratorates), and administrative organs that perform both administrative and judicial roles (public security organs, national security organs and judicial administrative organs). China regards the people's court as the highest judicial entity of the world. The People's Republic of China has established a Supreme People's Court, as well as local people's courts at all levels (with three levels: basic people's courts, intermediate people's courts, and senior people's courts), as well as military courts.

In a collegiate system, people's courts adjudicate cases. Cases before people's courts can be decided by a collegial panel of judges or by a collegial panel of judges and people's jurors; common civil cases, minor criminal cases, and cases expressly specified by law may be prosecuted by a single judge. Due to the fact that hearings are conducted in people's courts, the two-trial-for-final law applies. Concerning first-instance rulings and orders issued by local people's courts, parties can appeal to the next higher level people's court in compliance with legislative procedures, and people's procuratorates can file a lawsuit against the people's court in accordance with procedural procedures.

In China, the procuratorate acts as a national legal oversight body, created by the People's Congress, and accountable to and reporting to the People's Congress. Parallel to the People's Judiciary and the People's Government, the procuratorate is collectively referred to as "the

People's Government, the People's Court, and the People's Procuratorate," with its duties including monitoring and accepting arrests, agreeing to sue, and appearing in court in support of criminal prosecution. China has founded special people's procuratorates at various stages, including the Supreme People's Procuratorate, local people's procuratorates, and military procuratorates. Judicial administration, in the broadest sense, includes administrative roles performed by civil security organs, national security organs, judiciary administrative institutions, and organizations such as prisons, labor instruction, notarization, judges, and mediation.

To include a more detailed explanation of why China becomes stuck in the operation and execution of legislation concerning gender equity and workplace discrimination, I would first outline channels that may assist individuals in protecting their rights and resolving issues that arise through compliance as they believe they have been subjected to workplace discrimination.

If someone feels discriminated in their work, the following ways apply in China. First of all, you may choose communication with corporate management, or complaining to the human resource management department. If no reasonable feedback arrives you, you can resort to litigation channels. Presently in China, there are no special provisions for discrimination cases in the workplace which are treated as ordinary labor cases instead of a kind of discrimination cases alone. According to China's laws, labor arbitration must be carried out first concerning with labor cases, rather than direct litigation. The Regulations on Settlement of Labor Disputes in Enterprises (1993)¹⁵⁴ and the Labor Law of the People's Republic of China (1994)¹⁵⁵ require parties to submit to labor arbitration before they can file a lawsuit with the people's court for work-related disputes, including employment discrimination. However, there are no specific laws and regulations for Chinese courts to handle discrimination cases. There are still many problems to be solved in order to successfully protect rights through litigation.

First, there is a lack of clear assignment of responsibility within organizations. As mentioned above, various laws seem to rely on and assign responsibility to a corresponding competent authority. The words "relevant competent authority" and "superior authority" are very ambiguous. This often means that victims do not know who to ask for help. The most direct consequence of not having clear law enforcement is mutual evasion of responsibility between agencies, with the result that all departments treat employment discrimination passively. This can

¹⁵⁴ *Regulations on Settlement of Labor Disputes in Enterprises*, NPC 1993, [RSLDE].

¹⁵⁵ *LLPRC*, *supra* note 106.

create not only a sense of confusion, but of distrust and helplessness for individuals who seek assistance.

Second, existing governmental agencies or departments either lack legal authority, or lack clear direction to address employment discrimination in their work. “Article 53 of the Law on the Protection of Women's Rights and Interests stipulates that the specialized agency for the protection of women's rights is the Women's Federation.”¹⁵⁶ However, its legal status is that of a public welfare social organization. It can only play an auxiliary role and has no ability to execute the law. “Article 85 of the Labor Law clarifies the supervisory responsibilities of the labor administrative department, including the internal rules and regulations formulated by the company, contract conclusion and social insurance payment, and does not include employment discrimination.”¹⁵⁷ The role of the labor inspection department in protecting women's rights and addressing employment discrimination has not been implemented, and the supervision is not strong enough.

Along with the questions addressed in the preceding segment about the legislative system addressing occupational gender inequality, there are a number of concerns about the operation and feasibility of these laws in reality. To begin, the absence of a precise description of workplace discrimination and an appreciation of the different types of discrimination, such as direct versus indirect discrimination, impedes attempts to avoid discrimination on the field. Second, current statutes do not explicitly define remedies or disciplinary measures against contractors that discriminate against employees. As a consequence, there is no deterrence, and workers are free to disregard or violate the statute. Third, since prejudice may be relatively subtle and often depends on witness statements, it can be challenging for staff to assemble adequate facts to assess whether discrimination has happened. This necessitates a debate on whether the level of evidence or duty of proof can be altered in prejudice situations. Finally, and even most significantly, China lacks a professional or devoted law enforcement or supervisory authority to counter workplace discrimination. The decentralization of authority undermines the laws' efficacy in securing women at work. This segment delves into and analyses each of these organizational issues, highlighting major deficiencies in China's response to workplace gender discrimination.

¹⁵⁶ *LPWRIPRC*, *supra* note 86 at 53.

¹⁵⁷ *LLPRC*, *supra* note 106 at 85.

3.2.1. Lack of Definition of “Discrimination”

The current provisions on employment discrimination laws are too general. As the previous section outlined, the Constitution and other laws and regulations stipulate equal rights for men and women, including labor rights, rest and leave, labor protections, and the right to participate in labor insurance. The Employment Promotion Law further prohibits discrimination in employment, including in relation to hiring and conditions of work. However, such general provisions are too vague, resulting in weak application in practice.

Because there is no clear definition of discrimination in law, only the most obvious and direct forms of discrimination may be readily understood as such. “Discrimination includes both direct discrimination when an employer directly proposes “male only” when hiring and indirect discrimination when screening female applicants.”¹⁵⁸ Discrimination has emotional factors, and employers mostly use indirect discrimination, which is more covert and challenging to detect. China has not articulated a definition of discrimination, nor has it distinguished between direct and indirect discrimination. This limits the ability of employers to effectively regulate workplace behavior, and the ability of women employees to seek legal remedy when they have been discriminated against.

The current laws in China appear only to prohibit direct discrimination. The lack of explicit attention given to indirect discrimination, in particular, creates a significant loophole in available legal protections. Companies who discriminate against women in recruitment directly will be investigated by the labor inspection department. Therefore, companies often only collect resumes during recruitment, and simply do not contact female job candidates for interviews, or control internal processes to limit hiring of women. Companies may transfer pregnant women to poor job positions or to create conditions in which they will resign from their post. These are each forms of indirect discrimination that are difficult to prove and punish under the current laws in China. Companies use these gaps to eliminate female job seekers and employees while avoiding accusations of discrimination.

Article 27 of the Employment Promotion Law states: “The state guarantees that women enjoy equal labor rights with men. Employers shall not refuse to recruit women except for jobs or

¹⁵⁸ Fei Li, *Study on the Legal Protection of Women's Employment Under the Universal Two-Child Policy* (Master thesis, Shijiazhuang: Hebei University) at 396.

positions that are not suitable for women as stipulated by the state. They shall not refuse to hire women or raise the employment standards for women on the grounds of sex. Employers employing female employees shall not stipulate in the labor contract the content restricting female employees from getting married or giving birth.”¹⁵⁹ This Law prohibits discrimination against women in employment, but approaches the issue from a formal equality standpoint, as I discussed earlier. It is commonly understood as prohibiting direct employment, however, as I detailed above, many instances of discrimination are indirect in nature.

Article 13 of the Labor Law stipulates: “Women enjoy equal employment rights with men. When hiring employees, employer may not refuse to hire women or rise standards because of their gender, except for types of jobs that are not suitable for women.”¹⁶⁰ However, the law does not specify what is not suitable for women. Due to the lack of law, companies can make full use of the loopholes in the law to make discrimination “legal”. For example, as discussed in Chapter 2, job advertisements may include specific requirements that will implicitly exclude women from candidacy. Moreover, as outlined above, companies may use other tactics to eliminate women job seekers during the recruitment process.

Articles 12 and 13 of the Labor Law¹⁶¹ and Article 27 of the Law on the Protection of Women's Rights and Interests¹⁶² have designed equal employment for men and women, equal pay for equal work, occupational safety, development rights, and social security rights. However, these regulations are high level principles; they lack specificity. Because of the lack of specific legal provisions and implementation procedures, there are no specific legal provisions to determine the standard for establishing equality or compliance with the law. This lack of specificity contributes to the limited understanding of discrimination as this section has illustrated. Further, because of the lack of definition, it is difficult for judges to judge when a situation constitutes gender discrimination in the workplace. This weakens the effectiveness of the law, and means that many instances of discrimination likely go unrecognized.

3.2.2. Lack of Legal Consequences and Deterrent Effect of Discrimination Laws

The current laws in China do not clearly set out consequences that employers will face if

¹⁵⁹ *EPLPRC*, *supra* note 107 at 27.

¹⁶⁰ *LLPRC*, *supra* note 106 at 13.

¹⁶¹ *Ibid* at 12,13 .

¹⁶² *LPWRIPRC*, *supra* note 86 at 27.

they engage in discrimination in the workplace, nor do they set out sufficient remedies available to women who have been discriminated against.

The first problem is that the assignment of legal responsibility is not clear. For example, Article 57 of the Law on the Protection of Women's Rights and Interests stipulates: "Anyone who evades, delays or suppresses the investigation and disposition of a victim woman's charge, complaint, exposure, or retaliates against a person making a complaint, a charge or an exposure regarding an infringement upon a woman's rights and interests, shall be ordered to make corrections by his or her unit or by an organ at a higher level, and the person who is held directly responsible or other responsible persons may, in light of the specific circumstances, be subjected to administrative sanctions."¹⁶³ However, in practice, there is often no corresponding government body to oversee this or order corrections within the organization. As a result, many complaints are simply unaddressed at this stage.

Second, the corresponding liability provisions are not clear, and therefore create a related the lack of corresponding legal liability for some infringements. For example, if there is an incident of employment discrimination, the law only requires the superior competent department to ask the company to make corrections (as set out in the previous paragraph), which has no deterrent effect. "Chapter VIII of the Employment Promotion Law stipulates that the labor administration and professional intermediaries shall bear legal responsibility for some illegal acts."¹⁶⁴ Unfortunately, no specific punishment measures are taken after a violation. The cost to the employer is very low.

The determination of legal responsibility is the foundation of judicial relief for employment discrimination. Only when the legal responsibility is clear, the law can be better implemented in judicial practice. The lack of clear assignment of legal responsibility and accountability for it, as demonstrated in the previous two paragraphs, hampers the effectiveness of anti-discrimination laws on the ground.

Moreover, the lack of clear legal consequences and remedies further limits the effectiveness of the law by creating a minimal deterrent effect. First, liability is primarily located in the administrative, rather than civil, arena. An employer may be obligated to provide

¹⁶³ *Ibid* at 57.

¹⁶⁴ *EPLPRC*, *supra* note 107 at 8.

compensation where they have been found to have discriminated against an employer, but there are significant ambiguities in the calculation of a compensatory award, including the overall quantum of the award, and the ratio and quantum of punitive versus compensatory allowances within the award. In short, no specific legal provisions exist regarding the method and standard for compensation in instances of discrimination. Because the cost to the employer is uncertain, it is not an effective deterrent against discrimination.

Third, the current legal framework is unclear regarding the burden and standard of proof, which exacerbates evidentiary challenges that arise in the context of discrimination. Due to the subjectivity of discrimination and the concealment of employers' discriminatory behavior, Female workers also find it daunting to testify on their experiences of gender inequality. Without judicial support, labor inspection agencies and courts had difficulty enforcing and supervising prosecutions. In brief, the litigation mechanism and the necessary evidence of a causal link between racist conduct and harm to rights and interests obstruct attempts to comprehensively and adequately recognize and remedy cases of discrimination on the field. As a result, employment discrimination is becoming more common in practice. When employers perceive that they will not bear legal responsibility for their conduct, they may act with impunity, increasing the prevalence of gender discrimination. Further, as the previous chapter discussed, there are reasons to be concerned that the two-child policy will result in further discrimination, compounding existing challenges in practice.

3.2.3. Lack of Specialized Law Enforcement or Supervisory Body

Finally, the effectiveness of the law in operation is limited because of a lack of specialized law enforcement or supervisory body to oversee its administration and implementation on the ground.

The lack of clear assignment of responsibility and legal authority, both within government and within organizations, is compounded where discrimination occurs within government as the employment setting. “Some discrimination comes from certain departments of the government, such as various kinds of discrimination in civil service examinations. The “relevant departments” and “superior institutions” provided for in the current law are all subordinate to each government.”¹⁶⁵ As we know, the most powerful supervision often comes from the outside, and

¹⁶⁵ Ziji Zhou, *Studies of the Legal Protection of the Equality Rights of Employment* (Master thesis, Shenyang:

self-supervision from the inside is often unreliable. At present, this model is not feasible. It is therefore necessary to set up a specialized law enforcement agency to regulate and address gender discrimination in the workplace.

3.3. Challenges in the Legal System and Access to Dispute Resolution in Instances of Gender discrimination in Employment

The noted issues regarding the scope and application of the laws addressing gender discrimination in employment, coupled with issues arising in their operation and effectiveness on the ground, are further compounded by challenges navigating the dispute resolution processes that currently apply in China. This section is interpreting and applying the laws as set out above.

Currently, the system of dealing with labor disputes caused by discrimination in the workplace in China is summarized by “one mediation-one adjudication-two trial”, which means that after a labor dispute occurs, the parties can apply for labor mediation in addition to negotiation first. If the mediation fails, or if the parties are not willing to mediate, they can apply to the Labor Dispute Arbitration Committee for arbitration. If the parties are not satisfied with the arbitration award, they can file a lawsuit in the People’s Court, and the lawsuit procedure is based on the provisions of the Civil Procedure Law to implement the two-instance system. When workers encounter workplace discrimination, they must first take self-relief measures, such as negotiations with employers. If they do not want to negotiate, the negotiation fails, or the settlement agreement is not implemented, they may then choose to be hosted by a mediation organization (one conciliation). If mediation does not resolve the dispute, they can apply for labor arbitration (one arbitration). Those who are dissatisfied with the result of arbitration may file a suit in a people's court with a preserved right of appeal (two deliberations).

On the surface, the dispute resolution system provides a variety of remedies, promotes diversion of cases, and protects the rights and interests of parties through multiple channels. In fact, with increased awareness of employees' rights and interests, labor disputes have increased. However, this has resulted in more complicated and difficult cases emerging, which highlight several limitations and issues with this system.

This part discusses whether China's current relief procedures for employment discrimination are effective. I focus my analysis on the pre-litigation steps in the dispute

Northeastern University, 2010) 26.

resolution process, highlighting existing challenges and issues that make these steps largely ineffective for workers, and inefficient at their primary objective of diverging cases from the courts and encouraging early resolution of disputes. I discuss the ways in which insufficient independence and neutrality create issues at both the mediation and arbitration stages. Further, I analyze how a lack of coordination between arbitration and litigation creates both procedural and substantive access to justice issues, including in relation to time delays and cost. Overall, I establish that the compulsory nature of each step in the process creates inefficiencies and ineffectiveness for parties in resolving disputes.

3.3.1. Mediation and Internal Resolution Measures

As mentioned above, if informal internal dialogue does not resolve the issue, a worker may first request mediation to resolve their dispute. However, the mediation mechanism only has limited practical effects. This is due to a combination of challenges arising from the current rules, and the variables that exist in practical settings. Mediation is a term that applies to the actions of an impartial third person that acts as a mediator between groups, assists in the exchanging of ideas, proposes alternatives, and encourages the two parties to settle disputes. Mediation, as an informal method for resolving disputes, is not legally binding.

“[The] *Law of the PRC on Labor Dispute Mediation and Arbitration* authorizes three types of mediation mechanisms including enterprise mediation committees, township and sub-district office, and grassroots people's mediation.”¹⁶⁶ However, these mechanisms only play a limited role in resolving disputes, given challenges with their independence and neutrality in practice, and the lack of specific and clear rules governing mediation mechanisms.

An enterprise mediation committee is a statutory mediation organization that should be a third-party organization independent from enterprises and laborers. This independence is required to ensure that the mediation can occur in a manner that best aligns with its dispute resolution purpose. However, in practice, both labor union members of the mediation committee (who act as a staff representative), and the committee director (a position held by management of the enterprise), are paid by the enterprise-employer. Because mediation committee members are paid by the enterprise, the independence and neutrality of the members is compromised.

In addition to concerns regarding independence and neutrality of the mediation

¹⁶⁶ *Labor Dispute Mediation and Arbitration Law of the People's Republic of China*, NPC 2007, [LDMALPRC].

organization membership and composition, mediations are limited in their practical effect because there are no specific rules for mediation, meaning that the process and outcomes of mediations are affected substantially by individual membership, discretion, and expertise. In contrast to arbitration and court processes, mediations have no specific procedural and substantive rules in China at present. This often means that how a mediation unfolds is highly dependent on the individual understanding, perspective and approach of the person in charge. Accordingly, immoderate discretionary power affects the fairness, predictability, and consistency of mediation. The impact that discretionary power can have on the process and outcome of mediation is further compounded by the fact that most members of the mediation organizations do not have specific professional experience or knowledge about mediation or dispute resolution. This lack of expertise affects the ability for mediation committee members to engage in their role effectively. This further leads to distrust and dissatisfaction by parties to a mediation, increasing the likelihood that they will seek to use arbitration and litigation processes at the next stages of the dispute resolution system.

3.3.2. Labor Arbitration

If parties are not satisfied with the process and outcome of mediation, they will be required to submit to labor arbitration. The arbitration committee for labor disputes adjudicates and arbitrate the labor disputes applied for arbitration by the parties. In China, labor arbitration is a mandatory procedure for parties of labor disputes to undertake before they can file a lawsuit to the people's court. "It is stipulated in *Law of the PRC on Labor Dispute Mediation and Arbitration* that the party initiating labor arbitration shall submit a written application to the labor dispute arbitration committee within one year from the date of the labor dispute. The arbitration committee shall not accept the application for arbitration exceeding the limitation prescribed by law, unless due to force majeure or other legitimate reasons."¹⁶⁷

The labor arbitration mechanism currently creates several challenges for resolving employment discrimination disputes. First, like mediation mechanisms, it raises concerns regarding adjudicator independence. Second, the lack of finality and authority of arbitration decisions limits its effectiveness in practice. Third, the lack of coordination between labor arbitration and litigation mechanisms creates and compounds challenges regarding time and cost

¹⁶⁷ *Ibid* at .

by producing redundancies in the overall dispute resolution system.

Like the above-mentioned mediation, labor arbitration suffers from insufficient independence. “It has been clearly stipulated in Article 81 of the Labor Law of the People's Republic of China that a labor dispute arbitration committee shall be composed of three parties including representatives of the labor administration department, representatives of the labor union as well as the employer, and the committee directorship shall be held by the representative of the labor administration department.”¹⁶⁸ In terms of personnel composition, labor arbitration committees lack independence and neutrality, similarly to that described in relation to the mediation mechanism in the previous section.

Unlike other civil and commercial arbitration institutions, labor arbitration institutions are not independent. Consent of the relevant local government is required to establish a labor arbitration institution, and it operates under the guidance of the labor administration department. “Different from civil and commercial arbitration institutions, which are established after registering in the judicial administration institutions and have independent location and funds, labor arbitration committees have no independent location and their office is located in the labor administration department. In terms of the fund sources, labor arbitration committees obtain funds from labor administration department.”¹⁶⁹ “In conclusion, the labor arbitration committee will inevitably be subject to the local government faced with the complicated and changeable labor disputes, and taking the local economic, political and cultural policies as the weathervane of labor arbitration, labor arbitration is bound to escort the development of local economy.”¹⁷⁰ As a result, the influence of local government and community concerns mean that labor arbitration is more likely to protect the interests of enterprises, causing laborers to be in an unfavorable position.

In addition, the lack of finality and weak enforceability of labor arbitration decisions limits the effectiveness of this mechanism on the ground. “The mandatory provision on front arbitration makes the party lose their freedom of choice. The non-governmental arbitration institution and the flexibility of the procedures make the enforceability and authority of arbitration obviously

¹⁶⁸ *LLPRC*, *supra* note 106 at 81.

¹⁶⁹ Yishu Shu, “The Connection of Labor Arbitration Procedure and Litigation Procedure- From the Perspective of Efficient Allocation of Litigation Resources” (2015) 27:1 *J Shandong Police C* 57 at 57.

¹⁷⁰ *Ibid* at 57.

not as good as the judicial proceedings.”¹⁷¹ In addition, arbitration results typically require the assistance of the judicial departments in enforcement. This can, again, cause dissatisfaction for workers involved in the process. As with the ways in which concerns regarding independence and neutrality can influence parties’ decisions to proceed to the next stage of dispute resolution, so too does the lack of enforceability of arbitration decisions. In other words, this characteristic of labor arbitration results in fewer cases where the dispute is resolved at this stage. Rather, parties are more likely to proceed with litigation, or abandon their complaints early in the process due to the perceived issues and inefficiencies. This further impacts the efficiency and efficacy of these stages of the dispute resolution system. In addition, the transfer of many cases ultimately to the courts creates greater drain and pressure on the resources within that system.

3.3.3. The Lack of Coordination between Arbitration and Litigation Processes

The Regulations on Settlement of Labor Disputes in Enterprises (1993)¹⁷² and the Labor Law of the People's Republic of China (1994)¹⁷³ require parties to submit to labor arbitration before they can file a lawsuit with the people’s court for work-related disputes, including employment discrimination. This requirement creates additional challenges and issues for parties involved. First, the mandatory steps create time delays and additional costs in resolving disputes, particularly in light of the inefficient and ineffective nature of the pre-litigation processes as set out above. Second, this requirement creates redundancies in the system given the lack of coordination between the arbitration and litigation mechanisms. This lack of coordination arises in relation to differences in jurisdictional boundaries between the two mechanisms, evidence, and limitation periods and procedures.

This labor dispute settlement mechanism has many drawbacks, one of them is long processing period and high cost of workers' rights protection. “The general arbitration limitation for labor arbitration is 60 days.”¹⁷⁴ However, arbitrations typically take several months to resolve, “generally 6 months for the first instance, and 3 months for the second instance.”¹⁷⁵ In addition, there are further issues regarding time and cost relating to preparation time for time, time for

¹⁷¹ Genjie Xu, *Research on legal Issues of Female Employment Discrimination under the universal two-child Policy* (Master thesis, Chongqing: Southwest University of Political Science & Law, 2018) 37.

¹⁷² *RSLDE*, *supra* note 155 .

¹⁷³ *LLPRC*, *supra* note 106 .

¹⁷⁴ *LDMALPRC*, *supra* note 167.

¹⁷⁵ Lingling Hou, “*The Reflection and Reform of the Labor Dispute Final Adjudication System*” (2017) 34:3 Stud L Bus 160 at 160.

accepting, hearing and examination or complaints, delivery and transit time for legal documents, certification time, delays due to closure for holidays and festivals, prolonged time for pending cases within time limit, execution time and more.¹⁷⁶ This means that labor dispute cases are actually handled for a long time and are inefficient, which will greatly increase the time cost. It may take a long time to get results even if the money awarded is small. Due to such considerations, people may be reluctant to choose judicial relief. For example, if a worker initiates an arbitration to request the employer to pay one month's wages in arrears, it will take the laborer more than one year to have an effective judgment if the employer goes through one arbitration and two trials, excluding the time for execution of the judgment.¹⁷⁷ During this period, if the employer goes bankrupt, or transfers property, it may affect the execution of the judgment. In addition, the costs to undertake such processes are very high and the remedies awarded may be very low. Further, this system is seen by some as a waste of judicial resources. All of this combines to create circumstances in which workers choose not to seek judicial relief when they are discriminated against.

Second, a lack of coordination between arbitration and litigation mechanisms produces access to justice issues for workers. This lack of coordination can result, in part, from a difference in jurisdictional boundaries between the two mechanisms. “According to Article 21 of Law of the PRC on Labor Dispute Mediation and Arbitration, labor dispute cases shall be under the jurisdiction of the arbitration institution in the place where the labor contract is performed or where the employer is located.”¹⁷⁸ “Rules for Labor Dispute Arbitration further stipulate that “the place where the employer is located is the place where the employer is registered.”¹⁷⁹ There is no labor procedure Law in China, therefore, Civil Procedure Law is applicable to labor litigation. According to the provisions of General Principles of The Civil Law¹⁸⁰ and Civil Procedure Law,¹⁸¹ the place where the employer is located should be thought to be the main place of business or the place where the main administrative office is located. This may be different than the “location of the employer” as defined under the “Rules for Labor Dispute Arbitration”¹⁸² that

¹⁷⁶ *Ibid* at 37.

¹⁷⁷ *Ibid* at 37.

¹⁷⁸ *LDMALPRC*, *supra* note 167 at 21.

¹⁷⁹ *Rules for Labor Dispute Arbitration*, NPC 2017, [*RLDA*].

¹⁸⁰ *The Civil Law of the People's Republic of China*, NPC 2020.

¹⁸¹ *The Civil Procedure Law of the People's Republic of China*, NPC 2017, [*CPLPRC*].

¹⁸² *RLDA*, *supra* note 180.

it is the place where the employer is registered. This means that cases moving from labor arbitration to litigation in court may first have to transfer territorial jurisdiction, creating a further obstacle for workers in the dispute resolution process.

In addition to jurisdictional issues, a lack of coordination impacts the evidentiary procedures and creates redundancies in this regard. In the mode of “one arbitration and two trials”, there is a disconnection in the authenticating of facts between labor arbitration and litigation. If a side declines to recognize the labor arbitration agreement and brings a case in the appropriate people's court, the labor arbitration award becomes null and void. As the arbitration award has no legal effect, the evidence that has ever been presented in arbitration cannot be directly accepted as the basis of judgment in litigation.¹⁸³ As a result, the evidence submitted in labor arbitration is separated from that submitted in the phase of litigation. This means that evidence must be freshly tendered, resulting in administrative redundancies. Further, it can lead to different authentication of facts and factual findings from the evidence. “In theory, what labor arbitration and litigation are aimed at are the same facts of the case that have already occurred, however, they can only be inferred by evidence instead of recurring, which causes uncertainty to the authenticating of facts.”¹⁸⁴ This potential disparity in factual findings and authentication affects the credibility and fairness of the overall system.

Finally, a lack of coordination creates further issues between arbitration and litigation systems in respect of limitation periods. It is clearly stipulated in the Law of the PRC on Labor Dispute Mediation and Arbitration that the limitation of labor arbitration is one year.¹⁸⁵ As a result, “without any force majeure or other justifiable reasons, if the laborer applies to the labor arbitration committee for arbitration one year after the date when they know or should know that their rights are infringed, the arbitration committee shall not accept the application.

As there are no special provisions on the limitation of labor actions in civil law (lawsuits), “the limitation of labor action in China shall refer to the provision of 3 years of limitation of civil procedure.”¹⁸⁶ In other words, there is a two-year limitation period for civil suits related to labor

¹⁸³ Liwu Cheng, “The Connection and Transformation of Non-Lawsuit and Lawsuit in Labor Dispute Settlement Procedure” (2015) 1 JLA 67 at 67.

¹⁸⁴ Weidong Ju, “The Significance of Legal Procedure: Another Reflection on China’s Legal System Construction” (2009) 1 Soc Sci Chin 83 at 83.

¹⁸⁵ *RLDA*, *supra* note 180 at 188 .

¹⁸⁶ *CPLPRC*, *supra* note 182.

disputes. This longer limitation period facilitates the use of lawsuits after arbitration assuming that a worker engages the full dispute resolution system and steps in a timely manner.

However, if a worker files a lawsuit to a people's court without having first engaged in labor arbitration, and the people's court finds upon examination that it has already exceeded the limitation period for arbitration (one year), without justification, the people's court will dismiss the suit¹⁸⁷ This means that once the laborers lose the relief of labor arbitration, they will also lose the right of action, as a result, the flaws in legislation will bring serious damage to the rights of the laborers. In addition, cases of discrimination may give rise to special concerns regarding limitation periods due to the delay that may occur between the instance of discrimination, and the worker's discovery or realization of it. This means that the challenges noted above may acutely impact women who experience discrimination in the workplace.

3.4. Conclusion

Without adequate means of redress, it is impossible to guarantee the realization of citizenship. Judicial relief is the last line of support for female employees' privileges and interests. When female employees' rights and interests are violated, they have the ability to seek legal redress and protect their own rights and interests. However, as this chapter has detailed, the current labor dispute settlement procedure in China takes a long time and is relatively complex. It creates many hurdles for women to make a successful complaint of discrimination and have it adequately remedied.

The challenges associated with mediation and arbitration are particularly worrisome in light of the cultural context in China. "In traditional Chinese culture, people think that litigation is disgraceful. When people encounter disputes, they are not willing to choose to settle through litigation."¹⁸⁸ "It is not a likely scenario that someone will be willing to seek a court order to ask to be hired."¹⁸⁹ In such a social context, if the law cannot effectively protect the victims through prevention and proactive enforcement, and neither through dispute resolution outside of courts, people will be reluctant to rely on the law to solve their problems. Therefore, "If China adopts an individual anti-discrimination law, effective remedies will have to be one of the most important

¹⁸⁷ Fan Yueru, "Research on Labor Dispute Adjudication Institutions" (2007) 2 TJ 114 at 114.

¹⁸⁸ Lu, *supra* note 110 at 133.

¹⁸⁹ *Ibid* at 133.

components.”¹⁹⁰

Issues regarding access to justice through the existing legal procedures are compounded by a lack of clarity in defining employment discrimination and in defining employers’ obligations in respect of discrimination in the workplace. Having analyzed the multi-faceted challenges attending China’s current legal framework, procedures, and dispute resolution mechanisms, in addressing gender discrimination in the workplace, the next chapter will engage in a comparative analysis of anti-discrimination law and dispute resolution processes in Canada, with a view to identifying best practices and recommendations to improve the system in China.

¹⁹⁰ *Ibid* at 133.

Chapter 4: Canada's Approach to Addressing Gender discrimination in the Workplace

Discrimination against women in employment is a general problem, and governments of all countries have implemented various legal measures to safeguard women's employment. The current status of China's laws related to anti-discrimination in employment were analyzed in Chapters 2 and 3. Those chapters analyzed the manifestations and causes of discrimination in the workplace in China, and determined that there are many gaps and imperfections in China's laws against workplace discrimination. Key findings include that there is no clear definition of workplace discrimination, including in relation to indirect discrimination, no clear process or evidentiary standard to establish discrimination in the workplace through legal vehicles, and no supporting enforcement agencies, amongst others.

This chapter engages in a comparative analysis of Canada's anti-discrimination laws, with a view to identifying lessons that China can learn from the Canadian model to remedy the identified deficiencies of its current anti-discrimination system, as outlined in the previous chapters. In order to identify and explain recommendations for reform to China's laws on workplace discrimination, this chapter takes up an examination of Canada's laws on discrimination in the workplace, especially in relation to pregnancy and family status. According to the World Economic Forum's annual Global Gender Gap Index, Canada was ranked 16th out of 149 countries in 2018 based on the gender gap between women and men in health, education, economy, and politics.¹⁹¹

This chapter is divided into five main sections. In the first section, I review the historical background and establishment of Canada's anti-discrimination laws, including how women's movements influenced the development of anti-discrimination laws, and the legislative process that led to their enactment. In the second section, I present an overview of Canada's anti-discrimination laws. I draw on a few representative and influential Canadian statutes to illustrate not only general anti-discrimination laws but also specific laws against workplace discrimination and for the promotion of equality in the workplace. First, I discuss how the Canadian *Charter of*

¹⁹¹ World Economic Forum, *The Global Gender Gap Report* (Geneva: World Economic Forum, 2018) at 26.

*Rights and Freedoms*¹⁹² provides a foundation of equality rights. Second, I discuss the *Canadian Human Rights Act*¹⁹³ and Canadian Human Rights Commission, and how cases of workplace discrimination are dealt with under these systems. Third, I examine the Ontario *Human Rights Code*, Ontario Human Rights Tribunal and the Ontario Human Rights Commission and how they work together, and as a provincial counterpart to the federal *Act* and Commission. Fourth, I review the federal *Pay Equity Act*¹⁹⁴ and *Employment Equity Act*¹⁹⁵, which are specifically designed to address workplace discrimination.

In the third section, I discuss the discrimination complaints process in Canada. I examine pregnancy as a prohibited ground of discrimination in employment, how to initiate a legal complaint for pregnancy-related discrimination at work, and legal principles governing discrimination complaints in Canada. I explain the protections for pregnant women at work in Canada and how discrimination based on pregnancy is determined. In addition, I explore how employees can seek legal protection and litigate when they feel they have been discriminated against, the functions of the Human Rights Tribunal and Human Rights Commission, and the criteria for establishing *prima facie* discrimination complaints, and available justifications, especially the *bona fide* occupational requirement justification, that an employer may put forth to excuse their conduct.

In the fourth section, I review different forms of discrimination in Canada: direct, indirect, and systemic discrimination. I define these three types of discrimination and illustrate how they are prohibited by law in Canada.

Finally, in the fifth section, I discuss the role of institutional actors such as human rights tribunals and commissions in Canada. This section corresponds to the previously mentioned lack of specialized enforcement agencies in China, and I have selected representative examples of how different Canadian administrative bodies enforce anti-discrimination legislation. I focus on the Pay Equity Commission and the Human Rights Commission in Ontario to introduce the nature, process, and functions of these institutions respectively.

¹⁹² *Constitution Act*, 1982.

¹⁹³ *Canadian Human Rights Act*, RSC 1985.

¹⁹⁴ *Pay Equity Act*, SC 2018.

¹⁹⁵ *Employment Equity Act*, SC 1995.

4.1. Brief History of Canadian Human Rights Law

Compared with many other countries in the world, Canada has an advanced human rights protection system. This developed from a series of social transformations throughout Canada's 20th century history. Women in Canada were disadvantaged and did not have equal social or legal status as men, including in relation to employment. As a result, most women in Canada experienced socio-economic dependency and had limited employment and income opportunities historically.¹⁹⁶ However, history establishes that Canadian women protested against discrimination they suffered, resulting in a series of legal changes to advance their equality. For example, the Edwards decision made by the Judicial Committee of the Privy Council of the United Kingdom in 1930 became a watershed moment, which determined that the meaning of the term "person" includes women.¹⁹⁷ It was no longer possible for the Canadian government to refuse to appoint women as members of the Senate of Canada because of their gender, because they are "persons" like men. It should be noted that this case is an early important example for advocating women rights but the real movement started later.

The legislative and judicial history addressing gender discrimination in employment in Canada unfolds in three periods. First, before World War II, federal and provincial laws paid very little attention to discrimination in employment against women, with few prohibitive clauses.¹⁹⁸ Second, in the 1940s and 1950s, various provinces of Canada began to formulate employment equity statutes; accordingly, protective clauses related to women's employment gradually appeared.¹⁹⁹ In Ontario, the Jewish Labor Committee and the Association for Civil Liberties successfully rallied scores of groups to advocate for anti-discrimination laws.²⁰⁰ Their actions paid off in 1951, when Leslie Frost's Conservative government enacted the country's first Fair Work Practices Act and, in 1954, the Fair Accommodation Practices Act—basically prohibiting

¹⁹⁶ Mary Eberts & Anne F Bayefsky, "Sex-based Discrimination and the Charter" in Anne F Bayefsky & Mary A Eberts, eds, *Equal Rights Chart Rights Freedom* (Toronto: Carswell, 1985) 183.

¹⁹⁷ *Edwards v A.G. Canada*, [1930] AC 124 (PC) reversing the Supreme Court of Canada in *In the Matter of Reference as to the Meaning of the Word "Persons" in Section 24 of the British North American Act, 1867*, [1928] SCR 276.

¹⁹⁸ Chuang Ai Jin, *Research on the Issues of Contemporary Chinese Women's Employment* (PhD thesis, Northeast Normal University, 2012) 26.

¹⁹⁹ *Ibid* at 26.

²⁰⁰ Dominique Clément, William Andrew Silver and Daniel Trottier, *The evolution of human rights in Canada* (Ottawa: Canadian Human Rights Commission, 2012) c 4.

cultural, national, and religious segregation in employment and housing (the government also passed, in 1951, a Female Employees Fair Remuneration Act).²⁰¹ In 1956, Equal Pay for Equal Work law is adopted in Manitoba, preventing discrimination in salary based on gender.²⁰² In the early 1950s, Canadian provincial legislatures and the federal government began to realize that it was necessary to enact comprehensive legislation prohibiting discrimination. However, it was not until the 1960s that unified protection for women's employment was established. Third, from the 1960s to 1970s, the Human Rights Code represented a new approach to conceptualising discrimination.²⁰³ Human Rights laws were noted that prejudice could be unspoken and systemic.²⁰⁴ In this way, the Human Rights Code of Ontario addressed both substantive and formal equality.²⁰⁵ However, the Ontario legislation did not even ban sex discrimination.²⁰⁶ Since the 1980s, the *Canada Human Rights Act*, which is mainly targeted at discrimination, has become more inclusive, like its provincial counterparts, constructing an anti-discrimination system to protect various grounds, including race, nationality, religion, age, gender, sexual orientation, marital status, family status, disability and pardoned crimes.²⁰⁷ In addition, the federal government passed the *Pay Equity Act* and other laws in order to further safeguard women's employment.

4.2. Canada's Legal Framework on Sex Discrimination in Employment: An Overview

Canada has a relatively complete legal system to address anti-discrimination in the workplace. Human rights are also legally protected in Canada by a dual mechanism of civil entitlements and federal and regional legislative human rights codes. There are laws specifically against discrimination, such as human rights laws, and laws specifically aimed at equal protection in the workplace, such as the *Pay Equity Act*. This section analyses relevant laws that comprise Canada's legal framework to address sex discrimination in employment, including as

²⁰¹ *The Fair Employment Practices Act*, SO 1951, c 24; *The Fair Accommodation Practice Act*, SO 1954, c 28; *The Female Employees Fair Remuneration Act*, SO 1951, c 26.

²⁰² *The Fair Employment Practices Act*, SO 1951, c 24; *The Fair Accommodation Practice Act*, SO 1954, c 28; *The Female Employees Fair Remuneration Act*, SO 1951, c 26.

²⁰³ Dominique Clément, William Andrew Silver and Daniel Trottier, *The evolution of human rights in Canada* (Ottawa: Canadian Human Rights Commission, 2012) c 4.

²⁰⁴ *Ibid* !

²⁰⁵ Mary Cornish, Fay Faraday and Jo-Anne Pickel, *Enforcing Human Rights in Ontario* (Aurora: Canada Law Books, 2009).

²⁰⁶ The 1960 federal *Bill of Rights* banned sex discrimination, and the first provinces to ban discrimination on the basis of sex were British Columbia and Newfoundland, both in 1969.

²⁰⁷ *Canadian Human Rights Act*, RSC 1985, s 3.

they are located: (a) under the Constitution; (b) under the *Human Rights Act*; and, (c) under the *Pay Equity Act* and *Employment Equity Act*.

4.2.1. The Constitution

The Charter safeguards the fundamental rights and liberties of all Canadians that are deemed necessary for Canada to remain a free and democratic country. It is applicable to all levels of government – federal, provincial, and territorial – as well as the legislation they enact.²⁰⁸ The promise of equality, even on the grounds of sex and ethnicity, is based on Canada's Charter of Rights and Freedoms' section 15 right to equality. The Supreme Court of Canada has stated that section 15's purpose is to protect marginalized groups in society from social, political, and legal disadvantage. The Charter's Section 15 states unequivocally that all individuals shall be handled fairly regardless of ethnicity, faith, national or ethnic origin, color, sex, age, or physical or mental impairment.²⁰⁹

As setting out the requirements of substantive equality for all legislation but only providing a direct remedy for employment discrimination if it is found in federal law or federal government action that applies to workers in the federal sector. Most recently, the Supreme Court of Canada considered whether a job-sharing program that disadvantaged primarily women employees from gaining access to pension programs violated s.15 in *Fraser v Canada*.²¹⁰ Three women employees of the RCMP took up job sharing arrangements after 1997 when the RCMP began to offer this option. “To over-simplify, their requests to “buy” (pay into the pension fund) themselves back into the pension position they would have been in as full-time workers for that period of job sharing were repeatedly denied by their employer.”²¹¹ “The claimants initiated an application arguing that the pension consequences of job-sharing have a discriminatory impact on women contrary to s. 15(1) of the Charter.”²¹² The Supreme Court found that “The RCMP pension”, which was created through federal legislation, had adverse effects on women. It met the two-step test for a *prima facie* violation of s. 15(1) of the *Charter*. “The first step: in order for

²⁰⁸ “*Guide to the Canadian Charter of Rights and Freedoms*” (April 2006), online: *Government of Canada* <www.canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html> [perma.cc/L3WA-4ZPG] [GCCRF].

²⁰⁹ *Ibid* at 15.

²¹⁰ *Fraser v Canada (Attorney General)*, 2020 SCC 28 (CanLII).

²¹¹ Sonia Lawrence, “Thinking about *Fraser v. Canada (Attorney General)*, 2020 SCC 28” (November 2020), online: *York University* <ifls.osgoode.yorku.ca/2020/11/thinking-about-fraser-v-canada-attorney-general-2020-scc-28/> [perma.cc/96AQ-YMKN].

²¹² *Fraser v Canada (Attorney General)*, 2020 SCC 28 (CanLII).

a law to create a distinction based on prohibited grounds through its effects, it must have a disproportionate impact on members of a protected group. The second step: whether the law has the effect of reinforcing, perpetuating, or exacerbating disadvantage — will usually proceed similarly in cases of direct and indirect discrimination. The goal is to examine the impact of the harm caused to the affected group, which must be viewed in light of any systemic or historical disadvantages faced by the claimant group.”²¹³“*Fraser* is the first successful adverse effects claim under section 15 of the *Canadian Charter of Rights and Freedoms* in over 20 years.”²¹⁴ It confirms that laws that seem neutral may still discriminate against members of protected groups and affect them differently.

Significantly, section 15(2) of the *Charter* specifically extends protection to affirmative action programs.²¹⁵ It notes that subsection (1) does not prohibit any statute, policy, or operation with the purpose of improving the circumstances of vulnerable persons or classes, including those who are disadvantaged due to their ethnicity, national or ethnic origin, color, faith, sex, age, or mental or physical impairment. Affirmative action applies to a collection of policies and procedures within a government or agency that aims to incorporate certain populations based on their ethnicity, color, creed, or national origin in fields such as education and jobs that they were previously exempt from.²¹⁶ Section 15(2) is therefore aimed at improving, in part, employment opportunities for women, Indigenous peoples, visible minorities, and those with mental or physical disabilities.²¹⁷

4.2.2. The Canadian Human Rights Act

In addition to safeguarding equality under s.15 of the *Canadian Charter of Rights and Freedoms*, comprehensive anti-discrimination laws are set out under provincial and federal human rights legislation. At the federal level, the *Canada Human Rights Act* [*CHRA*] prohibits discrimination on the basis of race, gender, disability, religion, and other enumerated grounds.²¹⁸

²¹³ *Fraser v. Canada (Attorney General)*, 2020 SCC 28 (CanLII).

²¹⁴ Jennifer Koshan & Jonnette Watson Hamilton, “Tugging at the Strands: Adverse Effects Discrimination and the Supreme Court Decision in *Fraser*” (November 2020), online (Blog): *ABlawg: The University of Calgary Faculty of Law Blog* <ablawg.ca/2020/11/09/tugging-at-the-strands-adverse-effects-discrimination-and-the-supreme-court-decision-in-fraser/> [perma.cc/DE4P-2NB5].

²¹⁵ Ming Feng Zhang, “Canada’s Action to Correct Discrimination and Its Implications for China” (2006) 7 *Law Sci* 103 at 103.

²¹⁶ Oxford University Press, *Oxford Dictionaries* (Oxford: Oxford University Press, 2014).

²¹⁷ *GCCRF*, *supra* note 2018 at 15

²¹⁸ *Canadian Human Rights Act*, RSC 1985, c H-6, s 3(1).

The *CHRA* prohibits discrimination in the following settings: goods and services; commercial and residential premises; and, employment.²¹⁹ In particular, the *CHRA* prohibits discrimination in many specific contexts related to employment, including in relation to recruitment, employee organizations, and wages.²²⁰

As a federal instrument, the *CHRA* applies to settings under federal authority in Canada, such as the aviation and airline industry, postal service, and federal fisheries.²²¹ Canada is a democratic democracy with a 'modern welfare state' constitution. The division of powers between the federal, state, and municipal governments is well defined and closely guarded.²²² There are similar legislative protections and institutional structures in different provinces. Due to the federalist structure under the Canadian Constitution, the federal laws (i.e., *Canadian Human Rights Act*) only apply in federally regulated workplaces. Provincial laws apply in all other workplaces.

At the federal level, the Canadian Human Rights Commission [CHRC] and Tribunal settle complaints of discrimination.²²³ Additionally, the Employment Equity Act empowers the CHRC to ensure that workers have fair opportunity for women.²²⁴ If an individual believes they have experienced discrimination in a setting that comes within the jurisdiction of the *CHRA*, they may contact the CHRC and file a complaint²²⁵. Once a complaint is filed, a human rights officer will review the complaint to determine its admissibility. And they will inform respondents and recommend you both participate in mediation. Mediation is an entirely mutual and private method. It provides an incentive for the parties to discuss their side of the storey and address the questions that prompted the lawsuit.²²⁶ All parties can sign a compromise document if mediation is effective. This resolution will detail the steps you and the respondent have agreed to take to settle the conflict. If a settlement cannot be reached, the human rights officer will prepare a report on the file and transfer this to a Human Rights Commissioner,²²⁷ who will review the file

²¹⁹ *Ibid* at ss 5-11.

²²⁰ *Ibid* at ss 7-11.

²²¹ *Constitution Act*, 1867, s 91.

²²² Kim England & Gunter Gad, "Social Policy at Work? Equality and Equity in Women'S Paid Employment in Canada" (2002) 56:4 *GeoJournal* 281 at 281.

²²³ *Canadian Human Rights Act*, RSC 1985

²²⁴ *The Employment Equity Act*, SC 1995.

²²⁵ "About the Process" (no date.), online: *Canadian Human Rights Commission* <www.chrc-ccdp.gc.ca/eng/content/about-process> [perma.cc/SRR4-AL3T].

²²⁶ *Ibid*.

²²⁷ *Ibid*..

and make a determination on the complaint. The Commissioner may decide to dismiss the complaint, send the complaint to conciliation or to the Canada Human Rights Tribunal [CHRT] for adjudication, or request more information to reach a decision.²²⁸

The Tribunal and the Commission are distinct entities with distinct roles in the human rights litigation procedure. The Canadian Human Rights Commission should be contacted first to file a lawsuit under the Canadian Human Rights Act. The Commission has the power to review cases of prejudice and, if the allegation is found to be justified, to send the matter to the Tribunal for a trial.²²⁹ The CHRT is a quasi-judicial entity that operates in a comparable manner to a judge.²³⁰ The Tribunal's task is to hear testimony and testimonies about discrimination complaints; to assess if discrimination occurred; and, if so, to determine an adequate remedy. For example, it has the power to summon witnesses to testify. The judgment made by the CHRT is legally binding, and remedies for discrimination that the CHRT can award include an apology, compensation for material loss or mental impairment, ordering employers to provide employment opportunities for employees who are deprived of work and correcting or eliminating discrimination. A judgment made by the CHRT can be appealed to the Federal Court of Canada for judicial review.²³¹

Prior to a hearing, the Tribunal's complaints resolution process involves many steps. First, once a complaint is referred to the Tribunal, the complaint can opt for mediation. If both sides consent on the complaint, the case is closed. If the complaint is not resolved, the matter is sent to pre-hearing case management. Second, parties prepare a declaration of particulars, which includes a collection of records and witnesses, during pre-hearing case management. The parties then provide facts to the jury, which could include notes and eyewitness testimony. Finally, the Tribunal renders a ruling under which it determines if prejudice occurred and, if so, grants an

²²⁸ Wei Wei Li, "The Domestic Implementation Mechanism of the Principle of Non-discrimination in International Human Rights Law - the Legal Model of Canada and Australia for Reference" (2003) 24:4 Law Sci Mag 44 at .

²²⁹ "A Guide To Understanding The Canadian Human Rights Tribunal" (no date), online: *Canadian Human Rights Tribunal* <www.chrt-tcdp.gc.ca/resources/guide-to-understanding-the-chrt-en.html> [perma.cc/S6RF-5W9L] [AGUCHRT].

²³⁰ "Home" (no date), online: *Canadian Human Rights Tribunal* <www.chrt-tcdp.gc.ca/index-en.html> [perma.cc/HE72-P4JW].

²³¹ Li, *supra* note 224 at 37.

adequate remedy.²³²

4.2.3. Ontario Human Rights Code

The Human Rights Code is a law in the Canadian province of Ontario that forbids discrimination in such social fields on the basis of a variety of factors (such as ethnicity, sex, or disability) (such as services, housing or employment). It is a provincial law and all other Ontario laws must conform with the *Code*. The *Code* is administered by the Ontario Human Rights Commission (OHRC) and enforced by the Human Rights Tribunal of Ontario.²³³ The OHRC is an independent government body that reports to the legislature through the Ministry of the Attorney General of Ontario.²³⁴ The OHRC largely engages in public policy, education and awareness activities.

The Human Rights Tribunal of Ontario is an administrative tribunal located in the province of Ontario, Canada. It hears and decides applications filed under the Ontario Human Rights Code. It is one of Ontario's eight criminal justice tribunals.²³⁵ As a direct-access Tribunal, any person who believes they have been discriminated against under the Ontario Human Rights Code may bring an application to the Tribunal and is not required to have their application vetted by the Commission, diverging from the *CHRA* approach outlined above. The OHRC can bring its own cases before the Tribunal or participate in human rights cases before the Tribunal in matters of general public interest. Additionally, the OHRC designs legislation and educates the public, tracks human rights, performs study and review, and conducts human rights investigations.²³⁶

Each province in Canada has a similar legislative and remedial structure for responding to discrimination in settings that fall within provincial jurisdiction, such as under the BC *Human Rights Code*, which prohibits discrimination on similar grounds and in similar settings to that contained under the *Canadian Human Rights Act* and Ontario *Human Rights Code*. Provinces also have similar institutions and procedures to the federal Commission and Tribunal, although

²³² *AGUCHRT*, *supra* note 229.

²³³ “Guide to your rights and responsibilities under the Human Rights Code” (December 2013), online: *Ontario Human Rights Commission* <www.ohrc.on.ca/en/guide-your-rights-and-responsibilities-under-human-rights-code-0> [perma.cc/Z2L8-B6PD].

²³⁴ “About the Commission” (no date), online: *Ontario Human Rights Commission* <www.ohrc.on.ca/en/about-commission> [perma.cc/U65U-9RPM].

²³⁵ “Home” (no date), online: *SJTO* <www.sjto.gov.on.ca/en/> [perma.cc/CX7B-2E3N].

²³⁶ “The Human Rights System” (no date), online: *Ontario Human Rights Commission* <www.ohrc.on.ca/en/human-rights-system> [perma.cc/UU48-X3BT].

some provinces, like BC and Ontario, provide a direct access model for complaints to be heard at the Tribunal, mirroring a court-like system more closely than jurisdictions that require a Commission to serve a gatekeeping role on complaints.

4.2.4. Employment and Pay Equity Laws

In addition to anti-discrimination laws contained in Canada's *Charter* and *Human Rights Act*, Canada also has specific laws to address equity in employment and pay. For example, the first equal pay legislation to come into effect was Ontario's *Female Employees Fair Remuneration Act* of 1951.²³⁷ Like the federal *Female Employees Equal Pay Act* of 1956 and similar legislation in a number of other provinces, this statute provided for equal pay for the same work done in the same establishment.²³⁸ In the 1970s and 1980s, pay equality policies proliferated, based on a recognition that women's salaries were generally lower than men's, and that women's ability to work was underestimated, leading to low salaries.²³⁹ These policies and laws generally relate to either employment equity, or pay equity.

Employment equity is not synonymous with wage equity. Pay equality, as a legislative concept in Canada, applies to the legal provision that predominantly female professions be compensated equally with predominantly male occupations of comparable value within a specified entity.²⁴⁰ One way to think about the difference between job equality and wage equity is to consider how they treat the issue of underpaying disproportionately female jobs differently. Pay equity is concerned with the pay disparity between men and women, while employment equity is concerned with and women's employment prospects.²⁴¹ Wage equity clearly acknowledges the difficulty in integrating primarily male professions and thus seeks to maximize compensation for predominantly female occupations. Employment diversity seeks to expand women's participation in well-compensated, historically male-dominated industries.

The *Pay Equity Act* is designed to address horizontal occupational segregation and reduce the gender pay gap, ameliorating the impact of concentration of women in less-skilled, less-paid, and less-prestigious occupations. The *Pay Equity Act* indicates that some female-dominated jobs

²³⁷ *Female Employees Fair Remuneration Act*, SO 1951.

²³⁸ Shirley GE Carr, "Sex-Based Discrimination in Employment: Problems and Progress in Canada" (1983) 122:6 Intl Lab Rev 761 at 761.

²³⁹ *Ibid* at 761.

²⁴⁰ Carr, *supra* note 238 at 761.

²⁴¹ *Ibid* at 761.

(e.g., nursing) are considered to be of equal value as male-dominated jobs. This act penalizes employers who violate pay equity, and takes a variety of measures to protect pay equity. Employment equity focuses more on increasing the number and status of people in the same profession, especially in relation to professions that have long been dominated by men, and tend to have higher status and pay, such as managerial positions. Employment equity is primarily designed to address vertical occupational segregation, and it aims to increase employment opportunities for women and to ensure that women and men compete on the same platform and do not lose out on job opportunities and promotions because of their gender. Canada has adopted two statutes to address the issue of occupational segregation between men and women from both horizontal and vertical perspectives.

Pay equity is required under both the *CHRA* and the *Pay Equity Act*²⁴² for federally regulated employers. The *CHRA* stipulates that the difference of salary between male and female employees engaged in work of equal value in the same organization is a manifestation of discrimination.²⁴³ The “Equal Wage Guidelines 1986” issued by the CHRC provide corresponding guidance for ensuring equality of wages under the *CHRA*. Under the *CHRA*, federally regulated employers have a legal obligation to ensure that male and female employees in the enterprise receive equal remuneration for work of equal value. The federal public sector also has clear provisions on wage equality. In order to compare whether wages are fair, it is necessary to consider wages including all forms of compensation, such as commissions, bonuses, holiday wages, housing funds, insurance, and other benefits directly or indirectly obtained from employers²⁴⁴.

The *Pay Equity Act* also requires employers to detect gender discrimination in remuneration measures in a timely manner and make improvements. Under this *Act*, employers will be required to adjust the wages of female employees to ensure that women receive the same wages when they perform a job of comparable value to men. In addition, sections 182 and 249 of Part III of the Canada Labor Code empower labor program inspectors to inspect all records of federally regulated companies to determine whether there is gender-based wage discrimination. If an inspector discovers the existence of wage inequality, the inspector may report the situation

²⁴² *Pay Equity Act*, SC 2018, c 27, s 416 [not in force].

²⁴³ *Canadian Human Rights Act*, RSC 1985, s 11.

²⁴⁴ Carr, *supra* note 238 at 761.

to the CHRC.

Work equity, as described by federal legislation in the Employment Equity Act²⁴⁵, mandates federally controlled companies to take affirmative measures to expand inclusion of four identified groups: women, people with disabilities, Aboriginal communities, and visible minorities.²⁴⁶ The *Act* states that “employment equity means more than treating persons the same way but also requires special measures and the accommodation of differences”.²⁴⁷ The *Act* aims to enable disadvantaged groups who have been excluded from certain areas to obtain greater employment opportunities so as to reduce or eliminate discrimination, such as by allowing more women to participate in high-paying jobs traditionally held by men²⁴⁸. It emphasizes the need for and goal of equality in the workplace by maintaining fairness in labor, and providing all employees with a fairer working environment.²⁴⁹ Therefore, as a pursuit of equal rights, employment equity requires not only procedural equality, but also specific measures to ameliorate systemic discrimination in labor and employment. Moreover, the *Employment Equity Act* requires employers to adopt an employment plan to increase the representation of women and other disadvantaged groups.²⁵⁰ In the section 5 of the *Employment Equity Act* from two aspects. It notes that all employers must enforce job diversity by removing obstacles to employment for vulnerable communities. Additionally, it allows employees to implement affirmative practices and fair accommodations to ensure that individuals from specified communities attain a certain level of inclusion in each occupational group.²⁵¹

Although some provinces have established detailed pay equity legislation, they also face the challenge of effectiveness. The Quebec Pay Equity Act²⁵² contains 135 articles that address all facets of pay equity implementation. This Act establishes the most progressive policy in the field of pay equity.²⁵³ The Quebec Act on Pay Equity allows a pay equity plan which comprises

²⁴⁵ *Employment Equity Act*, SC 1995, c 44.

²⁴⁶ “Frequently Asked Questions on Employment Equity” (August 2009), online: *Archive* <web.archive.org/web/20070927003006/http://www.chrc-ccdp.ca/publications/ee_faq_ee-en.asp> [perma.cc/RD7A-EYPG].

²⁴⁷ *Employment Equity Act*, SC 1995, c 44, s 2.

²⁴⁸ Lorne Foster & Lesley Jacobs, “Workplace Practice and Diversity in Canada: Employment Policy in Global Modernity” (2012) 15:3 *Think India Q* 57 at 57.

²⁴⁹ *Ibid* at 57.

²⁵⁰ *Ibid* at 57.

²⁵¹ *Employment Equity Act*, SC 1995.

²⁵² *Pay Equity Act*, SC 1996.

²⁵³ Séverine Lemièrre, “Un Salaire Égal Pour Un Emploi De Valeur Comparable” (2006) 1:15 *Travail, Genre Et*

four stages to judge the presence of sex-based pay discrimination. While this act is probably the most comprehensive and structure example, one of its limitation is that employees are not expected to report back which could adversely impact on the degree of law enforcement.²⁵⁴ A number of companies may not follow the rules even pay equity has been set by law. One of reasons is that the Pay Equity Commission need so much time lag to public its application guidelines. Many companies need to wait for more precise guidelines to draw up their equity plans.²⁵⁵ Another explanation may be that companies with less than 49 workers are exempt from developing a structured pay equality action plan. Certain small businesses are opposed to creating a pay equity scheme. According to a report commissioned by the Institut de la Statistique du Québec, 80.2 percent of wage equality programmes for businesses with 200 or more workers have been completed.²⁵⁶ According to a 2002 study conducted by the Quebec Pay Equity Commission, workers in overwhelmingly female occupations in businesses with between 10 and 49 employees received an average pay adjustment of 8.4 percent. Half of these employers have begun or concluded efforts to address pay equality.²⁵⁷

Having reviewed the overall structure of Canada’s anti-discrimination law framework, the next section will examine how this process unfolds for an individual who experiences discrimination in the workplace.

4.3. Protection for Women at Work in Canada: A View of the Legal Process

In this part, I describe how human rights law in Canada functions, focusing especially on employment protection for women who are pregnant. I explain how the legislation described in the above section applies (including the protected grounds and employment-related activities), the process required to enforce legal rights against discrimination, and the ultimate remedies available. This review provides a foundation through which to identify practices that will improve the current process, and its limitations, in China, as described in the earlier chapters.

Sociétés 83 at 83.

²⁵⁴ *Ibid* at 83.

²⁵⁵ Marie-Thérèse Chicha, “A comparative analysis of promoting pay equity: models and impacts” (September 2016), online: *ILO*

<www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_decl_wp_27_en.pdf> [perma.cc/2PH2-MMZL].

²⁵⁶ *Ibid*.

²⁵⁷ *Ibid*.

4.3.1. Pregnancy as a prohibited ground of discrimination in employment

The Canadian Human Rights Act prohibits discrimination on a number of grounds, including ethnicity, national or ethnic origin, color, faith, age, sex, sexual preference, gender identification or speech, marital status, family status, genetic traits, and impairment.²⁵⁸ Specifically, it clarifies that discrimination related to pregnancy or child-birth is discrimination on the basis of sex. Discrimination against pregnant women includes any behavior, decision, or procedure that adversely affects an individual as a consequence of her pregnancy status. *Brooks v. Canada Safeway Ltd.*, the Supreme Court of Canada also ruled,²⁵⁹ that sex discrimination includes discrimination based on pregnancy. Safeway breached the provincial Human Rights Act, the Court ruled, by declining to offer fair pay to employees who lost work owing to maternity.

The protection of pregnant women in employment in Canada is relatively complete, covering recruitment activities (applications, interviews, job selection), employment (job security, promotion and career advancement), and maternity leave and return-to-work specifically. For instance, the CHRA states that decisions regarding employment or promotion should not be made in a discriminatory manner. Section 8 of the Act states that: “It is a discriminatory practice (a) to use or circulate any form of application for employment, or (b) in connection with employment or prospective employment, to publish any advertisement, or make any written or oral inquiry, that expresses or implies any limitation, specification or preference based on a prohibited ground of discrimination.”²⁶⁰ Interviewers should refrain from inquiring regarding candidates' family plans, contraception use, or maternity.²⁶¹ Additionally, the CHRA allows employers to meet a pregnant employee's desires by avoiding obstacles that impede her capacity to do her work. They should offer reasonable and dignified solutions to accommodate the employee. When an employee returns from maternity leave, they should be assigned to the same or similar position. Provincial legislation and its interpretation contain the same or similar requirements as described here.

Along with the Canadian Human Rights Act, federally supervised workers are required to comply with additional occupational regulations, such as the Employment Equity Act and the

²⁵⁸ *Canadian Human Rights Act*, RSC 1985, s 3.

²⁵⁹ *Brooks v. Canada Safeway Ltd.*, 1989 SCR 1 at 1219.

²⁶⁰ *Canadian Human Rights Act*, RSC 1985, s 8.

²⁶¹ “Policy on Pregnancy & Human Rights in the Workplace - Page 2” (no date), online: *Archive* <www.chrc-ccdp.gc.ca/eng/content/policy-and-best-practices-page-2#ftn12> [perma.cc/HER7-ZYXC].

Canada Labor Code. This and other employment-related laws and policies can provide pregnant women with additional safeguards and benefits.²⁶²

4.3.2. Initiating a legal complaint for pregnancy-related discrimination at work

As examined in the previous chapter, China's current legislation does not specify institutions that can receive complaints of discrimination. As I discussed, this has created significant challenges and obstacles for women who experience discrimination in the workplace to seek legal remedy through an effective and efficient means. The administrative tribunal model adopted in Canada may provide an alternate pathway for complaints to improve access to justice.

If a pregnant employee feels that she is discriminated due to being pregnant at work, she may seek assistance to file a complaint with a relevant human rights body (either the federal Commission, or a provincial Tribunal or Commission). At the federal level, as described earlier, the Commission will analyze the complaint and determine how to proceed. They may attempt to effect resolution through mediation, or send the case to the Canada Human Rights Tribunal. The Tribunal is a separate entity that has the authority to render binding rulings and grant remedies. They have the power to order a company to pay penalties or modify its procedures or policy to lessen or remove the discriminatory impact.²⁶³

In Ontario or BC, which each have a direct-access tribunal model, the employee would file a complaint directly with the Tribunal. This would proceed through a series of pre-hearing processes, which may include mediation or other settlement-type conferences. If the complaint is not resolved, it would proceed to a full hearing and the relevant Tribunal would decide the matter. Provincial human rights tribunals have broad remedial authority, which can include awarding compensation, requiring the employer to change their policies or practices, and others.

4.3.3. The legal principles governing discrimination complaints in Canada

In Canada, the burden of proof in a human rights complaints process is clearly divided between the complainant and respondent. First the complainant must prove *prima facie* discrimination. The Supreme Court of Canada has stated the following as the norm for this: In litigation before human rights tribunals, the applicant must define three elements: (1) they

²⁶² Jessica Howard, "No, Moms, the gender pay gap is not on us" (September 2018), online: *Archive* <canadianwomen.org/blog/no-moms-the-gender-pay-gap-is-not-on-us/> [perma.cc/9KXU-G6WB].

²⁶³ *Ibid.*

possess a protected characteristic; (2) they have been subjected to an adverse effect or procedure; and (3) their protected characteristic was a contributing factor to the adverse effect or treatment.²⁶⁴

Once a complainant has established *prima facie* discrimination, the respondent may establish that the discriminatory treatment was justified in order to excuse them from liability. For example, if a complainant claims she was not hired for a job because she is a woman, the employer may present evidence that the complainant wasn't qualified for the job. In Canada, this is referred to as a bona fide occupational condition [BFOR]. A BFOR is a condition that is needed for the job to be performed. It must be essential for the job to be completed and its absence must be difficult to handle without causing unnecessary inconvenience to the employer.

“The Supreme Court set out a test for determining whether a discriminatory standard is a BFOR in its 1999 Meiorin decision:

(1) The employer must show the standard is adopted for a purpose rationally connected to the performance of the job;

(2) The employer just establish it adopted the standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and,

(3) The employer must show that the standard is reasonably necessary to the accomplishment of that purpose. To demonstrate this, the employer must show that it is impossible to accommodate individual employees sharing the characteristics of the complainant without imposing undue hardship upon the employer.”²⁶⁵

If the respondent cannot justify the standard as a BFOR, the discrimination complaint will be allowed, meaning that the respondent is liable. Other forms of justification are available for respondents to advance in discrimination complaints, the definitions and tests for which are outlined individually and in relation to the specific site of discrimination at issue.²⁶⁶

Despite the existing approach in Canada, there are concerns that remain in requiring an

²⁶⁴ *Moore v British Columbia (Education)*, 2012 SCC 61, [2012] 3 SCR 360.

²⁶⁵“Gender Equality And Women’s Development in China” (22 September 2015), online: *The State Council Information Office of China* <<http://www.scio.gov.cn/zfbps/ndhf/2015/Document/1449896/1449896.htm>> [perma.cc/8473-KSN9].

²⁶⁶ Other than the BFOR justification, the issue of accommodation to the point of undue hardship often arises in employment discrimination complaints.

individual employee to bear the burden of proof in an employment discrimination complaint. First, in the workplace, the employee is in a weaker position relative to the employer. In addition, an employer may uniquely have in their possession or knowledge relevant evidence or information about the rules or practices that relate to the discrimination complaint. It may be particularly difficult, therefore, for employees to gain access to such evidence or information. This is all the more concerning in light of the fact that a majority of discrimination complaints will arise in the context of indirect discrimination, where the evidences and facts giving rise to the complaint will often be more subtle in nature. This may lead to unsubstantiated cases, and cases that do not marshal sufficient evidence may be dismissed or abandoned.²⁶⁷

4.4. Classifying Discrimination in Employment: Direct, Indirect and Systemic Discrimination

At present, although it has been stipulated in China's legal provisions that direct discrimination is prohibited, indirect discrimination remains widely documented in practice. As a consequence, in order to better respond to sex-based discrimination in employment, China could adopt a similar approach to Canada, to expand the categories of discrimination protected against under law, including not only direct discrimination but also indirect discrimination. This section discusses the definition and expression of direct discrimination, indirect discrimination and systemic discrimination, and analyzes how these classifications may operate to better identify and remediate employment discrimination for women, and in particular, in relation to pregnancy and family status.

Direct discrimination is when someone is treated unfairly because of their gender or other protected characteristics.²⁶⁸ If the employer adopts a standard that discriminates on the surface based on a protected characteristic, this is considered as direct discrimination.²⁶⁹ For example, if a woman loses the opportunity to be promoted because she is female, or the company gives reasons that the woman will be pregnant and take maternity leave, and therefore refuses to promote her, these are manifestations of direct discrimination. Absent the ability to prove

²⁶⁷ Guang Peng Chen, "The Judicial Practice of Sex Discrimination in Employment-- Based on the Comparative Study Between China and the United States" (2019) 34:4 *Grad Law Rev* 12 at .37

²⁶⁸ Colleen Sheppard, "Mapping Anti-Discrimination Law Onto Inequality at Work: Expanding the Meaning of Equality in International Labor Law" (2012) 151:1-2 *Int Labor Rev* 1.

²⁶⁹ Caterina Ventura, *From Outlawing Discrimination to Promoting Equality: Canada's Experience with Anti-Discrimination Legislation* (Geneva: Employment Department, International Labor Office, 1995) .

justification (such as in relation to a *bona fide* occupational requirement), direct discrimination is prohibited under Canadian law,²⁷⁰ and a woman will have access to legal complaint and remedy under human rights law.

Indirect prejudice acknowledges that such procedures, regulations, or requirements that seem to be neutral on the surface can have an unjustifiable or substantial detrimental effect on specific individuals or cultures in reality.²⁷¹ For instance, apparently benign laws, guidelines, procedures, activities, or requirements can have a "adverse impact" on individuals with disabilities.²⁷² Indirect prejudice is often imperceptible. Discriminatory comments are seldom made explicitly, and people seldom use stereotypical beliefs to justify their actions.²⁷³ For example, in the process of hiring sales executives for a company, the human resources department issues specific requirements that are gender-neutral, but only those who meet the application requirements are men. This would give rise to questions about indirect discrimination based on gender.

Systemic discrimination has been described as "practices or behaviours that have the result of restricting an individual's or group's right to resources commonly accessible due to attributed rather than actual characteristics, whether by design or influence."²⁷⁴ The occurrence of discrimination does not require the discovery of discriminatory intent. Therefore, systemic discrimination usually refers to the negative impact caused by certain standards, policies or behaviors. In addition, systemic discrimination is comprised of multiple rules and practices, although it may not be possible to find the discrimination contained in these rules or practices when viewed separately.²⁷⁵

Systemic discrimination still exists in Canadian workplaces. For example, female-

²⁷⁰ *O'Malley v Simpsons-Sears*, [1985] 2 SCR 536. The court released another opinion concurrently that also recognized unintentional employment discrimination. *K.S. Bhinder v. Canadian Nat'l Ry. Co.*, [1985] 2 S.C.R. 561, 567 (agreeing that "the definitions of discriminatory practices in the Canadian Human Rights Act, ss. 7 and 10, extend to both unintentional and adverse effect discrimination"); see Hunter & Shoben, *supra* note 12, at 119.

²⁷¹ Bethany Hastie, "The Inequality of Low-Wage Migrant Labor: Reflections on *PN v FR* and *OPT v Presteve Foods*," (2018) 33: 2 Can J Law Soc 243 at 246; Colleen Sheppard, *Inclusive Equality: the Relational Dimensions of Systemic Discrimination in Canada* (Montreal: McGill-Queen's University Press, 2010) 13; Bob Hepple, "Equality and Empowerment for Decent Work," (2001) 140 Int'l Lab Rev 5 at 7; Adelle Blackett and Colleen Sheppard, "Collective Bargaining and Equality: Making Connections," (2003) 142 Int'l Lab Rev 419 at 426.

²⁷² "6. Forms of discrimination" (no date), online: *Ontario Human Rights Commission* <www.ohrc.on.ca/en/policy-ableism-and-discrimination-based-disability/6-forms-discrimination> [perma.cc/V79A-8SBJ].

²⁷³ *Ibid.*

²⁷⁴ *Canadian National Railway Co. v Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114 at 1138.

²⁷⁵ *Ibid* at 1138 .

dominated occupations often pay less than male-dominated occupations — even though they need the same degree of skill.” based on Canadian statistics.²⁷⁶ According to a Canadian Centre for Policy Alternatives research, 97 percent of truck drivers in Canada are men and receive a median salary of \$45,417 per year, whereas 97 percent of early childhood educators are women and earn a median salary of \$25,334 per year.²⁷⁷ There are some factors that are said to contribute to the gender wage gap, such as maternity leave.²⁷⁸ However, even women without children, on average, face a pay gap of 10% according to Statistics Canada data from 2015.²⁷⁹ By focusing only on the motherhood punishment, we overlook the obstacles that women encounter in the workplace regardless of whether they have children – perhaps more so as they seek jobs in male-dominated fields.²⁸⁰ Women are paid less than men not just because they are pregnant and take maternity leave. As I have mentioned above, *Fraser* is an important case about systemic discrimination against women in relation to assumed family roles. Three former RCMP employees on maternity leave were subjected to discrimination as a result of a job-sharing scheme. They were not qualified for full-time pension credit because job-sharing RCMP participants are counted as part-time employees under the RCMP pension scheme. The plaintiffs filed an appeal with the Federal Court charging that the pension effects of work sharing are discriminatory against women in violation of Charter section 15. Their application was denied by the Federal Court, and their petition was denied by the Federal Court of Appeal. However, Justice Abella of the Supreme Court of Canada, arguing for the plurality, concluded that the RCMP pension package had a discriminatory effect on women and therefore directly breaches women's right to equality under section 15 of the Charter. Justice Abella used two-step test to section 15 claims. “She emphasized that the *Charter* not only guarantees but also substantive equality which requires attention to the full context of the claimant group’s situation and the

²⁷⁶ Melissa Moyser, “*Women and Paid Work*” (March 2017), online: *Statistics Canada*

<www150.statcan.gc.ca/n1/pub/89-503-x/2015001/article/14694-eng.htm> [perma.cc/9MXY-ZKUP].

²⁷⁷ Brittany Lambert & Kate McInturff, “*Making Women Count: the Unequal Economics of Women’S Work*” (March 2016), online: Canadian Centre for Policy Alternatives

<www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2016/03/Making_Women_Count2016.pdf> [perma.cc/83P4-WVJY].

²⁷⁸ Maria Florencia Cabeza, Jennifer Barger Johnson & Lee J Tyner, “Glass Ceiling and Maternity Leave as Important Contributors to the Gender Wage Gap” (2011) 3:1 *South J Bus Ethics* 73 at 37.

²⁷⁹ Melissa Moyser, “*Women and Paid Work*” (March 2017), online: *Statistics Canada*

<www150.statcan.gc.ca/n1/pub/89-503-x/2015001/article/14694-eng.htm> [perma.cc/9MXY-ZKUP].

²⁸⁰ Jessica Howard, “*No, Moms, the gender pay gap is not on us*” (September 2018), online: *Archive*

<canadianwomen.org/blog/no-moms-the-gender-pay-gap-is-not-on-us/> [perma.cc/9KXU-G6WB].

actual impact.”²⁸¹ She stressed the group's members' enduring organizational disadvantages, which have acted to restrict their opportunities. This case demonstrates a watershed moment in the Court's understanding of the correct reading of section 15 of the Charter and the Court's position in eradicating prejudice in Canada.

4.5. Institutional Actors: The Role of Human Rights Commissions and Related Administrative Bodies in Canada

This section discusses the role of administrative bodies, such as Human Rights Commissions, in Canada. I discuss two examples here: the Pay Equity Commission in Ontario and the Human Rights Commission in Ontario. Each of these Commissions serve distinct roles related to both adjudication of discrimination complaints, and related work to advance equality and equity in the workplace. As such, these various bodies may illustrate key characteristics, functions and purposes that would be beneficial for future law and policy reform in China.

In each province and at the federal level in Canada, Human Rights Commissions play a significant supporting role in addressing sex-based discrimination in employment. In addition, related bodies, such as Pay Equity Commissions, may address specific equality issues.

Each province in Canada has a designated Human Rights Commission, though the function of these commissions varies across provinces. In provinces that utilize a direct-access complaints model to the Human Rights Tribunal, such as BC and Ontario, the Commission will not be directly involved in handling cases or complaints. In other provinces, such as Quebec, and at the federal level (as described earlier in section 2), the Commission may act as a “gatekeeper” for screening and handling complaints on their initial filing. However, not every province has these specialized bodies to deal with discrimination. A number of provinces don’t even have pay legislation.

In Ontario, the Pay Equity Commission is responsible for resolving issues related to wage levels between employees and employers, such as women’s equal pay for equal work, and women’s wage equity under different job values. The Commission is divided into two components: the Pay Equity Office and the Pay Equity Hearings Tribunal. The Pay Equity Office interprets the Pay Equity Act in order to assist contractors and workers in understanding their respective privileges and obligations. Additionally, the Pay Equity Office conducts investigations

²⁸¹ *Fraser v. Canada (Attorney General)*, 2020 SCC 28 (CanLII).

into complaints regarding violations of the Pay Equity Act. The Pay Equity Office is responsible for enforcing the Pay Equity Act in industries and, where appropriate, referring matters to the Pay Equity Hearings Tribunal for greater action. The Pay Equity Commission mediates disputes between parties. When the two parties cannot reach an agreement, they can appeal to the Pay Equity Hearings Tribunal. The Tribunal has sole authority to resolve all factual and legal issues that could occur in each matter before it. The decisions of the Tribunal are final and conclusive for all purposes. The Pay Equity Committee strictly abides by the Pay Equity Act. Its purpose is to maintain the equality of women's wages in the work process and eliminate or reduce gender discrimination against women.²⁸²

Ontario's pay equality legal scheme is widely regarded as one of the most successful in the world at closing the income disparity. To achieve meaningful wage parity, it incorporates regulatory, collective bargaining, adjudicative, and compliance processes.²⁸³ The Ontario Equal Pay Coalition was most effective in eradicating the gender disparity for women's jobs under the Act.

However, advanced legislation doesn't mean that gender wage gap has been solved. Ontario's law and enforcement institutions also have their weakness. Not all women achieved pay equity in Ontario. Those non-organized women cannot effectively enjoy the benefits of the legislation. They need special support and a strengthened law with monitoring.²⁸⁴

According to the Gender Wage Gap Strategy Steering Committee's final report and guidelines, the recommendations are directed at simplifying the pay equality legislation in order to support job assessment.²⁸⁵ Additionally, the recommendation is based on corporate policies and advocates for more accountability, gender analysis of the workplace, and a rise in the number of women on boards of directors.²⁸⁶ The government need pay more attention to how to maintain pay equity once they achieved. Or how to add new job classes to system. The gender pay

²⁸² "Advancing Women's Economic Equality" (no date), online: *Pay Equality Commission* <www.payequity.gov.on.ca/en/AboutUs/Pages/the_act.aspx> [perma.cc/6HCJ-F6PA].

²⁸³ "History of Pay Equity Advocacy in Ontario" (2014), online: *Ontario Equal Pay Coalition* <equalpaycoalition.org/history-of-pay-equity-advocacy-in-ontario/> [perma.cc/V8WK-ZZVK].

²⁸⁴ *Ibid.*

²⁸⁵ "Archived - Final Report and Recommendations of the Gender Wage Gap Strategy Steering Committee" (June 2016), online: *Ontario* <www.ontario.ca/page/final-report-and-recommendations-gender-wage-gap-strategy-steering-committee#section-5> [perma.cc/8L7G-GEW5].

²⁸⁶ *Ibid.*

disparity persists in Canada: in 2019, a woman gained 0.88 cents for every dollar earned by a male. This equates to a \$3.87 hourly pay disparity (or a 12% wage disparity) between men and women.²⁸⁷ Canada still has a lot to do to improve the effectiveness of law.

Human Rights Commissions also provide a wide array of resources, training programs and educational tools to increase awareness and knowledge about human rights. In addition to publishing research and policy reports that the Tribunal may rely on in interpreting human rights obligations, it also develops training materials which the Tribunal may use in ordering remedies. For example, the Ontario HRC has a number of recorded webinars on different topics: sexual harassment, discrimination of pregnancy and breastfeeding, gender identity and gender expression.

4.6. Conclusion

From the above analysis and comparison, there are many lessons that can be learned from Canada's advanced legislative experience in addressing sex-based discrimination in employment. First, Canada's approach to developing a complete system of anti-discrimination law, such as under the *Canadian Human Rights Act* and provincial human rights legislation, creates a more effective and efficient body of law and process for complaints. The definition and classification of discrimination in Canada is also more detailed, accounting for not only direct discrimination, but also indirect and systemic discrimination. Canada has cited considerable protected grounds in human rights legislation, including specifically extending protection on the basis of pregnancy as a form of sex discrimination. In addition, human rights legislation is applicable to all employment-related activities, including recruitment, ongoing employment, maternity leave, and career advancement. Moreover, Canada requires employers to accommodate the reasonable needs of pregnant employees.

The legal processes and principles attending discrimination complaints in Canada properly balance the burden and onus of proof for complainants. This is particularly clear in the formulation of the *prima facie* discrimination test, and the burden on employers or respondents to justify discriminatory conduct, such as through establishing a BFOR. There is with a detailed explanation of complaint process and the burden of proof to ensure that when people are

²⁸⁷ "Pay Equity Short Explainers" (2021), online: *CHRC-CCDP* <www.chrc-ccdp.gc.ca/eng/content/pay-equity-short-explainers> [perma.cc/93MQ-KJ42].

discriminated against, they can access the law and related supporting institutions to protect their rights and interests. Canada's federal and provincial human rights Commissions and Tribunals have taken measures to ensure the implementation of the law to better deal with discrimination. These specialized agencies have a significant role in implementing anti-discrimination laws.

Overall, Canada's anti-discrimination legal system provides a comprehensive and effective foundation from which to consider reform proposals for China. The next, and final, chapter of this thesis will formulate and explain recommendations for China, based on the identified gaps and challenges from Chapters 2 and 3, and the best practices from Canada identified in this chapter.

Chapter 5: Recommendations for China

In September 2015, the Fifth Plenum of the 18th Central Committee of the Communist Party of China decided to implement “the universal two-child” policy.²⁸⁸ According to the new situation of population development, this is an important adjustment following the “one-child” policy implemented by China. This fertility policy was officially implemented on January 1, 2016, which is marked the beginning of “the universal two-child” era in China.²⁸⁹ “The universal two-child policy” has given way to great expectations. The government hopes that it can assist the economic development of China by effectively alleviating problems such as labour force shortages, the aging population, the population gender imbalance, and the increasing number of elderly parents who have lost their only child. Besides, new two-child policy also can help solve social issue which caused by family planning policy. Now some Chinese families face a lot of pressure to take care elder people since there is only one kid in a family. This also places a heavy burden on a family. If there are more children, they can take turns to look after the elderly. Women are the most directly affected group related to China carrying out the population policy.²⁹⁰ If women’s concerns that the two-child policy will aggravate their workplace development are not addressed, they may not have a second child, and the effect of the two-child policy will be limited. Therefore, research on the protection of women’s rights must be incorporated into the entire policy system and discussing the impact of this policy on women.

In the context of the implementation of the two-child policy, many women will choose to have a second child. Under these circumstances, discrimination in the workplace is of great concern to women. Numerous women worry that they will face greater difficulties in the workplace if they have a second child.

Employment is a key factor for social and political stability. The protection of female labor rights should balance the relationship among women, employers and the overall interests of society. However, business is not a charitable institution and pursuing capital and profit is its

²⁸⁸ Zeng, *supra* note 1 at 1935.

²⁸⁹ P J Cheng & T Duan. “China’s New Two-Child Policy: Maternity Care in the New Multiparous Era.” (2016) 123:S3 *BJOG* 7 at 37.

²⁹⁰ Li Fei, *Research on the Legal Guarantee of Female Employment Under the Policy of “Universal Two-Child Policy* (Master thesis, Shijiazhuang: Hebei University, 2018) 37.

core mission.²⁹¹ Therefore, it is unrealistic to expect companies to actively pay attention to the labor rights of women absent legislative requirements to do so. Additionally, it does not meet the requirements of social fairness and justice if enterprises bear the economic costs alone brought about by the two-child policy. As a result, China should attach importance to the protection of the labor rights of women in the workplace. However, the current legal system does not adequately protect female rights.

In English it is often said: rights with remedies are meaningless. Judicial relief is the last line of defense for the rights and interests of female workers. When the rights and interests of female workers are infringed, they have the right to safeguard their own rights and interests through accessing legal remedies. If women in the workplace are to be truly protected, it is necessary to reform the law. As a result, if China adopts a person anti-discrimination rule, one of the most critical elements would have to be successful solutions. Developing individual anti-discrimination law will solve some of the problems in the existing legal system, which, as discussed in the previous chapters, includes the lack of a clear definition, a lack of proactive implementation and specific agencies responsible, and the burden of proof.

As established earlier, there is no clear definition of discrimination in China nor a single or complete code for addressing gender discrimination in the workplace. Second, there is no real mechanism to hold employers accountable when they do discriminate against women in the workplace. As a result, there is no deterrent effect and employers may ignore the law or act with impunity. Third, because discrimination can be relatively covert, and often relies on the testimony of parties, it may be difficult for employers to gather sufficient evidence and determine when discrimination has occurred. This necessitates a discussion of whether there should be an altered standard or burden of proof in discrimination cases. Fourth, and finally, there is no specialized or dedicated law enforcement or supervisory body to address workplace discrimination in China.

In the previous chapter, I engaged an analysis of anti-discrimination law and dispute resolution processes in Canada, with a view to identifying best practices and recommendations to improve the system in China. In this chapter, I will draw on the findings of the previous chapter to propose recommendations to improve the laws and legal system protecting women from

²⁹¹ Juejing Tian & Bin Luo. "Analysis on the Protection of women's labor Rights and Interests under the Background of Second Child Policy." (2014) 8 LR 96 at 96.

discrimination in the workplace in China. I discuss three distinct elements of an improved anti-discrimination legal system in China, one that has the potential to provide meaningful redress for workplace gender discrimination. The first proposed change is a new workplace anti-discrimination law in China. I discuss three important issues that should be clarified in a new anti-discrimination law: the definition of discrimination and protected grounds, classification of discrimination, and reform legal process to address and remedy workplace discrimination. I will discuss how to complement the existing blankness in law in China. The second recommendation is to establish a dedicated legal administrative enforcement body. I discuss two different agencies due to comparative study between Canada and China: anti-discrimination commission and anti-discrimination tribunal. The third recommendation is to improve public education about workplace discrimination, and particularly gender discrimination.

5.1. Establishing a New Workplace Anti-Discrimination Law in China

In China, Article 3 of the “Labor Law” stipulates that “workers enjoy the right to be equally employed and choose occupations”.²⁹² Additionally, Article 12 stipulates that “as for the employment of workers, workers shall not be discriminated against because of the differences in ethnicity, race, gender, and religious beliefs”.²⁹³ These laws would ostensibly extend protection against discrimination to workers. However, these provisions are currently only declarations of principle, which have little effect on the actual conduct of litigation and need to be supplemented by more detailed legal provisions. Moreover, these provisions can neither benefit the person experiencing discrimination nor make the infringing defendant be punished for breaking the law. Therefore, they cannot play a practical role in deterring conduct nor protecting workers.²⁹⁴

China should formulate a specific “Employment Anti-Discrimination Law.” There should be a special law on the issue of anti-discrimination. Discrimination issues have many unique characteristics such that they should not be just addressed through a provision of labor law. In addition to embodying the priority of protection for workers, this new law should implement the concept of substantive equality in employment. Therefore, separate legislation is more conducive to the realization of the basic idea of anti-discrimination in employment.

²⁹² *LLPRC*, *supra* note 106 at 3.

²⁹³ *Ibid* at 12.

²⁹⁴ Kewei Dong, *The Need for a Legal Boost in the Fight against Employment Discrimination* (Beijing: China Reform News, 2006) 26.

As discussed in the previous chapter, Canada has specific anti-discrimination laws. At the constitutional level, the *Charter of Rights and Freedoms* protects equality, non-discrimination and affirmative action.²⁹⁵ The *Canadian Human Rights Act* and the human rights laws of each province specifically address employment discrimination.²⁹⁶ The *Canadian Human Rights Act*, and its provincial counterparts, prohibits both direct and indirect discrimination. Protected grounds of discrimination are quite broad and include race, nationality or ethnic origin, color, religion, age, gender, sexual orientation, marital status, family position, disability and pardoned crimes.²⁹⁷ The anti-discrimination laws and practical experience of Canada can provide China with examples in formulating its anti-discrimination laws.

China should introduce a law which specifically targets gender discrimination in the workplace. Specifically, China should develop a clear legal definition or concept of “discrimination” and clarify the protected grounds of discrimination, including in relation to sex, gender, pregnancy, and family status. Second, China should consider adopting language to give effect to the various classifications of discrimination (i.e., direct, adverse effects, systemic) and ensure each kind of discrimination is captured by the law. Third, China should reconsider the burden and onus of proof in workplace discrimination complaints. Rather than adopting the traditional civil litigation method, the burden should be divided between employees, who would be required to establish that they experienced discrimination, and employers, who would be required to establish a “reasonable demand” or reason for their behaviour that excuses the discriminatory conduct.

5.1.1. Defining discrimination and protected grounds

China has not articulated a definition of discrimination, nor has it distinguished between direct and indirect discrimination. This limits the ability of employers to effectively regulate workplace behavior, and the ability of women employees to seek legal remedy when they have been discriminated against. Under existing laws in China, the Constitution and other laws and regulations stipulate equal rights for men and women, including labor rights, rest and leave, labor protections, and the right to participate in labor insurance. The Employment Promotion Law further prohibits discrimination in employment, including in relation to hiring and conditions of

²⁹⁵ *Constitution Act*, 1982.

²⁹⁶ *Canadian Human Rights Act*, RSC 1985, s 3.

²⁹⁷ *Ibid* at 3.

work.²⁹⁸ However, such general provisions are too vague, resulting in weak application in practice.

Discrimination occurs when an individual or community is treated unfairly on the basis of an identification trait, such as ethnicity, age, or impairment. Usually, these features, referred to as grounds, are covered by anti-discrimination legislation, such as *the Canadian Human Rights Act*.²⁹⁹ The Canadian Human Rights Act prohibits discrimination on a number of grounds, including ethnicity, national or ethnic origin, color, faith, age, sex, sexual preference, gender identification or speech, marital status, family status, genetic traits, and impairment.³⁰⁰ It has also been clarified, through case law, that discrimination based on pregnancy or child-birth shall be deemed to be discrimination based on sex. The right to equal treatment without regard for sex includes the right to equal treatment without regard for the fact that a woman is, was, or may become pregnant, or has had a child.

The proposed Employment Anti-Discrimination law should clearly proscribe employment discrimination, including on the basis of sex, gender, pregnancy, and family status. Moreover, its development should be attentive to broadening the scope of application of the law, capturing all relevant forms, such as direct and indirect, and grounds of discrimination that might occur in employment and at all relevant stages, including recruitment, active employment, leaves and vacation, benefits and retirement.³⁰¹ In addition, the development of the law should be attentive to ensuring effective protection of workers under the law, through extension of effective remedies, adequate legal processes, and broad application of the law. Further, the proposed law should consider all enumerated grounds and relevant categories to be included, and should be precise and specific in its wording.

As an example, the employment anti-discrimination law may state, “based on reasons of ethnicity, race, religion, gender, origin, body, health, age, or other grounds, any distinction, exclusion, or preference in action taken in respect of workers, including that which has the effect of canceling or damaging their employment, remuneration, rest and vacation, labor safety and health protection, employment services, social insurance and welfare, or other aspects of

²⁹⁸ *EPLPRC*, *supra* note 107.

²⁹⁹ *Canadian Human Rights Act*, RSC 1985.

³⁰⁰ *Ibid* at 3.

³⁰¹ Maoli Song, *Research on Several Issues of Anti-employment Discrimination* (Master thesis, Shanghai: East China University of Political Science and Law, 2008) 37.

employment, constitutes discrimination.”

However, when expanding the scope for protection against discrimination, it is important to also pay attention to exceptions, and to allow for reasonable differences and certain restrictions where they are based on appropriate and legitimate reasons. The statute agrees that there are times where a restriction on human freedom is justified.³⁰² If the employer establishes that the discriminatory criterion is a necessary condition of employment. The norm or regulation will therefore be nondiscriminatory. This circumstance is referred to as a bona fide occupational necessity. Male apparel manufacturers, for example, could lawfully market only for male models, while female models would be unable to model men's clothing as planned. The boss must demonstrate that accommodating the workers will be impractical without causing unreasonable hardship.³⁰³ The Supreme Court of Canada issued the *Meiorin* decision in 1999, which provides workers with guidance on determining if a specific occupational qualification is fair and justifiable and therefore a bona fide occupational requirement.³⁰⁴

5.1.2. Classifying discrimination

Discrimination in the workplace should be divided into categories to account for the various forms that discrimination takes. The current laws in China appear only to prohibit direct discrimination. The lack of explicit attention given to indirect discrimination, in particular, creates a significant loophole in available legal protections. Since direct discrimination is explicitly prohibited, employers are more likely to choose indirect discrimination methods that are more covert and difficult to prove. For example, companies often only collect resumes during the recruitment process, do not contact female applicants for interviews at all, or control internal processes to restrict the recruitment of women. In addition, companies may assign poorer jobs to pregnant women. These indirect methods are more widespread problems. Employers may use loopholes in existing laws to exclude female applicants or employees while protecting themselves from legal sanctions. Canada's laws appear to reflect a more in-depth understanding of modes of discrimination. It not only prohibits direct discrimination but also indirect

³⁰² “Bona Fide Occupational Requirements” (5 February 2010), online: *Alberta Human Rights Commission* <www.albertahumanrights.ab.ca/employment/employee_info/employment_contract/Pages/bfor.aspx> [perma.cc/4WPV-A2WC].

³⁰³ *Ibid.*

³⁰⁴ *Ibid.*

discrimination and systemic discrimination. Indirect prejudice acknowledges that such procedures, regulations, or requirements that seem to be benign on the surface can have an unjustifiable or substantial detrimental effect on individual individuals or cultures in reality.³⁰⁵³⁰⁶³⁰⁷³⁰⁸ Discriminatory words are usually not published directly, and people usually do not explicitly cite stereotyped views as a reason for their behavior. For example, in the process of recruiting a sales executive for a company, the human resources department proposes specific requirements. These requirements are gender-neutral, but only men meet the application requirements. This may constitute indirect discrimination. Relatedly, systemic discrimination has been defined as “practices or attitudes that have, whether by design or impact, the effect of limiting an individual’s or a group’s right to the opportunities generally available because of attributed rather than actual characteristics.”³⁰⁹

At present, although it has been stipulated in China's laws that direct discrimination is prohibited, indirect discriminations has not clearly been proscribed, and appears to remain a relatively common practice. As a consequence, China may learn from Canada to define categories of discrimination, divided into direct discrimination and indirect discrimination, and to incorporate indirect discrimination explicitly under relevant laws.

5.1.3. Reforming legal processes to address and remedy workplace discrimination

In China, labor cases adopt the general standard of proof in civil litigation, which requires that the wronged party (employee) must provide the evidence to establish their case.³¹⁰ Typically, one party in an employment discrimination case is an employee (or job seeker) whose employment rights have been infringed, and the other party is an employer. The status of the two parties is very different and the employee (job seeker) is obviously in a disadvantaged position because it is difficult for them to obtain strong evidence to prove the discriminatory behaviour of

³⁰⁵ Bethany Hastie, “The Inequality of Low-Wage Migrant Labor: Reflections on *PN v FR* and *OPT v Presteve Foods*” (2018) 33: 2 *Can J Law Soc* 243 at 246.

³⁰⁶ Colleen Sheppard, *Inclusive Equality: the Relational Dimensions of Systemic Discrimination in Canada* (Montreal: McGill-Queen’s University Press, 2010) 13.

³⁰⁷ Bob Hepple, “Equality and Empowerment for Decent Work,” (2001) 140 *Int’l Lab Rev* 5 at 7.

³⁰⁸ Adelle Blackett and Colleen Sheppard, “Collective Bargaining and Equality: Making Connections,” (2003) 142 *Int’l Lab Rev* 419 at 426.

³⁰⁹ *Canadian National Railway Co. v Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114 at 1138.

³¹⁰ Hongli Ren, *On the Legal Guarantee of Women’s equal Employment Right* (Master thesis, Chongqing: Chongqing University, 2012) 37.

the employer.³¹¹ As such, requiring the employee to shoulder the burden of proof is unfair.

In Canada, the human rights complaints process is clearly divided between the complainant and respondent. First the complainant must prove *prima facie* discrimination. Once a complainant has established *prima facie* discrimination, the respondent may establish that the discriminatory treatment was justified in order to excuse them from liability.³¹² For example, if a complainant claims she was not hired for a job because she is a woman, the employer may present evidence that the complainant wasn't qualified for the job. This is called a bona fide occupational requirement [BFOR] in Canada. In Canada, the employer needs to prove that the accused actions are based on required needs instead of discriminating behavior. Moreover, human rights tribunals in Canada tend to adopt relaxed evidentiary standards as compared to civil courts, and adjudicators tend to play a more active role in the process, ensuring that relevant information is brought to their attention. China may consider how it could similarly shift the burden of proof and relax evidentiary standards in workplace discrimination cases to better protect and advance the rights of workers.

To accomplish these aims, China could alter the burden of proof in employment discrimination and/or gender discrimination cases. A complainant/employee could submit *prima facie* evidence to establish a differential treatment (such as in respect of hiring or advancement). At this point, the burden of proof could be transferred to the defendant/employer to provide evidence and reasons to establish a legitimate reason for the treatment and to alleviate themselves from liability. If the defendant/employer cannot establish a legitimate reason for the treatment, the complainant/employee would be found to have been discriminated against. Under the employment anti-discrimination law, available defences or excuses to liability should be clearly stipulated, as well as the conditions or elements to meet those defences. Additionally, China's anti-discrimination law should provide for legitimate grounds and defenses that are not considered discrimination. It is irrational and unrealistic to impose a complete ban on all differential treatment in employment without regard to reality. As a result, it shall establish legitimate grounds such as bona fide occupational qualifications, affirmative action programs, etc., to balance the interests of employers and job seekers. Defences or excuses from liability

³¹¹ *Ibid* at 37.

³¹² Benjamin Oliphant. "Prima Facie Discrimination: Is Tranchemontagne Consistent with the Supreme Court of Canada's Human Rights Code Jurisprudence." (2012) 9 JL & Equal 33 at 33.

should consider whether the treatment was essential, reasonable, and whether it represented a *bona fide* occupational requirement or concern for the enterprise. They will balance responsibility between the two parties to the dispute. It will reduce the complainant's difficulties in establishing proof of discrimination without allocating too much responsibility to the employer.

In Canada, after an employee establishes that they have been unfairly treated, such as in respect of recruitment, the employer is required to submit to the court specific personnel criteria, as well as the requirements and nature of the job, to justify the practical necessity of such recruitment requirements, the underlying reasons for the differential treatment of the person concerned and the extent to which the person concerned or the employer would be harmed if the differential treatment were not applied. For example, drivers must have an acceptable vision and an appropriate driver's licence. This reasonable shifting of the burden of proof provides the court with a comprehensive view of the work. In addition, by having the parties identify the basic facts of the case and the specific nature of the job as submitted by the employer, the court is able to compare and analyze the actual situation of the individual with the conditions of the job, which increases the accuracy of the decision. The determination of whether unequal treatment is the result of an unfounded subjective judgment, based on the characteristics of the position, reduces the burden of litigation on the parties and ensures that the remedy is timely and accurate.³¹³ This method of distribution in respect of elements of the case and burden of proof is conducive to reducing the requirements for admissibility, making judicial protection of equal employment rights more efficient. This is also in line with the current development of the rule of law, "to improve judicial reform, to form a factually binding judgment in favor of the rights and interests of the victims".

5.2. The Need for a Dedicated Legal Administrative Enforcement Body

This section discusses the establishment of a dedicated administrative body in China to oversee the employment anti-discrimination law, legal process and enforcement, and engage in education and awareness raising. Currently, China does not have a dedicated body to deal with this issue. As a result, government agencies may shirk their responsibility or shift the burden to another agency to address, creating inefficiencies and ineffectiveness. Furthermore, many

³¹³ Guangpeng Chen, *The Judicial Practice of Sex Discrimination in Employment-- Based on the Comparative Study between China and the United States*(Master thesis, Beijing: China University of Political Science and Law, 2019) 26.

administrative agencies may be under the jurisdiction of local governments and will opt do nothing out of a desire to avoid trouble. Together, these factors suggest that China would benefit from an independent institution like the Canadian Human Rights Commission, which is given independent authority and can proactively address discrimination issues.

In each province and at the federal level in Canada, Human Rights Commissions play a significant supporting role in addressing sex-based discrimination in employment. In addition, related bodies, such as Pay Equity Commissions, may address specific equality issues. Each province in Canada has a designated Human Rights Commission, though the function of these commissions varies across provinces. In provinces that utilize a direct-access complaints model to the Human Rights Tribunal, such as BC and Ontario, the Commission will not be directly involved in handling cases or complaints. Human Rights Commissions in Canada also commonly develop and provided training and educational resources.

As stipulated in the existing laws and regulations in China, job seekers can seek assistance from several organizations when they feel they have been discriminated against. The first is the competent administrative departments for labor of people's governments at central and provincial levels, which is stipulated in Paragraphs 1 and 2 of Article 73, and Article 77 of the *Labor Law*.³¹⁴ The administrative department of labor is the Ministry of Human Resources and Social Security and its agencies at all levels. The State Council's labour administrative branch is in control of national labour policy. Labor function within their administrative areas is overseen by labour administrative offices of local people's governments at or above the county level. The second is "a variety of individual people's governments at all tiers and pertinent branches," which refers to local governments.

While these organizations in China may ostensibly solve problems related to discrimination in employment, there are quite a few limitations in practice. First, despite stipulation in legal text, there is a lack of clear responsibility assigned within the identified organizations and in relation to responding to employment discrimination issues.³¹⁵ Words such as “relevant competent department” and “superior organs” do not clearly signal to workers to

³¹⁴ *LLPRC*, *supra* note 106 at 73,77.

³¹⁵ Ziji Zhou, *Research on the Legal Guarantee of Employment Equality* (Master thesis, Shenyang: Northeastern University, 2010) 26.

whom they should turn for help when they have been discriminated against.³¹⁶ This may compound the stress experienced by the worker due to the discrimination they experienced. Second, the lack of clarity about who to approach may result in many workers simply abandoning their complaint.³¹⁷ Over time, this may even erode confidence in the legal system and government more generally. Third, the organizations mentioned above are all subordinate to the central government. Internal delegation of responsibility and supervision of duties may limit the reliability and accountability of such departments in respect of addressing employment discrimination.

Establishing a dedicated legal administrative enforcement body like the Commission is better to the enforcement of anti-discrimination law. An external, independent body to oversee this area of complaint, pursuant to specific laws, may work to create greater reliability and accountability, while closing off legal loopholes. A dedicated administrative body would take up two primary roles: human rights commission and human rights tribunal. A human rights commission may offer advantages, The Human Rights Commission can hire professionals to mediate or provide a free consultation, which is more flexible and costs less money than a regular lawsuit. A Commission-like body may further be able to provide free or low-cost consultation, accept applications, administer mediation, proactively inspect workplaces, and engage in research and policy analysis and reporting. Complementing the role of a commission, a human rights tribunal could act in a coordinated fashion to hear legal disputes.

5.2.1. Anti-Discrimination Commission

Where there is a lack of legal supervision and regulation of liability, the deterrent effect of the law will be reduced. Conversely, the greater the legal supervision and accountability for violations of the law will improve compliance in practice, increasing the effectiveness of the law.³¹⁸ As supervision is an important link in the implementation of the legal system, a dedicated administrative body to supervise the administration of the law is significant.

In terms of specific execution, an anti-discrimination commission may have the following functions: (1) receiving complaints from the persons discriminated against, mediating cases related to gender discrimination, and providing free legal consulting and help for employees who

³¹⁶ *Ibid* at 26.

³¹⁷ *Ibid* at 26.

³¹⁸ Ren, *supra* note 312 at 37.

have been discriminated against; (2) actively investigating whether identified enterprises have engaged in discrimination; (3) accepting applications, organizing informal negotiations with enterprises on behalf of the employees discriminated against; (4) creating proposals and recommendations for practices and policies to reduce and eliminate discrimination in the workplace; (5) regularly conducting discrimination surveys to the general public, drafting survey reports on discrimination and making them publicly available; and, (6) putting forward corresponding law amendment proposals based on identified deficiencies in existing anti-discrimination laws. In terms of staff composition, the members of the commission ought to be required to have certain professional knowledge regarding anti-discrimination law and issues. In addition, a certain number of enterprise representatives, laborer representatives, trade union representatives, legal experts and labor experts would best enable dialogue and work that accounts for various different perspectives.³¹⁹

5.2.2. Anti-Discrimination Tribunal

In addition to an anti-discrimination commission, China may also consider setting up a tribunal specialized in discrimination cases, which is independent of the commission and plays a different role in resolving discrimination-related problems. Specifically, a tribunal could act as a dispute resolution body in place of a court, with a direct-access model like that which exists in BC and Ontario's Human Rights Tribunals. A worker who believes they have been discriminated against could make an application directly to the tribunal, or seek mediation before the tribunal through the commission. Human rights court of Canada is an inseparable constituent of anti-discrimination. If China intends to establish a human rights court which offer more legal aid services for victims, not only designating full-time lawyers but also using Commission Council can be taken into consideration.

The tribunal would have the power to summon witnesses to testify. The judgment made by the commission would be legally binding, and remedies for discrimination that the commission could award should include: an apology, compensation for material loss or mental impairment, ordering employers to provide employment opportunities for employees who are deprived of work, and correcting or eliminating the discriminatory policy or practice.

³¹⁹ Yue Yang, *Research on the Equal Protection of Women's Employment Rights under the "Two-child Policy"* (Master thesis, Shanghai: Shanghai Normal University, 2019) 26.

It is necessary to reduce discrimination not only through the creation of legislation but also through effective execution of it. Through setting up a commission and tribunal specialized in dealing with discrimination-related problems, China may not only realize goals of non-discrimination in the workplace, but bring greater attention to the ways in which women face discrimination in employment and society more generally. This is beneficial to establishing a more complete system of law to address discrimination.

5.3. Improving Human Rights Education and Training

Advancement of education, knowledge and training regarding discrimination is a necessary complement to legal reform. China could undertake several initiatives to improve awareness, knowledge and training about discrimination to reduce gender discrimination at work, including: induction training, regular presentations, and, providing special training for women returning to the workplace to improve their skills.

Government must take a leading role in education and awareness building to aid in the success of this goal. For example, in Canada, Human Rights Commissions, and other organizations, provide various forms of education and training programs for employers, employees, and the general public, to increase awareness and education about discrimination, and equality issues. Some of these initiatives also provide education and information about legal rights and processes.

Local governments in China could similarly undertake initiatives to popularize knowledge and awareness of discrimination issues and anti-discrimination law, as well as available legal rights and processes to guard against and remedy discrimination. In particular, government could create induction training programs for new workers to educate themselves on their rights and employment discrimination issues, and complementary training for employers about their obligations and liabilities. In addition, governments could develop and provide specialized training for women who are returning to work following childbirth, to facilitate a smooth return to work and ensure they remain skilled and competitive in the labor market. Moreover, mental health resources for women could be extended in recognition of the high workload and stressors they face as both paid laborers and, often, unpaid primary caregivers. Finally, governments could deliver regular lectures on workplace discrimination either in person or online, inviting experts and scholars in relevant fields to disseminate knowledge and educate the general public. Such

lectures could be available not only in workplaces, but also universities and public settings.

Most significantly, the government should play a more active role in education and awareness building on the issue of employment discrimination against women. As this issue has gained more traction in China in recent years, it requires a greater response and dedicated resources, including in respect of education and knowledge-building. This will, in turn, create greater knowledge and awareness for workers of discrimination, their rights and available legal processes and remedies if they believe they have been discriminated against. In addition to general initiatives, the government should further consider specialized projects and policies for pregnant women in light of the move to the “two-child policy” and noted discriminatory experiences women have vis-à-vis family planning, pregnancy, and childbirth.

5.4. Conclusion

Despite changes in women's status, gender disparity seems to be a prevalent issue today. The adoption of China's "universal two-child" scheme is expected to have a detrimental effect on female jobs and sexism experiences. This necessitates the improvement of the regulatory framework in order to further secure women's workplace rights in view of this current legislation. This study discussed how the "universal two-child scheme" has affected women's rights and is likely to intensify existing gender inequality against women in the workplace. I have also discussed how current labor and jobs legislation and the judicial system have struggled to adequately defend women from workplace discrimination and also limited their capacity to effectively obtain civil redress when they have been discriminated against. I discovered that current policy is ambiguous and lacks adequate concrete measures for compliance and accountability; that there is a dearth of specialized law enforcement agencies; that there are inadequate sanctions to discourage employers; that there is a dearth of consistent scope for law enforcement roles and supervisory responsibilities; and that there are insufficient administrative forces.

I examined Canada's response to job discrimination and gender discrimination and, building on that study, made some proposals in this chapter for reforming both the existing legislation and administrative policies in order to change the situation in China. I proposed, in particular, that the legislation create a specific concept and classification of discrimination; that the framework of anti-discrimination law be expanded; that a specialized supervisory authority

be established to oversee and uphold the law; and that understanding, education, knowledge-building, and preparation for women at work, both employees, employers, and the general public be increased.

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