



GLOBAL **Women's** **LEADERSHIP** Initiative

Women Leading Lawmaking in China

**Final
Report**

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About the Global Women's Leadership Initiative at the Wilson Center:

The Global Women's Leadership Initiative's (GWLI) vast global network is a unique platform for change—connecting current and emerging leaders, raising the profile of critical issues, advancing inclusive policies, and bringing new research to the forefront. The GWLI strives to inspire a new generation of women leaders to realize the goal of at least 50 percent women in positions of political, public, and civic leadership by 2050.

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Greetings

Ira Belkin

Executive Director, U.S. Asia Law Institute at the New York University School of Law

I write to congratulate the authors of this impressive volume, with a special note of appreciation to Dr. Rangita de Silva de Alwis, who helped bring forth the English language translations of this collection as well as the original Chinese language versions. Congratulations should go to the Wilson Center's Global Women's Leadership Initiative and Wellesley College Centers for Women for sponsoring this volume.

These articles are, first and foremost, the product of an impressive group of women's rights advocates, researchers, and legal scholars in China. The authors are passionate about equality and social justice and they match their passion with incisive, analytical ability. Of course, there is gender inequality in China as there is almost everywhere in the world. The obstacles to equality are daunting and it is easy to be cynical about the prospects for change and simply give up the fight.

What has most impressed me about the women's rights advocates in China, as represented by the authors in this volume, is that they do not have any quit in them. Despite the obstacles in their way they meet the challenge of creating a more fair society head on, with brilliant insight into their own society, with clear-eyed recognition of the difficulties they face but with determination to make a difference and with a measure of good humor.

The lessons of history teach that individuals can make a difference and bring about positive change. But they must find the path that will bring broader attention to the problems they seek to solve so that the general public, as well as policy elites who are empowered to make decisions, are motivated to make the changes that need to be made. They need to objectively analyze the root causes of the obstacles that stand in their way and propose practical solutions that promise greater equality but also accommodate the views of the broader society so that their proposed solutions can be accepted. In short, they must be strategic in their thinking and actions.

Those who observe legal reform in China closely are aware of the intellectual resources Chinese legal scholars bring to bear on China's most pressing legal reform challenges. The broader English speaking community, however, may not be as aware that China has such brilliant researchers and advocates. By translating this collection of articles into English you have provided a great service to the broader community who cares about these issues and to the authors themselves, who deserve to see their work reach a broader audience.

I hope this will be the beginning of a trend to share outstanding works of Chinese legal advocates and scholars with the non-Chinese speaking world to deepen understanding and promote more effective collaboration.

Ira Belkin is the current Executive Director of the U.S. Asia Law Institute at New York University School of Law. Prior to his time at NYU, he was a former program officer at the Ford Foundation's Beijing Office. Belkin also served at the U.S. Embassy in Beijing, where he helped promote the rule of law in China.

Greetings

Judge Nancy Gertner
Professor at Harvard Law School

To the Gender and Law Experts:

For over ten years, often twice a year, I have joined Dr. Rangita de Silva de Alwis in visiting you in China to talk about issues of concern to women. It has been an extraordinary dialogue over the course of those years. And although many who visit China may say this, I have learned more in our discussions than I have contributed. I have learned about you, the challenges you face, and the cultural and legal norms that you confront, that are often so different from those in my country. I have watched the dialogue change over time, as we both confronted new issues and new concerns – from simply identifying the problems of gender discrimination, to seeking solutions, from understanding the impediments to change in our own countries, to feeling a part of a global movement for women’s rights.

This volume reflects the very best of your efforts, and will make a lasting contribution to the field. I am proud to have helped even to a small degree and truly look forward to our future collaboration.

Judge Nancy Gertner (retired)

Judge Nancy Gertner was appointed to the bench in 1994 by President Clinton. She has won numerous awards for her service including: the Thurgood Marshall Award for the American Bar Association, the Morton A. Brody Distinguished Judicial Service Award, the Massachusetts Bar Association’s Hennessey award for judicial excellence, and an honorary Doctor of Laws degree from Brandeis University. Judge Gertner retired from the bench in August 2011 and is currently at Harvard Law School and formerly taught at Yale Law School.

Greetings

Susan Roosevelt Weld
Executive Director, Law Asia Leadership program at Georgetown Law

Women Leading Lawmaking in China is an impressive collection of research and analysis on efforts to improve the status of the women in the world's most populous nation. It is encouraging that the spirit of the global movements for women's rights, a spirit drawn together and fostered by the 1995 Fourth World Conference on Women, is still so strong in China. I remember the first meetings of the "Gender and Law Expert Group" on clear September days in Wellesley in 2009, when all things seemed possible if we could only state the problem clearly. Those meetings created an opportunity to focus on key areas where progress would be crucial to the achievement of the goals of the Platform of Action in China.

In this volume I see how the energies mobilized in Wellesley have led to research clarifying the issues of continuing discrimination against women in access to land rights, still the key to women's search for equality in rural areas; in access to jobs in public service, the door to high-level participation in government; in access to full participation in the criminal justice system, where it is especially needed to prevent the abuse and harassment too commonly inflicted on female plaintiffs and victims. Articles here also treat the need for protection of the employment rights of pregnant women, and the access of victims of domestic violence to protection from their abusers and justice in the courts.

The light focused in this volume on these and other similar failings in the Chinese legal system demonstrates the urgent need for continuing efforts. As elsewhere around the world, progress in securing equal rights for women does not run a smooth course; the struggle requires constant vigilance and energy – each nation must take hope from the success of other nations and see each failing as a renewed challenge to its own system of justice.

Dr. Susan Roosevelt Weld is currently an Adjunct Professor and the Executive Director of the Law Asia Leadership program at Georgetown University Law School. She was formerly General Counsel to the Congressional-Executive Commission on China.

Foreword

J. Stapleton Roy, Director, Kissinger Institute on China and the United States

Chairman Mao is reputed to have said that “women hold up half the sky.” The harsh reality is that women in China, which has about 20 percent of the world’s female population, do not yet have a status commensurate with the Mao quotation. The fifth generation of Chinese leaders that emerged from the 18th Congress of the Chinese Communist Party is still very much an “old boys’ club.” Of the seven members of the new Politburo Standing Committee (China’s top ruling body), none is a woman; nor has there ever been a woman on the Politburo Standing Committee in the sixty-three year history of the People’s Republic of China (PRC). The new 25-member Politburo fared slightly better, with female representation doubling, from one member to two, equivalent to the number of military members on the Politburo. Not since the Cultural Revolution, when the wives of Chairman Mao and Communist Party Vice Chairman Lin Biao were Politburo members, has there been this many female representatives in the highest echelons of China’s party apparatus.

Since the beginning of the period of “Reform and Opening,” China has made great strides in advancing gender equality by developing a legal system designed to protect the rights and interests of women; rights and interests that are enshrined in the PRC Constitution. As many of the papers in this timely compilation point out, in spite of such breakthroughs in legal provisions, gender bias and discrimination still exist in practice due in large part to an ineffective enforcement mechanism. In many cases, women do not assert their rights, whether because of ignorance of the law or the lack of legal recourse. All of these issues are symptoms of a legal system and culture in which law is regarded and utilized as an instrument of government as opposed to an institution designed to limit the powers of government and protect the rights of the people, both male and female alike.

China is not unique in this respect. In virtually all countries, including the United States, the status of women is not what it should be for a gender that “holds up half the sky.” Again, looking at the representation of women in the U.S. Congress and the PRC National People’s Congress, the bodies responsible for writing the laws that affect the interests of women and for overseeing the implementation of the laws, the statistics show how far both countries have to go. In China the high point of female representation in the National People’s Congress occurred in 1975, in the final stages of the Cultural Revolution, when women occupied 22.6 percent of the seats. The comparable figure in 2012 is 21.3 percent. In the case of the United States, the number of female representatives holding seats in the Senate and the House of Representatives had never exceeded 25, less than five percent of the seats, until after 1989. Female representation in the U.S. Congress increased rapidly after 1989, but female representation in both houses of Congress was still less than 18 percent at the end of 2012.

Much of the gender gap found globally can be attributed to some combination of cultural legacies from male-dominated societies in the past, flawed legal systems, or the absence of legal protections for women. Cultural notions that a woman’s role in society should be as a primary caretaker of young children hinder the ability of women to advance in the workforce. Women are also disadvantaged by gender-biased hiring practices and paternalistic legislation ostensibly meant to “protect” women, but in practice only reinforcing traditional subordinate roles for females.

Such considerations underline the importance of the papers that follow. This compilation contains a wealth of material that can help spur constructive dialogue on gender equality, an ever changing and crucial topic. Hopefully, these offerings will contribute to broadening and deepening exchanges between the United States and China on these issues.

Ambassador Roy rose to become a three-time ambassador, serving as the top U.S. envoy in Singapore (1984-86), the People's Republic of China (1991-95), and Indonesia (1996-99). In 1996, he was promoted to the rank of Career Ambassador, the highest rank in the Foreign Service. Ambassador Roy's final post with the State Department was as Assistant Secretary for Intelligence and Research.

Introduction

Rangita de Silva de Alwis

The Global Women's Leadership Initiative at the Woodrow Wilson International Center for Scholars is animated by the mission of advancing women's equal representation in all decision-making positions in public service and in civic leadership. The essays in this seminal compilation on China's gender and anti-discrimination law speak to combating challenges to women's decision making in the public sphere in China.

This compilation of papers brings together some of China's leading voices on gender and the law. The Gender and Law Expert group was brought together by the Ford Foundation at Wellesley College in September 2009. These experts are defined by the significant individual and collective mark they have left on China's gender and law landscape. Since 2009, the Gender and Law Expert Group has been meeting every six months to cross-fertilize ideas, share strategies, and develop a plan of action for shared and independent work on new developments in gender and the law.

The burgeoning gender and law movement in China has undergone some major shifts and changes. Those changes for the most part are the progeny of the Fourth World Women's Conference and the knowledge sharing that was sparked by that major event. A hallmark of the new developments in law and policy is that since the Beijing Conference, Chinese gender and law experts have developed new patterns of interaction with their counterparts in different countries. New ways of thinking have grown out of these transnational arrangements.

All of the articles in this compilation address challenges to gender equality. These challenges include unequal distribution of responsibility and land, violence against women, and sexual harassment. The authors themselves have long championed gender equality. For example, Guo Jianmei, the founder of legal services for women in China, was chosen as one of the 1,000 outstanding women in the world nominated for the 2005 Nobel Peace Prize. In 2011, she received the Women of Courage Award from United States Secretary of State Hillary Clinton.

Experts reflecting on the development of China's legal system define the last ten years in China as the decade of challenging discrimination in all sectors. However, these same experts claim that efforts of anti-discrimination lawyers only touched the tip of the iceberg. These experts refer to China's Constitution which in Articles 33, 34, 48 and 49 outlaws gender discrimination as a "paper tiger."

Moreover, although a plethora of law reform has helped to revise some of the direct discrimination inherent in the Chinese laws, much still remains to be done to translate this rhetoric into action. The landmark Employment Promotion Law of 2007 was promulgated by the National People's Congress and broke new ground by outlawing discrimination on the grounds of nationality, race, gender, religious belief, age and physical disability. The law provides for: "Workers enjoying the right of equal opportunity and free choice in employment in accordance with the law."¹

However, gender bias in hiring continues at all levels of employment including in public service. Chinese laws and policies reinforce negative stereotypes by restricting women's equal access to employment. A range of employment opportunities still remain closed to women. Laws promulgated in the 1980's still

¹ Employment Promotion Law of the People's Republic of China order, 2007: P.O. No. 70 of 2007.

prohibit women from work underground, at high altitudes, or in cold water during their menstrual period.² Women's employment opportunities are limited by laws that shut them out from performing jobs considered physically arduous like scaffolding, logging timber, or work involving carrying weight over twenty-five kilos.³ Certain paternalistic laws restrict work according to women's biological functions, specifically restricting certain work for lactating, menstruating women.⁴ Additionally, discrimination in public service includes discrimination against HIV/AIDS and Hepatitis B Pathogen carriers and patients, which even extends to include physical features.⁵

In close to fifty countries there are constraints on the industries that women can work in. The most common constraints are those that involve heavy lifting and are considered arduous work. Although these laws were originally conceived as protecting women, they are now considered paternalistic and a limitation on women's economic opportunities.

Over protections in the laws not only stereotype women but create barriers to women's agency in the public sphere. The co-relationship between protective gender laws and gender bias in hiring and firing is apparent in many situations. There is a tension between protecting the special needs of women and achieving equality of employment between men and women.

Women's groups are attempting to address such overprotective, inhibiting legislation. In a famous case in Argentina, a traditional chain of ice cream stores employed only men on the grounds that repairing ice cream machinery would be challenging physical labor for women.⁶ Although it is important to regulate hazardous employment environments, these regulations must extend to both men and women. Laws must reflect this for jobs that include not just manual work, but scientific and technological work as well.

These policies masquerade as being more "caring," and "protective," but they are actually more dangerous as they are subtle and therefore easier to dismiss as being harmless. As stated in the article: We do not think of this form of discrimination as less harmful. It can equally intimidate female candidates and achieve the same result of exclusion.⁷

This addresses the inherent duality and contradictions in some of the protectionist provisions of the Chinese labor laws. Along with protectionist provisions, the law stipulates that certain work categories or positions are unfit for women, thus restricting women's labor market choices and opportunities. An analogous cause-and effect relationship is seen between protective laws and gender bias in the hiring and firing of employees.

² Lao Bu Fa No. 532 [Labor Act] (promulgated by the Ministry of Labor, Dec. 26, 1994, effective Jan. 1, 1995) 1995 China Law LEXIS 685, at art. 12 § 2(China).

³ *Id.* at art. 12 §§ 1-3.

⁴ *See id.*

⁵ Liu Xiaonan, *Research Report on Employment Discrimination in 2011 Civil Service Recruitment* (2011).

⁶ Beatriz Kohen, *The Effectiveness of Legal Strategies in Argentina*, in FEMINIST AGENDAS AND DEMOCRACY IN LATIN AMERICA 103 (Jane S. Jaquette, ed. 2009) (describing *Mujeres en Igualdad (MEI) v. FREDDO*, a case in which a chain of ice cream shops was required to hire more women to eliminate an imbalance in the workforce. When a progress report revealed that the ice cream shop employed 107 men and only 26 women, the chain was ordered to pay fines. The case was filed by a woman's organization, Mujeres en Igualdad (MEI), and litigated by a clinic at the Law School of Palermo.). *See also* Comm. on the Elimination of Racial Discrimination [CERD], *Yilmaz-Dogan v. The Netherlands*, Communication No. 001/1984, U.N. Doc. CERD/C/36/D/1/1984 (Sept. 29, 1988). This case provides an example of a multiple stereotype. Yilmaz, a Turkish national living in the Netherlands, was terminated because of her employer's belief that there was greater absenteeism among foreign female workers with dependent children. *Id.* The employer believed that foreign women have neighbors and family members take care of their children and at the slightest set back disappear under the terms of the Sickness Act. *Id.*

⁷ Liu Xiaonan and Wang Liwan, *Gender Discrimination in Civil Service Recruitment* (2011).

These deeply engrained social practices have long-term consequences on women's images as workers, limiting their chances of being hired for posts that are more prestigious and reducing their opportunities for promotions. Rebecca Cook argues that:

[S]ome of the most . . . sexist behavior is expressed through paternalism. . . . The head of a . . . department who believes women are not physically, physiologically or mentally able to accept responsibility may hold that belief convinced of his very real concern for the well-being of women. . . . He may believe women should not be appointed to positions of responsibility because a senior post means late nights back at work, corporate meetings at odd hours or weekend work. . . . He may think women employees will have to give up activities they prefer, such as meeting the children after school, cooking the evening meal or attending school meetings. . . . [H]e may accept a general notion of women appropriately filling the role of nurse rather than doctor, because women prefer the service role.⁸

The CEDAW Committee too has identified several categories of stereotypes, addressed the correlation between stereotypes and gender discrimination both in the public and private spheres, and considered the way they legitimize and normalize unequal gender roles.⁹ In General Recommendation 23, for example, the Committee states that sex role stereotyping has helped confine women to the role of caregivers and homemakers.¹⁰ This has constrained women's active participation in public life. General Recommendation 25 of the CEDAW affirms that combating wrongful gender stereotypes is pivotal to state parties' efforts to eliminate all forms of discrimination against women.¹¹

The quintessential goal of CEDAW lies in Articles 2 (f) and 5, as they call for fundamental changes in the traditional roles of men and women in order to bring about gender equality.¹² Article 2 (f) of the Convention states that the state should take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against women.¹³ Further, Article 5 (a) of CEDAW calls for state parties to take appropriate measures "to modify the social and cultural patterns of conduct of men and women with a view to achieving the elimination of prejudice and all other practices based on the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."¹⁴

Although the employment of women has seen an increase, women are still concentrated in the lower strata of the public sector. Sex segregation in employment; gender bias in advertisements and recruitment that call for particular height, weight and looks among applicants; the commodification and objectification of women; family based discrimination; and cross-cutting and multiple forms of discrimination disadvantage and subordinate women in China. Furthermore, differential retirement practices that force both blue collar and professional women to retire ten years ahead of their male

⁸ COOK & CUSACK, *supra* note 23, at 17-18 (some alternations in original).

⁹ *Id.* at arts. 5, 15(3), 16-17. See also generally Rangita de Silva de Alwis, LEGISLATIVE REFORM ON SELECTED ISSUES OF ANTI-DISCRIMINATION AND ANTI-VIOLENCE ISSUES (2009), available at http://www.unicef.org/policyanalysis/files/Legislative_Reform_on_Selected_Issues_of_Anti-Gender_Discrimination_and_Anti-Domestic_Violence_-_the_Impact_on_Children.pdf.

¹⁰ CEDAW Comm., General Recommendation No. 23, U.N. GAOR, 16th Sess., ¶ 8, U.N. Doc. A/52/38 (Jan. 31, 1997) [hereinafter General Recommendation No. 23], available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom23>.

¹¹ *Id.*; CEDAW Comm., General Recommendation No. 24, U.N. GAOR, 20th Sess., ¶ 17, U.N. Doc. A/54/38/Rev.1 (1999) [hereinafter General Recommendation No. 24], available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom24>.

¹² CEDAW, *supra* note 46, at art. 2(f).

¹³ *Id.*

¹⁴ *Id.* at art. 5(a).

counterparts are some of the biggest threats to economic development in China. In 13 countries across six regions, laws specify that women must retire at an earlier age than men. Since women tend to live longer than men on average, these provisions can heighten the feminization of poverty.

In 2008 and 2009, the European Court of Justice found that different pensionable ages for male and female civil servants in Greece and Italy violated the principles of equal pay. Both governments revised their laws to eliminate discrimination by 2013.

Despite changes in the law, overt and covert discrimination appears in talent fairs and job websites in public service. It is even found in civil service recruitment, public service advertisements, and job qualifications where women are excluded overtly or covertly. The central government agencies should comply with principles of equity and fairness in the hiring process and take the lead in prohibiting any forms of discrimination.

For example, “the job announcement for the phytosanitary quarantine officer of the Exit and Entry Inspection of the Quarantine Bureau of Longyan City, Fujian Province” stated that the “‘job requires quarantine inspection done in hazardous environment and [thus] . . . is more suitable for male applicants.’ Similar [gender exclusions] were made by the anti-smuggling unit of custom services, maritime administration, border clearance agency, exit and entry inspection and quarantine authority, and railroad police.”¹⁵ Their job advertisements stated that: “the job entails frequent travel”, “long time at sea”, “extended stay in the field” and “working in extreme conditions.”¹⁶ Although women are not directly excluded, these requirements are termed in value loaded language meant to bar women from equal employment opportunities.

“A majority of the gender-bias job postings in 2011 specified that the applicants must be men or implied preference for men. Most of such jobs openings were provided by railway police, maritime administration, exit and entry inspection and quarantine, coal mine safety administration, Yangtze River Shipping Public Security Bureau under the Ministry of Transportation, and custom services.”¹⁷ Gender bias is manifested not only in potentially hazardous employment but also in judicial services and procuratorate.

Many positions in the court system also call for explicit and implicit gender bias. The general expression as advertised was “restricted to male or female candidates” or “suitable for male and female candidates.” Travel requirements, which are a substantial part of work in the procuratorate, should not be used to disallow women from employment opportunities. Author Liu Xiaonan argues: We hold that traveling often does not constitute a sufficient condition, and there is no evidence that women cannot travel often. Therefore, we define this as gender discrimination. The procuratorate agencies too often cite “harsh conditions,” “field work,” “front-line enforcement,” and other conditions to justify limiting recruitment to males. More often than not, they gave no reason at all and directly imposed a gender restriction on candidates. We hold that even if these reasons are given, they are hardly tenable. There is no evidence to show that women are not competent for such work.¹⁸

The studies in this publication also show that overt and covert discrimination is prevalent in the civil service recruitment process. In urging the public sector to take the lead in addressing discrimination in public service, Liu Xiaonan states, “the hiring process in the public sector provides a yardstick to measure employment equality and defines the bottom line for equal employment opportunity”.

¹⁵ Liu Xiaonan and Wang Liwan, *Gender Discrimination in Civil Service Recruitment* (2011).

¹⁶ *Id.*

¹⁷ *See id.*

¹⁸ *See id.*

Central government agencies must set the standard and lead the charge on equality and fairness in the hiring process, act in compliance with laws and international treaties, and ensure equal access to employment. However, discrimination remains rampant in job announcements and advertisements.

While in earlier years, advertisements were couched in distinctive “men only” terms, advertisements in 2011 were more subtle and contained veiled language in excluding women from employment by couching language in terms of protection. Nevertheless these less overt exclusionary provisions are as dangerous as the more overt exclusions of women from employment.

Many of the job postings for judicial officers specified the applicant must be of a particular gender or implied a certain gender was preferred. For example, “successful candidates must be male/female” or “[the job] is more suitable for men/women.” Studies found that 31.2 percent of all the job postings listed by the people’s courts were discriminatory.

“The notice of examination for the enforcement officer of the Wanghua District People’s Court in Fushun City, Liaoning Province specified the job was open to male applicants only. It was because the responsibility of court order enforcement and mediation would require extensive travel. Since there was no evidence to demonstrate that women could not meet this requirement, extensive travel was not a sufficient condition for the gender restriction”.

In China, sex-based exclusionary laws, combined with other institutional and ideological constraints against women, limit women's opportunities in the public sphere. Gender based segregation also impedes women’s leadership in public service. Gender segregation is prevalent in China’s criminal justice system which includes the courts, the prosecutors’ offices, the police, and law firms. Statistics show that women constitute only 20-30 percent of the entire workforce in the court system and in the prosecutors’ offices. The ratio is even lower for the police--only 12 percent.

China’s cultural tradition exerts a significant influence on gender-based occupational segregation in the criminal justice system. Studies show that modern Chinese women still feel the pressure to live up to traditional social expectations. First, stereotypical images of women subordinate women. Second, the traditional role as care-taker inhibits women’s professional advancement. For example, women are often not assigned to work at night because of their family duties, and night work is an important indicator for performance evaluation. Further insights on women’s participation in the criminal justice system is presented in Professor Liu Mei’s seminal project of the Criminal Procedure Law Research Institute at China University of Political Science and Law on Women’s Participation in China’s Criminal Justice System in 2009-2011, the first of its kind in the country.

In the United States, gender bias task forces and gender bias studies spawned a gender bias task force movement and new research on why women are not represented at the top when it comes to the legal profession. What effects can feminization of the profession have on the profession? These studies show that gender bias hurts everyone. Women lawyers as a group receive less favorable treatment and fewer opportunities to advance in the profession, and women litigants often face hostility in the court proceedings. Stereotypes about women hurt their children and families including men who then become victims of similar stereotypes.

The eight federal task forces on gender bias in the courts and the forty state task forces that preceded them emerged from the work of a project of the NOW Legal Defense and Education Fund (“NOW LDEF”) and the National Judicial Education Program (NJEP) to Promote Equality for Women and Men in the Courts. NJEP’s emphasis on developing state-specific information for judicial education became the catalyst for the first gender bias task force. The task force’s presentation at the 1983 New Jersey judicial college made

the first page of the New York Times and inspired the national gender bias task force movement. The task force reports provide a wealth of information and an action plan for everyone concerned with fairness in the courts. Justice Ruth Bader Ginsburg summarized the impact of the task force best when she said:

*“Self-examination of the court's facilities and practices . . . can yield significant gains. First, such projects enhance public understanding that gender equality is an important goal for a nation concerned with full utilization of the talent of all its people. Second, self-examination enables an institution to identify, and devise means to eliminate, the harmful effects of gender bias. Third, close attention to the existence of unconscious prejudice can prompt and encourage those who work in the courts to listen to women's voices, and to accord women's proposals the respect customarily accorded ideas advanced by men. And finally, self-inspection heightens appreciation that progress does not occur automatically, but requires a concerted effort to change habitual modes of thinking and action.”*¹⁹

Prof. Guo Huimin writes of gender discrimination based on real or perceived potential to get pregnant. “Pregnancy potential” has become a category of discrimination. Some employers exclude pregnant women from employment or mandate that women should voluntarily leave if they become pregnant during the course of employment. Moreover, pregnancy is considered a disabling feature, and employers often transfer women to lower positions and or reduce their pay on the pretextual ground of pregnancy protection. Despite labor laws that prohibit discrimination during pregnancy and lactation, many young female university students have difficulty finding good jobs because of their potential to get pregnant. Some students complain that they are asked to sign contracts in which they promise to not get pregnant within three to five years of employment. The Bureau of Labor and Social Security reports that it handled more than 10,000 cases related to the infringement of women employees’ reproductive health rights between 2001 and 2005.

Guo Huimin discusses the changes wrought by the market economy. What was earlier considered a social responsibility is now considered a “domestic affair.” Guo Hui Min suggests that China should define a legal category of pregnancy discrimination and monitor such discrimination and establish a workplace complaint mechanism. Several laws around the world prohibit pregnancy discrimination and as in Australia’s Sex Discrimination Act, prohibit discrimination against another person on the ground of the other person’s sex, marital status, pregnancy or potential pregnancy or family status.

Guo Jianmei who heads the first non-governmental organization specializing in legal services for women (the Beijing Zhongze Women’s Legal Consulting and Services Center, formerly Peking University Law School Center for Women’s Law Studies and Legal Services) focuses on impact litigation and research. Rural women’s land rights issue is one of the most complicated areas of legal services. Apart from litigation Guo Jianmei and her Center are calling for administrative review of the legality of village rules, especially in terms of addressing rural women’s access to land. Rural women often become landless upon marriage or divorce. In addition, frequently a woman who marries a man in another village moves to her husband’s village and forgoes her land-use rights in the village of her birth.

Women by and large face discrimination in land use rights. These women include married-off women (women who transfer to their husbands’ villages), married-in women (women whose husbands transfer to their villages), divorced women, widows, and those whose husbands work in cities. In most villages, a married-off woman is considered “water thrown off.”

¹⁹ Ruth Bader Ginsburg, *Foreword* to THE REPORT OF THE SPECIAL COMMITTEE ON GENDER, PREPARED FOR THE D.C.CIRCUIT TASK FORCE ON GENDER, RACE, AND ETHNIC BIAS, *reprinted* in 84 GEO. L.J. 1651 (1996).

Upon divorce, a woman finds it nearly impossible to claim a share of land in her ex- husband's village, resulting in the feminization of poverty. Despite de facto female-headed households in rural areas, there is no de jure recognition of this. Furthermore, despite facially equal laws, not all members of a rural household enjoy equal land allocations. Most village rules and "villager agreements" dealing with land allocation are inconsistent with the equal protection guarantees in China's Constitution and Civil Law.

This compendium of papers by China's leading gender and law scholars is a reflection of challenges that women in contemporary China face in their role in the public sphere. Together these papers provide insights into the causal impact of both direct and indirect gender bias in national and local policies on women's participation in the public sphere and in China's development. Unless these barriers are addressed, women will not achieve full and equal citizenship rights, and the promise of China's development will not be fully realized.

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Gender Discrimination in Civil Service Recruitment

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1. Objectives and Scope of the Study

2011 marked the 20th anniversary of China's ratification of the *Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value*, 10th anniversary of its ratification of the *International Covenant on Economic, Social and Cultural Rights*, and 5th anniversary of its ratification of *Convention concerning Discrimination in Respect of Employment and Occupation* (hereinafter called *Convention 111*).¹ Ratifying these conventions shows the Chinese government accepts the notion of employment equality and undertakes the international responsibility of promoting equal opportunity in employment and eliminating employment discrimination. As part of the initiatives to ensure full employment and equal employment opportunity, the central government enacted the *Employment Promotion Law* three years ago and the local governments subsequently issued the corresponding enforcement manuals and implemented the rules.

However, the law is no guarantee of employment equality. Overt and covert discrimination is still ubiquitous in the talent fairs and job websites. It is even found in the civil service recruitment. The government bodies are supposed to drive change and lead the fight against discrimination. If they don't comply with the laws and regulations, the vision to eliminate discriminatory practice will never come into reality. It is fair to say that the hiring process in the public sector provides a yardstick to measure employment equality and defines the bottom line for equal employment opportunity.

Our study was conducted annually over the past two years. In 2011, we first assessed the overall situation of gender discrimination in civil service recruitment as in 2010, and then examined the hiring practice of six departments. By analyzing the job announcements of the selected departments, we aimed to gain insight into the discrimination in recruitment in the public sector and offer advice on how to get rid of the discriminatory practice.

The methodology used was the same as in 2010. We evaluated the appropriateness of the qualification requirements specified in the job announcements in accordance with laws and regulations. This allowed

¹ The *Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value* was adopted in 1951 by the General Conference of the International Labor Organization at its 34th session. The *International Covenant on Economic, Social and Cultural Rights* was adopted on December 16, 1966 by the United Nations General Assembly, and the Standing Committee of the 9th National People's Congress decided on February 28, 2001 at its 20th session to ratify the covenant. The *Convention concerning Discrimination in Respect of Employment and Occupation* was adopted on June 25, 1958 by the General Conference of the International Labor Organization at its 42th session and ratified by the Chinese government on January 12, 2006.

us to identify noncompliance and obtain detailed information about employment discrimination in China.

We recognize that the discrimination in the eligibility criteria is just the tip of the iceberg. Much more is hiding in the qualification review, final interview, and throughout the entire career progression which causes more harm to the applicants or employees. Nevertheless, we are unable to document all of the individual cases simply through desk research. It is our hope that the study focusing on the qualification requirements could set off a chain reaction, in which the government agencies would reflect on and the general public would give attention to the employment discrimination.

1.1 Central Government Agencies

The central government agencies should adhere to the principles of equity and fairness in the hiring process, take the lead in prohibiting any forms of discrimination, comply with the laws and the international treaties, and ensure equal access to employment because they are supposed to act as a role model for their local branches, public organizations, or companies and serve as a showcase for China's progress on human rights.

Our study concentrated on the central government agencies, which had hiring plans in 2011, and involved 9762 job openings. In order to explore the patterns of discrimination, the entities posting the jobs were divided into four groups: (1) offices under the Central Committee of the Communist Party of China and the quasi non-governmental organizations, (2) central administrative organs and the headquarters of the public agencies which report to the State Council and whose employees are treated as civil servants, (3) affiliates and local branches of the central government agencies and the local branches of the public agencies which report to the State Council and whose employees are treated as civil servants, and (4) judicial authorities.²

1.2 Six Departments

In addition to assessing the overall situation, we looked at the hiring practice of six departments (including the headquarters at the central level and the branches at the local level). The purpose was to find out whether these departments provided equal employment opportunities. The six departments we chose included people's congress agency, people's court, people's procuratorate, women's federation, association of people with disabilities, and trade union.

It is prescribed in the constitution that National People's Congress and Local People's Congress, as "the organs of state power," make laws, supervise the enforcement, and protect people's rights; people's courts, as the "judicial organs of the state," "exercise judicial power independently" and guard people's legitimate rights against violation; people's procuratorates, as the "organs for legal supervision," "exercise procuratorial power independently," maintain the law and justice framework, ensure domestic tranquility, and defend people's rights. It is also stipulated in laws that women's federations, as the organizations bringing together women from all walks of life, represent and protect women's rights and promote gender equality; associations of people with disabilities, as organizations composed of people with disabilities, their families and friends, spread humanitarianism, provide opportunities for people with disabilities, enable them to equally and fully participate in social life, and share the benefits of

² With a view to reflect the difference between central and local government, we broke down the public bodies into headquarters and local branches and put them in the second and third category respectively. Judicial authorities were originally placed in the first category - offices under the Central Committee of the Communist Party of China. As last line of defense in the battle against discrimination, they should uphold the principles of equity and fairness. So we considered judicial authorities a separate category. The number of job openings for each category can be found in Table 2.

socioeconomic development; trade unions, as organizations of workers, protect workers' rights (see diagram below).³



图1：本次调查部门选择示意图

Diagram 1: Selected Departments

Because of their roles and responsibilities, they should be the equal opportunity employers and serve as role models for the other government agencies, non-government organizations, and enterprises. Putting them under the microscope was not to find fault, but to set a lowest expectation and identify the starting point for the elimination of employment discrimination in the public sector.

Although the six departments have different organizational structures, all of them are comprised of a nested hierarchy of local sub-divisions. In order to acquire holistic knowledge about the reality of employment equality in these departments, we looked at not only the headquarters at the central level, but also the branches at the provincial level.⁴ Fifteen administrative regions at the provincial level⁵ were selected on the basis of geographic location, economic size, and number of job openings. By doing this, proper representation was ensured.

2. Definition and Patterns of Employment Discrimination

Employment discrimination refers to any distinction, exclusion, restriction or preference made by the employer on the basis of any factor not directly related to the inherent requirement of a particular job. That is why we took the nature of a job into account when analyzing its qualification requirements and determining whether such requirements were discriminatory.

China ratified *Convention III* in 2006 and has ever since undertaken the obligation of prohibiting discrimination on the basis of race, color, sex, religion, political opinion, national extraction or social

³ Women's federation, association of people with disabilities, and trade union are usually classified as "civil society organizations" led by the Communist Party of China and conducting nation-wide activities to deliver their missions. Such organizations are represented at the Chinese People's Political Consultative Conference. They are treated as the quasi non-governmental organizations or public agencies, which report to the State Council and whose employees are treated as civil servants. Their employees are recruited through the civil service exam.

⁴ China has 35 administrative regions at the provincial level, including provinces, autonomous regions, municipalities, special administrative regions and Xinjiang Production and Construction Corps.

⁵ The 15 administrative regions at the provincial level were Beijing, Tianjin, Shanghai, Chongqing (municipality), Guangxi Zhuang Autonomous Region, Heilongjiang, Hunan, Shandong, Guangdong, Yunnan, Jiangxi, Zhejiang, Hainan, Liaoning (province) and Xinjiang Productions and Construction Corps. To ensure the data correctness, we only analyzed the civil service exam announcements on the official website of the human resources and social security authorities of each locality.

origin. At the same time, its *Constitution*, *Labor Law*, *Employment Promotion Law* and *Law on the Protection of Women's Rights* forbids gender-based discrimination and promotes equal employment rights for women.

Gender discrimination is the differential treatment based on gender unless such treatment is reasonably necessary to the performance of a specific job.

For example, the job announcement for the phytosanitary quarantine officer of the Exit and Entry Inspection and Quarantine Bureau of Longyan City, Fujian Province indicated gender preference. It said “this job requires quarantine inspection done in harsh environment, such as remote mountainous area and it is more suitable for male applicants.” Similar restrictions were often made by the anti-smuggling unit of custom services, maritime administration, border clearance agency, exit and entry inspection and quarantine authority, and railroad police. Their job announcement for some of the positions usually hinted male applicants were particularly welcomed because “the job entails frequent travel”, “long time at sea”, “extended stay in the field” and “working in extreme conditions”. Although women were not excluded, such announcements were discriminatory because gender-referent words were used and requirements irrelevant to the job were raised.

3. Gender Discrimination in the Hiring Process of Central Government

Agencies

Compared with 2010, incidences of gender discrimination in 2011 were higher. The number of discriminatory job postings increased from 1203 to 1519, and the percentage of such postings rose from 12.96% to 15.6%.

A majority of the gender-biased job postings in 2011 specified that the applicants must be men or implied preference for men. Most of such job openings were provided by railway police, maritime administration, exit and entry inspection and quarantine, coal mine safety administration, Yangtze River Shipping Public Security Bureau under the Ministry of Transportation, and custom services. The main reason for the desire to hire male applicants was that the job involved heavy workload, long-term travel or seagoing. The way the job was described seemed to give a thoughtful heads-up to women. However, it actually limited their right to choose careers, reduced their employment opportunity, and intensified the competition among females for the “equal opportunity” positions, thereby constituting employment discrimination.

A distinctive element for the gender discrimination in 2011 civil service recruitment was discouraging women from applying through delicately indicating men were more suitable. Compared with the rigorous criteria established in the 2010 exam announcement, such as “men only”, it sounded considerate and thoughtful. But the harm it caused was no less. Women would take the hint and cross these jobs off from the list. Thus, such wording can be labeled as discriminatory.

4. Gender Discrimination in the Hiring Process of People's Courts

Judicial authorities are the guardians of equality and fairness. They are given more political responsibilities and higher expectations. This is especially so for the people's courts, which exercise independent judgment. How they construe and apply the laws breathes life into the stipulations on paper. In this study, we sampled 3005 positions of the Supreme People's Court and the courts in the fifteen administrative regions at the provincial level. The job titles included judges, enforcement officers and judicial police officers.

Many of job postings specified the applicant must be of a particular gender or implied certain gender was preferred. For example, “successful candidates must be male/female” or “[the job] is more suitable for men/women”. A few of the restrictions were justified. However, many more were discriminations based on stereotypes. We considered it employment discrimination when gender preference was indicated, but the job description was not explicitly stated. It was found in the study that 939 job postings were discriminatory, accounting for 31.2% of all the job postings listed by the people’s courts.

The notice of examination for the enforcement officer of the Wanghua District People’s Court in Fushun City, Liaoning Province specified the job was open to male applicants only. It was because the responsibility of court order enforcement and mediation would require extensive travel. Since there was no evidence to demonstrate that women could not meet this requirement, extensive travel was not a sufficient condition for the gender restriction. Therefore, it was discriminatory.

In another job announcement for enforcement officer, the employer, Mingshan District People’s Court in Benxi City, Liaoning Province, made it very clear that only female applicants would be considered because the job involved supervising the female defendants who failed to comply with the court orders. The gender restriction was reasonable as it is necessary for the performance of the duty.

5. Gender Discrimination in the Hiring Process of People’s Procuratorates

People’s Procuratorates, as the “organs for legal supervision,” have the responsibility to protect, among many others, people’s personal and democratic rights. In the study, we reviewed the exam announcement for 2232 positions of the people’s procuratorates from fifteen administrative regions at the provincial level (the Supreme People’s Procuratorate had no hiring plan in 2011).

The gender discrimination was as serious: 32.7% of the job postings (729) put women at a disadvantage. In people’s courts, gender discrimination occurred mostly in the recruitment of enforcement officers and judicial police officers. In people’s procuratorates, it often took place in the hiring process of prosecutors dealing with the execution of criminal sentence, investigators, and judicial police officers.

Some procuratorates wanted only male applicants on the grounds that the jobs “involve working in harsh condition”, “travel” and “on-site investigation”. Many more specified the gender of the applicants without giving any reason. Even if they did, the explanations would not hold water as no evidence had proved that women were incompetent in such jobs.

In the job announcement for the investigator, the Anti-corruption Bureau under the Foshan People’s Procuratorate in Guangdong Province suggested that male applicants were more suitable because the job required “on-site investigation” of corruption-related crimes. We consider it discriminatory as the use of the gender-referent language excluded women from applying for the job.

The key to determining whether a gender requirement constitutes discrimination is to figure out whether such a requirement is job-related. If it is necessary to the performance of a job, limiting applicants to a certain gender is permissible. For example, the No.1 Division of Beijing People’s Procuratorate implied the job prosecutor, dealing with the execution of criminal sentence, was more suitable for male applicants. The reason was that the prosecutor would be stationed in Yanqing Prison in Yanqing County and Liangxiang Prison in Fangshan County and the inmates in both prisons were male. As the duties naturally excluded women from any role in the job, the gender restriction was justified.

We disagree with the practice of depriving women of the rights to choose their career on the grounds of “harsh working condition.” We also oppose any forms of discrimination against men. “Gender equality”

should not remain merely on paper. It is our view that a detailed job description should be provided so as to help decide if a job is more suitable for a specific gender.

6. Gender Discrimination in the Hiring Process of Trade Unions

Women's federation, association of people with disabilities, and trade union are the organizations represented in the Chinese People's Political Consultative Conference. But unlike the first two which serve the people of a certain gender or with specific physical traits, the trade union is an organization of workers that have banded together to protect their rights to employment, rights to work and rights to remuneration. Therefore, it should set an example for employment equality.

However, of the 114 job postings of the trade unions, 4.4% (or 5) treated women unfavorably.

For example, the official in the Finance Department of the Yingkou Trade Union, Liaoning Province, whose major responsibility was to collect and audit membership fees, had to be male because the job required travel to remote townships and villages. The restriction might be designed for the protection of females, but at the expense of women's rights to equal job opportunities. Therefore, it constituted gender discrimination.

Women are an important part of the work force. Trade unions, as the organization for the workers, should not shut the doors for female applicants. Otherwise, its representation and inclusiveness will be on a shaky ground. Thanks to the technological innovation in the modern society, the physical attributes of women have less impact on their employment than before. As the voice of the workers' interests, trade unions should not only defend female worker's rights, but abide by the principle of equity and fairness and eliminate gender discrimination in their own hiring procedure.

The Pain of Chinese Urbanization: Strengthening of Gender Layering

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Problem proposing

Chinese urbanization propelled rapidly from 37% in 2000 to 49.7% in 2010, almost 13 percentages in 10 years. According to *the Proposal on establishing the Guarantee Mechanism of farmer's benefits* proposed to National People's Congress, the total number of farmers who lost their land is more than 400 million and is increasing at 20 million annually. The most prominent problem among them is about female farmers' land loss and land income. According to the Chinese Women Federation, the third survey on women's social status has suggested that 21% of female farmers were without land in 2010, which is 11.8% more than the amount in 2000 and 9.1% more than male farmers. Based on these observations the conclusion can be made that as urbanization was propelling, gender layering and gender conflict was becoming more intense.

Focusing on the intense gender layering that appeared during the process of urbanization, we have been to Guangdong in the mid-December 2011, to hold a meeting and a special interview with women federation at all levels in Shenzhen and collective capital managing office. The result has suggested that gender layering during the process of urbanization has not disappeared naturally but lead to the constant existence of gender conflict, and has sharply enlarged the gap between the rich and the poor.

Shenzhen with a local population of more than 27 million and a permanent population of more than 100 million, has become the flagship of Chinese urbanization, and is the only city in China with zero farmer population. In year 2004, the endpoint of Shenzhen urbanization, the government's goal was to transform all farmers into residents, in other words, to make a city with 100% urban population. The urbanization did not result in poverty or a rude expelling of farmers, but propelled the urbanization of farmland and farmers. Land resources were transformed into collective Co. Ltd., which guaranteed the land value would increase in rates, and benefit the new citizens. The Co. Ltd. needed to set up a board of directors to elect a CEO, formulate a charter and complete a democratic management and supervision system; and also to invest and manage, or loan, to build a workshop or apartment on the collective land and gain the rent from the external population, or transfer the land to build other buildings and allocate the benefit to the shareholders according to their amount of shares.

Shenzhen is divided into the outside and the inside area. The inside area is the city while the outside is the suburb. 5 years ago there were plenty of fields, but now all have turned into skyscrapers. Farmers have become new citizens and moved into big buildings; most of the families hire nannies, live in big houses that can be means of livelihood and means of production; companies paid the shareholders their social insurances; there are school buses for the children; Shares per year can provide the elderly people with more than 10,000 yuan or tens of thousands yuan, which guarantee their living; shareholders can enjoy a trip and other welfare treatment. The urbanization in Shenzhen benefits the farmers.

At the same time, the ignored gender issue has gradually emerged: from 2004 until now, married women have relentlessly visited the local government and have become a problem for the government. The so called "married women" consists of two kinds of women: women married to husband's family through

traditional marriage, and the daughters who remain living in their home village. The married women mentioned here are mainly refer to the daughters who are willing to have their husbands live with their families, to keep their resident status in their home village and to keep living and farming where they were before marriage. During the transition from villagers to shareholders, hundreds of married women were deprived of shareholder qualification. This generated a strong sense of unfairness based upon the fact that other families were qualified to share millions of money while they had nothing to gain. Therefore they collectively visited government and the Chinese Women Federation to seek protection for their legal rights. Why did the married women visit government? What went wrong? The survey result suggested that the answer was closely linked to the qualification and the treatment of the shareholders.

Company Charter: How to confirm the shareholders' qualification and treatment?

In year 2004, led by the local government, the village committee in the outside Shenzhen transformed into the neighborhood committee, and the new city community showed up. It should be noted that there is a big difference between the old community and the new one. The former usually doesn't possess collective assets not to even mention the ability to allocate it, while the latter emerged during the transformation from the rural committee with a big deal of collective land resources that needed to be dealt with and allocated. In another word, this is the last time farmers could benefit from land resources before the transition from land owner into city residents. Such an allocation related to the life and treatment of farmers after the transformation, and is significant to the new residents.

The local government required every village committee to divide their land value into shares and establish a Co., LTD. Once the company was founded, the village committee was instructed to use 40% of the administration shares to develop economy and 60% to allocate to the individuals who are qualified to become the shareholder and enjoy the shareholder's treatment. The key of whether the person can enjoy the treatment is based upon the identification standard used to determine whether the person is legitimate enough to become a shareholder, in another word, if the person can gain the shareholder qualification and enjoy the share right. The governments handed over the qualification standard to the communities that consisted of new residents, which meant that the villagers voted to confirm the shareholders' qualification, and the shareholders altogether wrote the company charter. Then the charter was to be reported to the local government, ratified and come into force.

While writing the company charter, different companies showed different features with different ways of allocation shares: some of the seniors hold 2-3 shares while the young people hold 0.5-1 share, but all of them astonishingly share the same feature: the exclusion of the married daughters. Almost all the companies are bound by the patriarchal allocation principle: the seniors, sons, daughters in law and their children could hold a share without an exception, ignoring whether or not they have ever contributed to the land development, and then their share will be confirmed according to their age. Once the daughters have married, their shares could only be kept for 2 to 3 years, and then they will be disqualified, their husbands and children will be deemed as outsiders of the community with no qualification to hold a share.

The transformation from farmers into city residents demonstrates stark characteristics of Chinese collectivist economy, with conflict between agricultural civilization and industrial civilization. Different from most of the capitalist countries, Chinese rural economy is collectively-owned instead of individually-owned. Allocation of collective resources, which doesn't exist in countries of private ownership, does exist in Chinese rural areas of public ownership.

The core of agricultural value is to protect the strong and to deprive the weak. When formulating allocation rules, inborn factors such as gender, age and position inside the family, things that cannot be chose by human beings, have been emphasized. They were deemed to be the decisive factors for whether

a person could gain the resources from the allocation. Industrial society's values are rather different: it respects the basic rights of every member, highlights social justice, and reduces uncontrollable factors. It agrees with beliefs upon which the national law has been established: to pursue equal opportunity for everyone, and to protect especially the rights and interests of the weak. For example, married couples, according to the deal they made, can choose either to live with the husbands' family or with the wives' family, in other words they share the qualification as a villager without being tagged as an insider or an outsider. But these laws and rules didn't function well in real life. People spontaneously dealt with the problem of identification when allocate resources with agricultural values, citing marital living mode as one of the typical cases.

The daughters' rights have been deprived twice during the transition from collective members to shareholders. The first time is the artificial denial of collective membership qualification, which results in the inexistence of shareholder qualification. The biggest resource of the Collective Co Ltd., is land. Just like other male villagers, the daughters join the share through contracted lands and fields they own. Therefore, unless transferring or giving the land as a gift, the daughters' shareholder qualification is unquestionable and undeniable, as long as the qualification was confirmed according to land ownership. Actually what the Collective Co. Ltd., adopted was farming society values: using the family patriarchy principles as the standard to confirm the shareholder qualification. The Co. Ltd., only reserves the shares for married daughters for 2 to 3 years, after that, the qualification is cancelled, which leads to systematic deprivation of daughters' rights. Such a deprivation causes the daughters tens of thousands yuan loss annually.

The second time is the deprivation of welfare in the new community. The welfare produced by the collective economy in the new community should be endowed to every community member, especially the weak, to implement the principle of social fairness. In the reality, the welfare treatments in the new community continued to benefit the shareholders: not only can they share the year-end bonus, they can enjoy social insurance, free tour etc.; while the offspring of the daughters without shares cannot enjoy any welfare treatment and are deprived now and then, which sharpens the gender layering.

Gender Layering leads to conflicts

The gender layering sharpened by the arrangement of the system means the daughters experience a strong sense of unfairness: Despite the fact that they were all living together, why were the sons the reasonable shareholders while the daughters were excluded? Why could the sons enjoy every beneficial treatment while the daughters were deprived until there was nothing to benefit from? A woman stated, my daughter is 5 with no welfare to enjoy. The little girl asked: why uncle's kids can go on the tour but I couldn't? These women didn't agree with the concept of daughters living with their husbands' families. In their opinion, the daughters can decide to stay in their villages or not after getting married, just like the men, as long as the law supports the liberty to decide where to live after marriage. The right should be shared not only by the daughters, but also the sons in law and their children. It doesn't make any sense to deem the daughters' families as outsiders. To fight for the shareholder qualification became their biggest motivation to visit the government. With zero progress in negotiating with the new community, the married daughters started to visit the Women Federation and government to ask for shareholder qualification

There is an old saying that water falls while people climb. It is a universal law that places with more married daughters, therefore more sons in law, are richer. In Shenzhen there are 10 more daughter families in every citizen committee, tens of families at most. This is a large enough group that their power can't be belittled. It is about rights and interests of hundreds of people with 3 to 4 people per family. It is too many to ignore.

The local basic governments are the first to feel the pressure brought by the married daughters. Before that, local women barely participated in any collective events that would shake the stableness of society. Now, however, they have become the main force visiting the government, not only for their own interests, but also their husbands' and children's. For the governors, it was contradictory and confusing to understand the daughters' problem. Their position had been swayed between the folk law and the national law, and most of the governors themselves adhered to the traditional custom that deems women living with their husbands' families as common sense. They were unconsciously being exclusive to the daughter families: these women are here to trouble us. But on the other hand they had to legally admit what the women were asking for was totally legitimate, law-abiding, and the corporation had no reason to deprive them from their interests. The women's government visiting actions had already destabilized the society, which needed to be dealt with and solved, otherwise more serious controversies would emerge. Hence the district government issued the urbanization guidance, which emphasized that the confirmation standard of the shareholder qualification should be leveled with residence registers, which includes married women in their own villages. This guidance ensured the same treatment between men and the married women; otherwise the company charter wouldn't be authorized. Industrial values began to be put in use when regulating the company charter.

To the new city residents, there is a traditional tendency when formulating the company charter, since the old resource allocation rules in villages were all exclusive toward the married daughters without any obstruction. There are three language families that exist in Shenzhen, which is a part of Guangdong: Ke family, Guang mandarin and Chaoshan accent, with patterns that strengthens the patriarchy inheritance tradition while excluding the maternal families. A deeply-rooted traditional culture and allocation rules was then coming into form, by which the patriarchy interests had been protected. Nobody ever asked for gender quality and that the residents register should be the standard for the allocation. Now the government's administrative intervention forced the new city residents to reconsider the allocation rules. Besides, their own interests would be undermined if they were too late to do the modulation. All the company charters began to include the married daughters with local resident registers as allocation subjects. Finally a long-termed problem had been solved. This is the first time the married daughters share the same rights with men. One third of communities have given them company shares: some are low paid shares; some are newly generated shares to be allocated. A chief executive said the job should be implemented through reason and sentiment, that no matter sons' families or daughter' families, we are all members of this big family.

But the problem has not been solved completely. Although all the married daughters were able to hold shares, two thirds of communities were still exclusive to the children of the married daughters'. Other shareholders disagreed with the change, claiming that: *"the sons in law and their children are outsiders. We can't give our shares to the outsiders."* *"Some of the sons in law are aiming to our shares. They will get divorced and take the shares with them."* But daughters were not convinced by these arguments. They argued that there are numbers of daughters in law who get divorces. Why didn't people complain about them? The daughters knew it profoundly that before the shareholders' ideas changed, the rights of the minority would be deprived by the majority. They are looking forward to the government's compulsory means to solve the problem.

When dealing with these headaches, officers in charge of collective resource allocation said: *It is a challenge to solve the share problem because most of the company had already used up the shares during the allocation, and shares can be inherited, which means the reallocation would deprive the other shareholders' interests. This would certainly lead to discontents of the majority and be extremely hard to operate. We had only thought about the married women's interests but ignored their husbands and children at the beginning of composing the new guidance. If we didn't, there wouldn't be so many problems left.*

A few suggestions

It will be the urbanization acceleration period in the future 20 years in China: City populations will reach more than 70% of the total population, and the great scale of transition from agricultural society to industrial society will be accomplished. It was optimistically estimated that as urbanization grows, women will gain higher social status, which leads to an effortless solution of the gender discrimination problem. But the example of Shenzhen shows that urbanization isn't the answer to everything: it could not resolve the gender inequality that appeared within the transition period between agricultural society and industrial society, and could even worsen gender polarization. Besides, about 80% of Chinese rural area has discriminatory allocation rules exclusive toward the daughter families, and almost 500,000 rural committees intend to deprive the daughter families' interests. If these village rules cannot be corrected in time with the help of law, the interest gap will be enlarged as the allocation goes on, and the gender conflicts that were once hidden will be publically revealed and lead to a negative influence that cannot be underestimated. How can we prevent this from happening in the future urbanization process?

Levels of governments should intensively observe the social tendency on the field as noted. Please conclude the urbanization experience in Longtou region; take measurement in advance; realize the fairness during the interest allocation; design a timetable of solving the social conflicts; effectively prevent gender conflicts from sharpening.

Suggestion 1: Solve the gender problem within the urbanization period as early as possible. Urbanization is the intersections of every interest conflict, and is extremely complicated. To reduce interest conflicts, the discovered problems can be dealt with by scheduling a timetable of village rule revisions in the not yet urbanized rural areas that sets a plan to be done within 3 years by stages and in batches, led and organized by the local governments. Villagers should be motivated to revise the village rules that imply gender discrimination, and to explicitly assert marital living mode diversity and allocation measurements that realize gender equality. At the same time, governments should integrate the village rule revisions with communism culture development, to advocate and educate, to guarantee a change of concept of the mass's and the officers'. In addition, set the achievement of village rules revision as an evaluation standard for officers.

Suggestion 2: To the areas that are under urbanization, government should guide and supervise with an explicit direction considering related interest groups. The allocation clauses are better explicitly specified:

No matter how they are classified in the local residence register, women, their husbands and their children should share the village or citizen treatment. Even if they have a separated residence register, and are without a decent land or citizen treatment, their land in their homes should be reserved, and they deserve a villager treatment during the land removal.

Charters formulated by the rural committees and the new communities should be put on record in the street and the county. Basic governments should supervise and direct, and correct the anti-law rules.

Research Report on Employment Discrimination in 2011 Civil Service Recruitment

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I. Goals and Scope of Research

Goals

In order to thoroughly and completely implement relevant laws and regulations, state agencies must set a good example and take the lead in eliminating employment discrimination in their recruitment of civil servants. Through the analysis of general ordinances and relevant laws and regulations, this report undertakes to clearly indicate the actual conditions of employment discrimination in the recruitment of civil servants, and to provide state agencies with policy recommendations for its prevention.

Scope

1. Central State Agencies

The present investigation takes as its primary subject the 2011 Civil Service Exam for central agencies and subordinate institutions. Specifically, it includes central party agencies and mass organizations, central state administrative agencies, subordinate institutions and representative institutions of the central state administrative agencies, and public institutions under the State Council administered according to the Civil Service Law. In all, 9,762 positions were covered.

2. Six Agencies

The People's Congresses, the People's Courts, The People's Procuratorates, The Women's Federations, The Federations of the Disabled, and the Trade Unions



II. Standards and Identification of Discrimination

Forms of Discrimination Included in the Report:

1. Gender Discrimination
2. Ethnic Discrimination

3. Social Status Discrimination
4. Disability Discrimination
5. Health Discrimination
6. Political Affiliation Discrimination
7. Age Discrimination
8. Discrimination based on Bodily Characteristics

III. Employment Discrimination Situation in Recruitment for Central Government Agency Posts

Overview

Because of institutionalized discriminatory policies based on age and health written into the “Standards for Physicals in Recruitment of Civil Servants (Trial Implementation)” and “(Regulations for Recruitment of Civil Servants (Trial Implementation),” levels of discrimination in recruitment of civil servants for central state agencies in 2011 were highest in these aspects - both occurred in 100% of positions. After this was discrimination based on political affiliation, occurring in 19.1% of positions. Gender discrimination was also fairly serious, coming to 15.6% of the total. Next was discrimination based on social status, occurring in 11.5%; and last was discrimination based on bodily characteristics, coming in at 0.4%.

Situation of Each Form of Employment Discrimination

1. Age Discrimination

Because the "Regulations for Recruitment of Civil Servants (Trial Implementation)" stipulates that only individuals between 18 and 35 years of age are qualified to test for civil service positions, and because this requirement is applied uniformly to all positions, we have counted age discrimination as occurring in 100% of cases.

2. Health Discrimination

Because health discrimination is implied by certain articles of the "Standards for Physicals in Recruitment of Civil Servants (Trial Implementation)" implemented in January of 2005, it exists by implication in the recruitment of civil servants. Similar to the situation with age discrimination, health discrimination occurred in 100% of central and local government civil service recruitment.

3. Political Affiliation Discrimination

Discrimination against political affiliation has always been relatively serious in the recruitment of civil servants. In this analysis, it affected 1861 positions, standing at 19.1% of the total, a fall of 21.69% compared with the previous year. Discrimination against political affiliation primarily appeared in the form of a requirement that applicants belong to either the Chinese Communist Party or the Communist Youth League.

4. Gender Discrimination

Compared to the results of the previous year, gender discrimination increased somewhat. Positions affected by gender discrimination increased from last year's 1203, or 12.96%, to 1519, coming in at 15.6% of the total. In the present analysis, these positions were for the most part limited to men or encouraged males to apply. As examined from the distribution of positions, discrimination primarily occurred in the railway public security system, maritime agencies, epidemic inspection within the immigration system, the coal mining safety inspection system, the public security system for shipping along the Yangtse River, the customs system, and so on.

5. Social Status Discrimination

Social status discrimination is similarly a historical “disaster area” in civil service recruitment. In this year’s examination, social status discrimination occurred in 11.5% of all positions. Among forms of social status discrimination, the most serious was discrimination based on household registration (955 positions), accounting for 85% of the total (1124). Identity discrimination and origin discrimination in turn accounted for 10% and 5% of instances of social status discrimination, respectively.

6. Discrimination based on Bodily Characteristics

In the present survey, discrimination based on looks has reduced: requirements such as those that applicants have “normal features, with good form and temperament” no longer appear. The newest revisions to article 3 of the “Standards for Physicals in Recruitment of Civil Servants (Trial Implementation)” made in November 2010 stipulated that those with difficult to cure skin diseases affecting the face, those having clear indications of disease in their appearance (such as abnormalities in the sense organs, uncorrectable torticollis, abnormal gait) are not allowed to apply for police positions.

7. Ethnic Discrimination

In the present study, we did not find any civil service requirements that excluded or limited applications from minorities. Giving preference to minorities is an internationally employed rectification mechanism, and we do not consider it to be discriminatory.

8. Disability Discrimination

In the current study, we did not find any specific requirements for bureaucratic positions that would clearly exclude the disabled; however, there are discriminatory provisions in the physical examination standards for civil servants. The “Standards for Physicals in the Recruitment of Civil Servants” does not have any regulations regarding amputees, but it does provide specific requirements for sight and hearing. The “Special Standards for Recruitment of Disabled Civil Servants (Trial Implementation)” not only contains requirements regarding sight, hearing and olfactory capacities, but also specifies that “those with limited limb function are not fit for service.”

Figure: Bar Graph Comparing Forms of Discrimination in the 2011 Civil Service Examinations for Central State Agencies

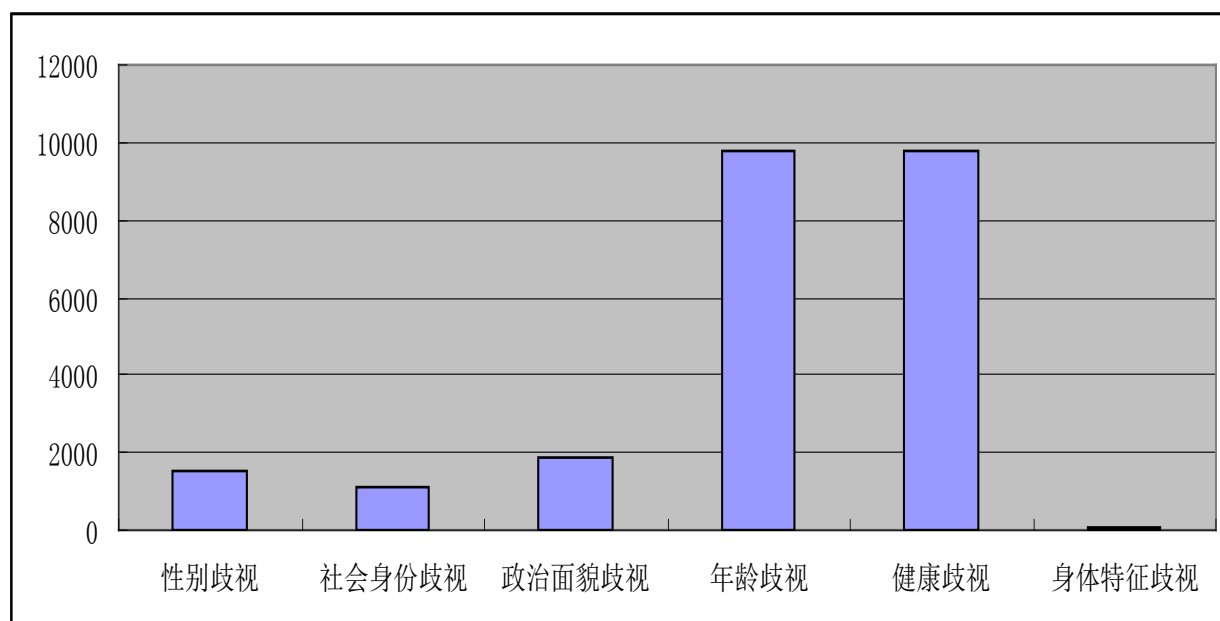
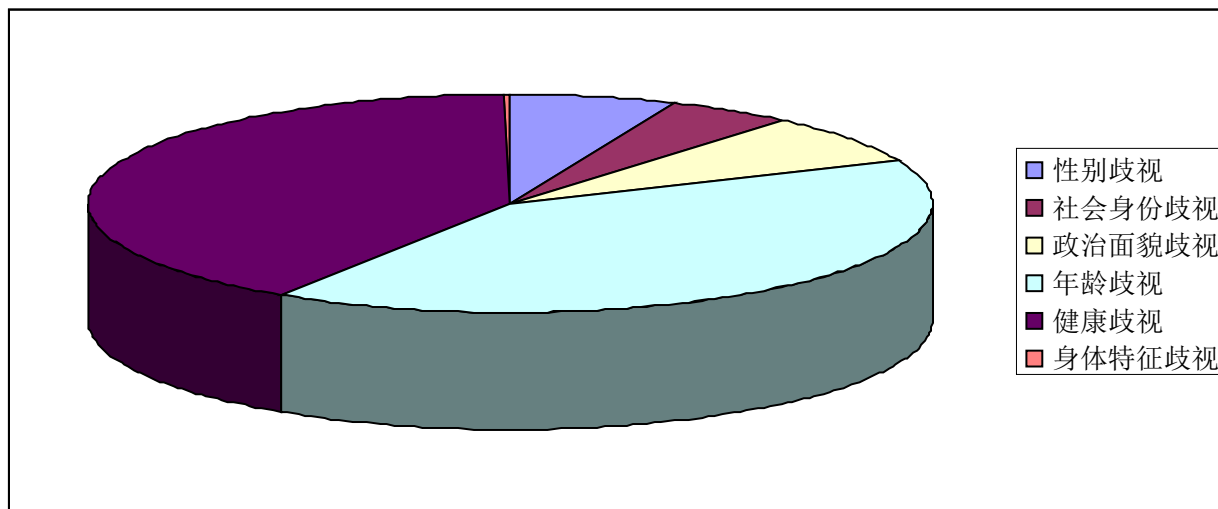


Figure: Pie Graph Comparing Forms of Discrimination in the 2011 Civil Service Examinations for Central State Agencies



IV. Employment Discrimination Situation in Civil Service Recruitment of Specific Ministries

1. People's Congresses

The present examination considered positions in people's congresses at both national and local levels, and includes both standing committee and special committee positions.

- **Political Affiliation Discrimination:** the main recruitment limitation for the People's Congresses is political affiliation. Overall, there were 30 positions affected by discrimination against political affiliation (38% of the total number), requiring that examinees be members of either the Communist Party or the Communist Youth League.
- **Social Status Discrimination:** of the 78 positions in the people's congresses included in our study, 10 were affected by discrimination against social status, coming to 12.8% of the total.

2. People's Courts

The study examined 3,005 positions within the court system comprising the Supreme People's Court and the administrative organs of each province. These included both judicial and administrative positions, as well as court police.

- **Gender Discrimination:** a total of 939 positions in the court system were found to constitute gender discrimination, standing at a total of 31.2% of positions within the court system.
- **Political Affiliation Discrimination:** our investigation discovered that 20 positions in the court system placed limitations on the political affiliation of the applicant.
- **Social Status Discrimination:** a total of 185 positions in the court system were found to be affected by social status discrimination (67 of which discriminated on the basis of household registration), standing at 6.2% of positions within the entire court system.
- **Bodily Appearance Discrimination:** in the recruitment process for civil servants in the court system, discrimination against bodily characteristics occurred in special bodily requirements for judicial police.

3. People's Procuratorates

The study examined the situation of employment discrimination in civil service recruitment for administrative positions in the People's Procuratorates in 15 provinces (the Supreme People's Procuratorate did not have a recruitment plan for 2011), a total of 2,232 positions.

- Political Affiliation Discrimination: in the procuratorial system, there were a total of 58 positions affected by political affiliation discrimination, standing at 2.8% of the total.
- Gender discrimination: the gender discrimination situation in the procuratorates was similarly serious. There were a total of 729 positions affected by gender discrimination, coming to 32.7% of all positions within the system.
- Social Status Discrimination: there were a total of 125 positions affected by discrimination against household registration, standing at 5.6% of positions within the procuratorial system. A total of 80 were positions that fell under preferential policies for grass-roots service staff.

4. Women's Federations

The present study examined 42 positions in the women's federations. There existed multiple forms of discrimination, including gender discrimination.

- Political Affiliation Discrimination: compared with gender discrimination, the rate of discrimination against political affiliation in recruitment was higher, affecting 10 positions or 23.8% of the total.

5. Federations of the Disabled

The present study included 33 positions within the federations of the disabled. There occurred for the most part only one form of discrimination, that against political affiliation; there was also an instance of social status discrimination.

- Political Affiliation Discrimination: there were a total of 5 positions within the Disabled Federations affected by political affiliation discrimination, standing at 15% of the total.
- Social Status Discrimination: discrimination based on household registration is relatively serious in Hainan, and this was true as well for their Federation of the Disabled, which has clear limits on the registration and birthplace of its workers. Aside from this, discrimination against examinees' social status also appeared within the system of the Federations of the Disabled in the form of a "grass-roots service staff" position.

6. Trade Unions

There were a total of 114 positions in the trade union system. Employment discrimination was primarily comprised of the following types: political affiliation discrimination, social status discrimination, gender discrimination, and educational discrimination.

- Political Affiliation Discrimination: similar to the situation in other departments, discrimination against political affiliation was the most common type within the trade unions. Specifically, there were 27 positions within the trade unions affected by discrimination against political affiliation, a total of 23.7%.
- Social Status Discrimination: discrimination against social status in the trade unions included identity discrimination in the form of "preferential selection for grass-roots service staff," as well as through discrimination based on household registration. 11 positions were affected by social status discrimination (8 from identity discrimination, and 3 from discrimination against household registration), coming to 9.6% of the total.
- Gender Discrimination: in the recruitment of civil servants for the trade unions, there were 5 positions affected by gender by way of restriction to male candidates, standing at 4.4% of the total.

V. Recommendations for Reform and Institutional Measures

1. Establish a principle of equality and eliminate misunderstandings
2. Dispose of "illegal laws" and eliminate institutional discrimination
3. Make efforts towards institutional development and attain fairness in employment
4. The establishment of limitations on employment must be regulated by law

VI. Media Reports and Societal Response

The publication of the "Research Report on Employment Discrimination in 2011 Civil Service Recruitment" was reported widely and thoroughly in several newspapers and periodicals, including "Southern Weekly," "Legal Daily," "Democracy and the Rule of Law Times," "Outlook Eastern Weekly," "China Women's News," "The Beijing News" and so on. It also saw heated discussion on several websites including those of Xinhua, QQ, Sina, China News and so on. The Guangdong TV and Dragon TV radio and television stations ran programs on the report. Public response was quite strong, with the head of the Bureau for Civil Service Examination and Recruitment Nie Shengkui responding personally that he does not think employment discrimination exists in the civil service examination.

Survey Report on Gender Discrimination in China

*Li Ao, Luo Ying, and Yan Dingguo**

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Yan Dingguo, vice director of the Legislative Affairs Office of the Government in Jiang'an District

This report consists of four parts: I. Background and Issues; II. Overview of the Survey; III. Objectives and the Questionnaires; and IV. Survey Results and Analysis. Below are excerpts from Part IV: Survey Results and Analysis

IV. Gender Discrimination in Marriage and Family¹

1. Reality of Domestic Violence and Sexual Harassment

Domestic violence and sexual harassment have increasingly become the focus of attention in most societies. The Convention on the Elimination of All Forms of Discrimination against Women defines domestic violence and sexual harassment as forms of gender discrimination. The Law on the Protection of Rights and Interests of Women also provides that women shall be protected from domestic violence and sexual harassment.

In this survey 20.6% of respondents acknowledged suffering domestic violence, impressing researchers with the difficulty of conducting a survey on such issues. The traditional pattern is to regard domestic violence as a private, ignominious family affair that should be covered up. Furthermore, the presence of other family members may be a barrier to obtaining honest answers. When asked “Have you suffered sexual harassment?” 9.8% of respondents gave an affirmative answer; 6.4% thought it hard to say; and the remainder answered negative.

These figures deviated greatly from the reality we have observed nationwide or even worldwide. Sexual harassment has become a common offense in the workplace because with social advancement women enjoy access to more jobs and involve themselves more in society, which expands their sphere of movement and creates more opportunities for contact between men and women. Compounding women's plight, not all people sympathize with victims of sexual harassment, and some even blame the victim. In such a hostile moral climate, most people view sexual harassment as a scandal but are reluctant to acknowledge women as unwilling victims. In addition, the term “sexual harassment” is exotic and spread worldwide through the women's movement. In China, although sexual harassment is prohibited by law, its definition is not clarified and is highly controversial, resulting in the lack of uniform criteria for identifying sexual harassment.² Therefore, people may have ambiguous and diverse understandings of

* Li Ao, Professor, Wuhan University, Law School; Luo Ying, faculty of Wuhan University Institute of Quality Development Strategy; Yan Dingguo, vice director of the Legislative Affairs Office of the Government in Jiang'an District. This is an excerpt from Research Report of Gender Equality in China, published by China Social Science Press, June 2008. The project was funded by the George Washington University Law School and CLD Consultants (Beijing).

¹ Li Ao, Luo Xuan: “Theory and Empirical Analysis on Gender Discrimination,” *The Quest*, Issue 12, 2006.

² In the Measures of Shaanxi Province for Implementation of the < Law of the Peoples Republic of China on the Protection of Rights and Interests of Women > (Draft), “sexual harassment” is defined as any unwanted conduct of a sexual nature against women, including verbal conduct, words, pictures, electronic information, and physical conduct containing any obscene, pornographic information, or sexual advances.

sexual harassment. A victim may not even be aware of suffering the impacts. Survey results show that public spaces and the workplace are primary venues for sexual harassment.

Women are more likely to become the victims of domestic violence and sexual harassment, as shown by our survey. Survey results (Table 5) indicate that women are more likely to suffer from domestic violence. That is also the case in surveys on sexual harassment. Many more women than men are sexually harassed. Women are in a disadvantaged position in the face of domestic violence and sexual harassment and thus need more protection.

Table 5 Proportion by Gender of Domestic Violence and Sexual Harassment Victims (%)

	Domestic Violence		Sexual Harassment	
	Male	Female	Male	Female
Yes	20.9	22.7	7.0	12.9
No	76.9	14.7	85.3	78.6
Hard to say	2.2	1.9	5.0	7.0
(n=900)	(455)	(435)	(455)	(435)

2. Obstacles to Combating Domestic Violence and Sexual Harassment: Personal Reactions and Choices

Both domestic violence and sexual harassment have spread from private to public areas. Most victims of domestic violence or sexual harassment dare not reveal or resist it, though many understand that domestic violence and sexual harassment are no longer trifles or private affairs, but constitute a violation of human rights. Survey data (Table 6) show that the vast majority (70.0%) of respondents regard gender discrimination sufferings as “shameful.” “Shameful” applies at both personal and social levels, indicating that victims feel shamed by suffering domestic violence or sexual harassment, so they are not willing to disclose or resist but choose to submit in order to protect personal or family reputation. That means personal shame and social stigma are the major barriers against individuals fighting domestic violence or sexual harassment.

Individual reactions to domestic violence and sexual harassment reflect one’s awareness of gender anti-discrimination. It is shown by analysis results (Table 6) that when domestic violence or sexual harassment occurs, nearly half (42.7%) of respondents choose to resist and 31.9% choose to seek help. Under the designed scenario, more people took action against domestic violence and sexual harassment.

Table 6 Causes for Silence on Domestic Violence or Sexual Harassment and Modes of Reaction (%)

Category	Sample Characteristics	Frequency	Percentage (%)
Primary cause for concealment of and submission to domestic violence or sexual harassment	Afraid of retaliation	203	22.6
	Unable to resist	206	22.9
	Consider it shameful	630	70.0
	Consider it normal	78	8.7

n=900			
Modes of reaction to domestic violence or sexual harassment	Escape	47	5.2
	Tolerate	116	12.9
	Resist	384	42.7
	Seek help	287	31.9
	Others	29	3.2
n=900			

Note: 1-2 options can be chosen for Category I

3. Recourse against Domestic Violence and Sexual Harassment

What recourse citizens choose against domestic violence and sexual harassment has two implications: First, percentages using these recourse avenues reflect whether the current remedy mechanism is reasonable for domestic violence and sexual harassment and whether remedies are effective. Second, whether citizens take legal recourse reflects their awareness of their rights.

According to survey results, when they have to seek external recourse against domestic violence or sexual harassment, 42.8% of respondents chose to seek help from relatives, friends, and neighbors; 41.0% chose public security authorities; 24.2% chose courts; 20.3% chose women's federations; 17.9% chose neighborhood committee or village committee; 10.9% chose complaint with supervisors of working units; 8.8% would seek help from news agencies, and 2.3% chose other methods. It's clear that most people chose private means. On the one hand, the result exhibits the special nature of domestic violence and sexual harassment compared with other infringing acts, i.e., they occur mostly between people who know each other, in which case private means may be more effective in problem solving, on the other hand, a large portion of people regard domestic violence and sexual harassment as private affairs and exclude them from the realm of public power. Public security authorities are also chosen by a large percentage of respondents, only 1.8 percentage points less than those seeking help from relatives, friends, and neighbors, followed by courts, women's federations, neighborhood committees or village committees, supervisors of working units, and news agencies in descending order.

As shown by gender analysis on recourse against domestic violence or sexual harassment (Table 7), many more women than men chose recourse through relatives, friends, and neighbors, indicating that women are more willing to tackle problems by private means. As indicated above (Table 3), women are more likely to become victims of domestic violence and sexual harassment. However, women victims would choose more moderate means of recourse than men. Survey results show women have stronger mental resistance to traditional beliefs. The shift from strong awareness of resistance to weak actions reveals that women are confronted with a series of social and family barriers to their fights against gender discrimination. A higher percentage of men chose public remedies than women, excepting recourse to women's federation. In particular, a wide difference is seen between percentages of men and women choosing recourse through public security authorities and courts. It indicates that improving women's capabilities is more important than increasing their gender awareness. Insufficient involvement in social life, lack of knowledge about law, and financial weakness are all obstacles to women's pursuance of their rights. It should be noted that 32.9% of women respondents chose recourse through women's federations, second only to public security authorities, indicating that women's federations at all levels have won broad recognition by women.

Table 7 Choice of Recourse by Gender (%)

Category	Gender	
	Male	Female
Relatives, friends, neighbors	41.3	45.1

Supervisors	14.1	8.0
Resident village committee	18.9	17.2
Women's federation	9.0	32.9
News agencies	9.0	8.0
Public security authorities	46.4	36.3
Courts	27.3	21.6
Others	3.0	2.0
(n=900)	(455)	(435)

Note: 1- 4 options may be chosen for recourse.

V. Gender Discrimination in Education

1. Gender Preference in Education Investment

Education plays a crucial role in the growth and development of individuals. It also provides a ladder to elimination of gender discrimination and to pursuance of gender equality. Whether gender choices exist in education investment or which choice is made determines the availability of education resources for individuals according to their gender. That has a direct effect on whether an individual has good opportunities for growth and development. We designed different scenarios for this survey.

First, a survey was undertaken on whether citizens make gender-based choices on child education given limited education resources. We designed this scenario: "You have one daughter and one son attaining school age, but you are financially troubled, and borrowing is impossible." As shown by survey results, 3.3% of respondents chose to send neither to school; 8.6% chose to send the son to school first and keep the daughter at home until they can afford her education; 2.4% chose to send the daughter to school first and keep the son at home until they can afford his education; 67.9% chose whichever is more eager to go to school; and 16.4% chose other options. The results indicate that most people base the choice on academic skills of children rather than gender, especially in urban areas where citizens are financially stronger. One-child families do not need to make such a choice. Therefore, gender discrimination in urban areas is seen primarily in employment, while limited education resources and girl dropouts still exist in rural areas. It is also shown in our survey that almost three times as many respondents chose to send the son to school first as chose to send the daughter first. That represents the reality in rural areas. The direct reason for more girl school dropouts than boy school dropouts can be found in gender choices in education investment.

2. Gender Preference in Academic Subjects

In academic subjects there is a pervasive traditional belief that girls are more suitable for the arts and boys are more suitable for the sciences depending on their ways of thinking. This is in fact a gender characteristic imposed by society on individuals. We analyzed the issue in anticipation of testing people's gender awareness based on gender choices in academic subjects.

As shown by survey results, the percentage of respondents choosing the arts for their daughters is almost nine times that of respondents choosing the arts for their sons, and the percentage of respondents choosing the sciences for sons is over three times that of respondents choosing the sciences for their daughters. These figures reveal that though the majority of parents are open-minded toward making a fair choice, some parents still believe that women are suitable for the arts and men are suitable for the sciences, illustrating how traditional beliefs are deeply ingrained in individuals.

3. Gender Discrimination in Textbooks

Researchers find that gender inequality ideas are grafted into the minds of children early in their socialization, e.g., by means of schoolbooks.³ In the survey, when asked “Have you noticed any gender discrimination in current schoolbooks in primary and middle schools in our country,” 11.1% chose “yes”; 14.3% chose “no”; and 73.1% chose “not aware of the issue.” The vast majority of respondents are not aware of the issue. In reality, however, gender discrimination is quite common in schoolbooks. People investigating illustrations in Chinese textbooks under the former five-year primary education system found that there were 140 male characters and only 42 female characters in these illustrations. Male characters were mainly heroes, leaders, and soldiers, while female characters were principally primary school teachers, doctors, nurses, or farmers.⁴ Gender discrimination is common in schoolbooks but receives little attention.

Table 8 **Distribution by Gender Awareness of Gender Discrimination in Schoolbooks (%)**

	Gender	
	Male	Female
Yes	12.1	10.3
No	16.3	12.6
Not aware of the issue	71.6	76.1
(n=900)	(455)	(435)

4. Different Education Styles Based on Gender

Parents’ styles of child rearing exert a subtle influence on children’s growth. A popular view is that parents should use different styles for boys and girls: Boys are encouraged to be strong, independent, and responsible, while girls are expected to be gentle, considerate, and understanding. In the survey 24.2% of respondents considered it “true,” 51.9% “partially true,” and 22.8% “untrue.” The results show that these educational styles are recognized more or less by the vast majority of people. Scientific researchers find that boys and girls are equal in intelligence and each has their own strengths: boys have more approaches of problem-solving, while girls have analytical minds and good memory, but these are not absolute. The differences can be eliminated by proper training.⁵ Parents may stereotype gender roles in education under the influence of traditional beliefs, and make such choices accordingly.

Gender analysis (Table 9) shows that men gave more support to using different education styles for boys and girls. As indicated above, women – as victims of gender discrimination under the long-lived dominance of patriarchy – may feel more deeply about the harm rendered by gender discrimination, and some women have stronger rejection awareness. Still, as the vested beneficiaries of gender discrimination, men are unwilling to change the existing landscape of benefit distribution between the sexes. It should be noted that among respondents who considered the traditional belief “partially true” the percentage of women (55.4%) is higher than that of men (49.5%), and women holding such an attitude account for the highest percentage, more than one half. These figures show that women may also become supporters of gender discrimination.

³ Zha Xiaohu, Chen Yumei, “Approach to Gender Equality – Analysis on Education Equality from Gender Perspective,” *Journal of Anhui Institute of Education*, Issue 2, 2003.

⁴ Mining materials for “Study on Gender Discrimination and Public Education,” Project of Law School of Wuhan University, September 2005.

⁵ “Insights into Gender Discrimination in Family Education,” http://www.qh.xinhuanet.com/2004-12/16/content_3399701.htm, about interview on 13 December 2006.

Table 9 Distribution by Gender of Attitudes toward Differentiation in Education Styles (%)

	Gender	
	Male	Female
True	29.7	19.1
Partially true	49.5	55.4
Untrue	20.8	25.3
(n)	(455)	(435)

VI. Gender Discrimination in Employment

1. Reasons Given for Employers' Preference for Men

Employment opportunity discrimination is a major form of employment discrimination. In reality many employers prefer to hire men. We conducted a survey on causes of this bias. Data show that 45.4% of respondents attributed it to physical characteristics of women; 34.1% thought women shoulder heavy housework; 51.9% attributed it to the nature of the jobs; 13.4% thought women are psychologically weak; and 4.3% chose other reasons. The results show most people think employers make gender choices in employment according to the nature of the work and thus tend to hire men, but the assignment of jobs that fit women and jobs that fit men is a gender disparity imposed by society. Making choices based on such beliefs obviously violates the gender equality principle. A large portion of respondents attributed the difference to physical characteristics of men. Respondents holding this opinion are a slightly smaller percentage than those who attributed it to the nature of work. Furthermore, this opinion shows a lack of understanding. Some respondents chose the heavy burden of housework on women as the cause, a very important objective constraint on women's employment. Finally, a fraction of people attributed it to a psychological weakness in women.

News media play a notable role in the fight against gender discrimination in employment. For a long time literature, the arts, and news media have frozen traditional gender roles and furthered gender discrimination, consciously or unconsciously. Even today, discrimination has its way despite rising voices against it. A national newspaper once published an article titled "Do not Abuse the Concept of Gender Discrimination,"⁶ which explicitly opposes gender discrimination in employment but then claims that many current practices are not gender discrimination and are instead "based on reality and done for promoting business development of employers and career development of college graduates"; for example, female students "are not suitable for jobs that require handling of heavy objects, going out at night, frequent business travel, or exposure to chemical pollution," implying that only easy, daytime, office-based and pollution-free jobs are suitable for women.

Notwithstanding, the "reality" known to everyone is that in the labor market supply exceeds demand, and all college students are faced with employment difficulty, making it impossible for female students to choose such jobs. Even when they are available, employers may tend to hire men first. Therefore, "for the interests of female students" results in exclusion of women from competition and forces them to accept the idea that "a good marriage is better than a good education" and therefore a woman should take on the responsibilities of housekeeper. Furthermore, the article held that since female students have difficult access to employment, the percentage of girls should be limited when colleges recruit students.

⁶ *China Education Daily*, 3 April 2007, p. 2.

The newspaper article takes as an example a vocational college that set no restrictions on gender ratios in recruitment “for fear of being accused of gender discrimination,” resulting in female students accounting for 40% of the student body, which translated into a big problem in employment of female graduates. For that reason, the article suggested that “education authorities and colleges should take gender into account when setting curriculum and determining the number of students, and ‘properly’ adjust the gender structure.” Given that view, it argued, women should give up their places to men in this competition, or the sexes should even start from different starting lines. Discrimination in employment is thus extended to education and widens the disparity between the sexes, called in Europe the “gender gap.” If decision-makers support that view, the result will be difficulties in taking effective action to prevent gender discrimination. If lawmakers adopt that view, they will make it harder to enact effective laws prohibiting discrimination, and thus erect a further obstacle to creating a public atmosphere supportive of non-discrimination.

2. Legislation on Gender Discrimination

In employment, the difference in retirement ages of men and women has triggered wide discussions in academic and professional communities. In February 2006, Ms. Zhou from Pingdingshan, Henan Province filed a lawsuit concerning sexual inequality in retirement ages, which drew wide attention. We conducted an analysis on the issue in our survey. When asked about their attitudes toward legal provisions that provide different retirement ages for men and women, 40.7% of respondents held an affirmative attitude, followed by 31.4% holding an indifferent attitude, and 26.3% holding a negative attitude. That fewer than 30% of people oppose such provisions shows that the public’s attitudes deviate from those of academic and professional communities. Retirement ages have never changed in China. Men and women retiring at different ages have come to be perceived as natural or normal. In addition, legislation favoring different retirement ages between the sexes is framed as “protecting women.” Gender analysis on public attitudes (Table 10) finds that the percentage (43.7%) of men holding an affirmative attitude toward different retirement ages between the sexes is higher than that of women having the same opinion (38.2%). Most men benefit from such legal provisions, which in fact deprive women of employment and promotion opportunities. These legal limits allow men greater potential for development. Consequently, more men support these legal provisions.

Table 10 Distribution by Gender of Attitudes toward Legal Provisions for Different Retirement Ages (%)

	Gender	
	Male	Female
Affirmative	43.7	38.2
Negative	22.9	30.6
Indifferent	32.7	30.8
(n=900)	(455)	(435)

Theoretically, what citizens do once they are aware of legislation on gender discrimination can reveal their gender awareness and consciousness of the rule-of-law principle. Survey data (Table 11) show that the largest percentage of respondents would pay attention to relevant discussions and legislative changes, nearly half of total respondents. This result reflects individuals’ concern about gender equality issues. Though people give less consideration to gender equality when discussing retirement ages of the sexes, the focus on legal provisions embodying gender inequality can reflect citizens’ gender awareness to some

extent, and also reveal that Chinese citizens' awareness of rule-of-law has been improved in line with society's development.

Table 11 Distribution of Reactions to Legislation on Gender Discrimination (%)⁷

Option	Frequency	Valid Percentage
0	10	1.1
None of my business	137	15.2
Concerns about relevant discussions and legislative changes	414	46.0
Disclose to new agencies	99	11.0
Propose amendments to NPC	178	19.8
Others	43	4.8
9	19	2.1
Total	900	100.0

3. Remedies for Gender Discrimination

How individuals react to gender discrimination determines whether public power can interfere in gender discrimination. Public remedies are impossible if victims submit themselves to discrimination. The issue deserving more attention is how to enable people to have a correct understanding of gender discrimination and learn how to protect their legitimate rights and interests. When asked "What will you do if you suffer gender discrimination at work," 28.8% of respondents chose to resist, 14.7% chose to submit, and 54.4% chose "that depends." Only a fraction of respondents chose to submit, and more are bound to say "no" to gender discrimination. Nearly 30 percent answered that they would take action to fight against gender discrimination. Over half of respondents stated "that depends," possibly for fear of retaliation, so they would make the choice dependent on the effects on their interests under specific circumstances.

"Where there is a right, there is a remedy." Addressing women's right to employment equality means ultimately to realize women's rights. Therefore, learning how to provide remedies for women when they suffer from employment inequality is the key to the problem. Personal choices of existing remedies can reflect to some extent how well these remedies work. Survey data show that 36.1% of respondents would seek help from industrial arbitration bodies; 23.6% would go to the court; 26.3% would file a complaint with a women's federation or trade union; 20.2% would disclose to news agencies; 21.9% would report to supervisors; and 6.8% would choose other remedies.

These figures show that most people chose industrial arbitration in existing remedies, possibly because industrial arbitration is required before initiation of legal proceedings. Small differences are seen between recourse to court, to women's federation, to trade union, to new agency and to supervisors, of which women's federation and trade union were followed by court, supervisors and to news agencies in descending order. In the case of disputes, arbitration as an economical and efficient remedy is the preferred choice. Women's federations and trade unions also play an important role in protecting women's rights, while the role of news agencies is less recognized by women, indicating that gender discrimination does not receive due attention from public media.

⁷ 0 means omission and 9 means error in Table 12. Option 0 and Option 9 have the same meanings in all tables in this report.

An Analysis of Gender-based Occupational Segregation in China's Criminal Justice System

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Abstract: Gender-based occupational segregation can be found in many societies and is often rooted in the country's cultural tradition. Such segregation is also seen in China's criminal justice system, which includes the courts, the prosecutors' offices, the police, and the law firms handling criminal cases. In the justice system, gender still plays an important role in the division of labor. Statistics show that both horizontal and vertical segregations exist in this system. In terms of horizontal segregation, statistics indicate that women make up 20%-30% of the entire workforce in the court system and around 30% in the prosecutors' offices. The ratio is even lower for the police at only 12%, while law firms handling criminal cases have a more balanced workforce with over 45% of the staff as women. In regards to vertical segregation, surveys of the courts, the prosecutors' offices, and the police find that men move up the career ladder faster, rising to higher positions than women.

China's cultural tradition exerts a significant influence on gender-based occupational segregation in the criminal justice system. Horizontal segregation is caused by two factors. First, women are considered to be care-takers at home. Although many argue for work-family balance for women, statistics show 84.77% of women would choose family over career should conflicts arise. This indicates that modern Chinese women still feel the pressure to live up to traditional social expectations. Second, the feminine qualities of women, such as patience, considerateness and accessibility, actually put women at a disadvantage because they are often assigned to marginal positions such as mediators, juvenile judges, or even clerks for this reason. There are also two factors contributing to vertical segregation, including the feminine qualities and traditional role of women as care-takers, both of which mean fewer opportunities for promotion. For example, women are often not assigned to work at night because of their family duties, and night work is an important indicator for performance evaluation. Further, women's caution is often considered indecisiveness, which is undesirable for a leadership position. An additional contributing factor is that traditional gender segregation in social activities and the "drinking culture" prevents women from engaging in effective communication with bosses who make promotion decisions.

Gender-based occupational segregation in the criminal justice system is a much larger problem than just women's career development. The segregation also harms the development of criminal justice itself since the system is biased with a "men only" perspective. Enhancing women's roles and participation in the criminal justice system will help maintain social stability, ensure social progress, and will lead to better implementation of criminal justice policies, all of which will contribute to a harmonious society.

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中国刑事司法职业性别隔离分析

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在劳动力市场上,当某一个人口群体内部的职业分布与另外一个人口群体内部的职业分布差异较大时,可以认为这两个人口群体之间存在着职业隔离。当人口群体的划分主要是依据性别做出的,即不同职业中某一职业的男性和女性所占比例和另一个职业男性和女性所占比例相差悬殊,就认为存在着职业性别隔离现象。¹职业性别隔离包含两种形式:横向隔离和纵向隔离。²前者用以描述男女两性在不同职业之间的分布,后者用以描述相同职业中男女两性在不同级别职务上的分布。在中国,与刑事司法活动相关的工作单位主要包括法院、检察院、公安机关和律师事务所。根据相关实证数据,当今中国刑事司法职场上同时存在着横向和纵向的职业性别隔离。本文第一部分将对中国刑事司法职业性别隔离的现状加以考察,第二部分集中论述中国传统文化对刑事司法职业性别隔离的影响,第三部分进一步论述刑事司法职业性别隔离给中国社会带来怎样的影响,最后简要探讨未来增进女性参与刑事司法的可能途径。

一、中国刑事司法职业性别隔离的现状

(一) 横向职业性别隔离

社会学研究领域将女性比例超过70%的职业称为“女性职业”,女性比例低于30%的职业称为“男性职业”,而女性比例处于30%和70%之间的职业称为“中性职业”。³根据相关实证数据,中国女性在法院所有工作人员中所占比例大约为20%-30%,在检察院中所占比例为30%左右,而在公安机关,这一比例仅约12%;在

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¹ 杨伟国、陈玉杰、张成刚:“职业性别隔离的测度”,载《中国人口科学》,2010年第3期。上世纪六十年代,Edward Gross将性别隔离的概念导入学术领域用以概括男性和女性集中于不同职业的现象。

² 在有些文献中也称“水平隔离”和“垂直隔离”。

³ 吴愈晓、吴晓刚:“1982-2000我国非农职业的职业性别隔离研究”,载《社会》,2008年第5期。

以刑事案件为主要业务的律师事务所，男女人数比例则相对均衡，女性比例能够达到45%以上。⁴据此，在中国，刑事司法工作在相当程度上仍然是一个贴有“男性职业”标签的工作领域，是反映横向职业性别隔离的领域之一。

呈现上述比例分布的原因发生于两个层面：其一，招聘条件中有性别要求。某些单位会在部分岗位上明确表示招收男性，比如法医、侦查人员等。其二，招聘条件没有性别要求，但面试环节存在与性别相关的潜规则。根据目前的招聘状况，女性在笔试中分数考得高，许多时候力拔头筹，因此入围面试女性人数占优；面试是招考单位裁量力度较大的环节，经过面试之后公布的招录名单中女性比例相对较小，所有职位实际招录结果上，女性人数约占 20%-30%。⁵近年来的招录趋势是逐步加大面试成绩在总分数中的比重，招考单位的裁量力度增大。⁶

职业类别的详细程度对职业性别隔离的研究至关重要。职业类别越详细，评估获得的性别隔离程度越接近实际情况。因此，对相关单位内部职位安排是否存在性别倾向加以考察，是细化刑事司法职业性别隔离研究的重要途径。相关材料表明，刑事司法工作单位在内部职位安排上也存在着一定的性别隔离现象。考察这些单位的职位安排和未来招募态度可以发现如下倾向：其一，倾向安排女性担当后勤、文秘、书记员、外事工作等职位，这些工作多数属于司法机关的边缘业务，而非司法工作的核心业务；其二，倾向安排女性担当与暴力、体力无涉的职位，例如认为女性不适合从事侦查、执行等工作，甚至有些单位认为女性不适合从事刑事审判工作，因为工作压力太大；其三，倾向安排女性担当对口才或亲和力要求较高的工作，比如公诉、少年法庭等；其四，安排女性担当法律规定需要女性担任的某些工作，比如法警中必须有一定比例的女性。⁷

⁴刘玫主编：《刑事司法领域中的女性参与》，中国人民公安大学出版社 2011 年版，第 4、53、91、113、148、159 页。

⁵刘玫主编：《刑事司法领域中的女性参与》，中国人民公安大学出版社 2011 年版，第 11 页。

⁶“裁量决策”一词在性质上是中性的，但裁量决策者的视角及思维方式可能导致女性在就业中的不利地位。

⁷刘玫主编：《刑事司法领域中的女性参与》，中国人民公安大学出版社 2011 年版，第 9、58、92、118、149 页。

（二）纵向职业性别隔离

通过对法院、检察院、公安机关进行问卷调查，研究者们发现，这类单位的人事部门基本表示，在中层领导的选拔机会上，男女两性拥有相同的机会；在院级领导的选拔机会上，则有单位坦言男性的机会多于女性。在法院、检察院中工作的大多数女性和男性认为两性晋升机会相同，但持此观点的女性比例低于男性比例，换言之，与男性相比，较少的女性认为两性晋升机会相同。而在公安机关工作的女性则多数认为两性晋升机会不同。⁸

然而，客观数据更能说明问题。关于两性晋升次数的调研数据表明，获得一至两次晋升的工作人员中，男女比例相当，在某些单位中女性比例甚至略胜；但获得三次以上晋升的工作人员中，则男性比例明显占优。⁹ 法院、检察院领导性别比例的调研数据表明，在任何级别的法院、检察院，女领导比例均明显低于男领导比例；在具体的任一法院、检察院之中，女性在中层领导中所占比例（约在20%-30%之间，个别单位达到40%以上）高于在院级领导中所占比例（约在10%-20%之间）。进一步观察可以发现，在法院和检察院中，上级决策层的性别分布尚未对下级决策层的性别分布产生规律性影响。公安机关的情况比较特殊，局级领导中基本没有女性，中层领导中的女性比例在6%左右。与此形成鲜明对比的是以刑事业务为主的律师事务所，其合伙人中女性比例达到50%以上。¹⁰

据此，纵向职业性别隔离在法院、检察院、公安机关中客观存在，在公安机关中尤为突出。这些机关中女性的晋升机会呈金字塔状，随着晋升级别的提高而不断减少，遭遇着职场发展中的玻璃天花板。

⁸ 刘玫主编：《刑事司法领域中的女性参与》，中国人民公安大学出版社 2011 年版，第 16、33、76、93、101、122、134、151、154 页。

⁹ 刘玫主编：《刑事司法领域中的女性参与》，中国人民公安大学出版社 2011 年版，第 34、106、156 页。

¹⁰ 刘玫主编：《刑事司法领域中的女性参与》，中国人民公安大学出版社 2011 年版，第 5、54、91、148、159 页。

二、中国传统文化对刑事司法职业性别隔离的影响

职业性别隔离在许多国家普遍存在，并非中国特有的现象。但应当承认，各国职业性别隔离所寄身的环境土壤有所不同，换言之，职业性别隔离体现一定的文化特性。对这种文化特性加以分析，有助于我们有针对性地研究特定国家或地区的职业性别隔离现象并提出解决方案。

（一）中国传统文化对刑事司法横向职业性别隔离的影响

1. “坤位”与“主内”：传统文化中女性与家庭的特有关联

中国传统文化重视家庭，家庭伦理是国家伦理的基石。在这一伦理体系中，宗法血缘关系构成了国家结构的范型，而国家成为家庭的摹本。¹¹在家庭关系中，女性处于的“阴”的位置，即“坤位”。这种位置的属性，早在中国上古时代的卜筮之书《易经》里便已被规定好了：“坤，顺也。”顺，即顺从。¹²这样的伦理基础之上形成了“男主外女主内”的社会性别分工，优秀的女性在传统文化中被界定为孝妇、贤妻、良母。尽管“男主外女主内”的角色定位在今天的中国已逐渐淡化，孝妇贤妻良母仍然是社会和家庭对女性的最普遍心理期待。有观点认为现代中国女性兼顾家庭和事业，“贤妻良母”已被赋予新的内涵，但这种观点并未触及问题的本质，看到的只是女权领域的虚假繁荣。问题的关键在于当事业与家庭发生冲突，两者无法兼顾时，如何进行选择和排序。实证数据表明，84.77%的女性会首先选择家庭¹³。这说明当代女性仍受到上述传统伦理的影响，这种心理压力在一定程度上来自社会评价方面的顾虑。

据此，“男主外女主内”及其道德规范将女性的角色定位在家庭内部，而且这种观念至今仍然潜在地影响着中国社会。于是长久以来形成一种思维定势，认为女性与家庭有更多关联，有更多的持家责任；而家庭与工作之间的关系并不总能保持融洽，根据传统伦理，一旦两者出现不可兼顾的矛盾，女性往往被要求将家庭放

¹¹ 易银珍：“中国传统女性伦理观的基本内涵”，载《中华女子学院学报》，2006年第3期。

¹² 参见林丹娅：“中国女性文化：从传统到现代化”，载《厦门大学学报（哲社版）》，1997年第1期。

¹³ 薛彦华、马影、杨云云：“传统女性文化在当代的变革及原因分析”，载《河北青年管理干部学院学报》，2011年第3期。

在首位。刑事司法是压力较大、强度较高的工作领域，在这样的工作领域之中，工作与家庭之间的矛盾相对更为突出。受到传统伦理定位的影响，刑事司法领域的招考单位在招聘时往往基于保证未来工作效率、降低家庭对工作的影响的考虑，倾向于选择男性，使得女性在刑事司法领域的就业难度大于男性，目前中国的刑事司法工作群体总体上仍然以男性人数居多，刑事侦查工作中的横向隔离现象尤为突出；与此形成对比的是，公诉工作和刑事辩护工作基本达到了“中性工作”的性别比例要求。

2. “细致耐心”与“亲和力”：女性特质的传统认知

排除上述传统伦理因素，刑事司法职场为女性提供的机会是否的确与男性相同？这一问题的回答也许是否定的，至少是模糊的。根据相关调查，在招聘和职位安排的过程中，传统理解中女性的生理或性格特点¹⁴仍被用作重要的考量指标，人们普遍认为女性在司法工作中比较突出的特点是细致耐心 and 具有亲和力。这种认识和定位既是积极的，也是危险的。一方面，这一认识有助于发挥女性特质在刑事司法工作中的积极作用，例如主导和推进调解工作、少年法庭工作等；另一方面，这些认识并不与刑事司法机关的核心业务产生必然关联，反而表现出与某些边缘业务的需求更为接近，比如办公室、政治处、书记员等等，因此，这种特点上的界定具有一定危险性，容易将司法工作中的女性边缘化。此外，绝大多数司法机关认为女性不适宜从事对抗性大、压力大、强度高的职位（比如，检察院认为女性不适合担任反贪、反渎等工作¹⁵，公安机关认为女性不适宜担任预审等核心业务），然而，刑事司法本身在性质上正是司法工作中对抗性大、压力大、强度高的部分，前述断言可能导致女性被排挤出刑事司法核心业务领域。

而现实也印证了这种担忧并非杞人忧天，数据表明，中国女性在刑事司法机关中正在经历着被边缘化的过程，主要体现于刑事司法机关的职位安排倾向。考察

¹⁴ 有学者将之称为“性别刻板印象”。

¹⁵ 许多检察院表示，在反贪、反渎的审讯中，讯问对象往往级别较高，讯问（尤其是首次讯问）对抗性强、压力大，女性工作人员形象上比较“软”、同情心强，讯问效果不好。

刑事司法部门未来招募女性的职位倾向，其中重要倾向之一就是招募财务、文秘、政工、书记员等职位，这些不是司法工作的核心内容，而是边缘业务。“刑事司法女性参与”主要指涉的应当是女性对刑事司法核心业务的参与程度，因为这才是女性视角影响刑事司法公正性的途径，是研究刑事司法性别平等问题的价值所在。当前这种招募女性的职位倾向令人担忧。

（二）中国传统文化对刑事司法纵向职业性别隔离的影响

1. 女性社会角色与女性特质的传统界定

上文谈到“男主外女主内”的传统伦理以及女性特质的传统界定不但会对横向隔离产生影响，对纵向隔离也会产生一定影响。例如，在刑事司法机关，加夜班是工作中经常遇到的情况，而单位往往将这样的工作安排男性完成，并不是因为男性没有家庭，而是因为他们可以依赖女性照顾家庭，“男主外女主内”的传统伦理之下，人们已经对此习以为常。然而，这在客观上影响了女性的职业发展，因为与“加夜班”类似的情况还有许多，这些工作往往是评定工作业绩的重要基础，而业绩是未来晋升的重要考察内容。“巧妇难为无米之炊”，女性由于育儿持家方面的传统道德负担而丧失了获得这些业绩的机会，在职务晋升的角逐中亦难以胜出。

又如，有观点认为，作为女性优点的细腻和决策慎重在另一方面也会成为她们上升的“瓶颈”，成为她们缺乏全面、强劲、果断、迅速、深刻决策能力的偏见，成为女性不得不面对的“天花板”。¹⁶ 根据访谈，研究者发现刑事司法机关的工作人员认为女性领导的劣势在于威严不够、容易感情用事、太注重小节等。为什么认为“领导”必须威严，必须感情内敛，必须不计小节？因为当前社会认可的“领导形象”是根据男性特征描述的，男权文化给“领导”职位做了注脚。¹⁷ 而在刑事司法这个靠近权力中心的工作领域，这一问题体现得尤为突出。

¹⁶ 蔡定剑主编：《中国就业歧视现状及反歧视对策》，中国社会科学出版社 2007 年版，第 60 页。

¹⁷ 中国解放后的历史上，曾经经历过一个“男女都一样”，以“说男性的话、做男性工作、穿男性服装”为标志的“平等”时代，国家对“铁姑娘”加以表彰。这种情况实际是对性别平等的扭曲，以男性标准作为社会标准体现出男权在社会中的主导地位。

2. “男女授受不亲”以及“酒文化”

《礼记·内则》提出了隔绝男女的闺阁制度和与此相应的性别回避制度，与此相似的是孟子提出的“男女授受不亲”。后者经过漫长的历史沉淀，成为了中国民间世代相传的道德内容。“男女授受不亲”是性别回避制度的重要体现，它可能导致在某一社会中处于非主导位置的性别难以融入该社会的高级决策层，其实质是对非主导性别所接触的社会网络的限制。“男女授受不亲”，不只是一般理解意义上的肢体保持距离，其更为重要的社会功能在于限制两性之间的思想交流，并因此形成了同性之间的交流倾向。中国著名社会学家费孝通先生在其论著中指出，男女有别的界限，使得中国传统的感情定向偏于向同性方面发展，而不对异性希望心理上的契合。¹⁸ 这有些类似西方社会学界探讨的“社会网”理论，即，个体的非正式社会网络是性别分化的——男人的交往圈主要是由男人组成的，而女人亦倾向与女性朋友交流信息或交换意见。而且，这两种社会网里流通的信息也是不同的，女性社会网交流的信息往往是“女性化”的或与家庭或亲情有关，而男性社会网中流传的信息则是“男性化”的，往往跟事业与成就有关。

刑事司法工作者们坦言，实践中的晋升机会与领导对相关个体的了解程度息息相关。领导对相关个体接触和了解越多，越容易获得他/她在性格、人品、洞察力、判断力、人际交往能力等方面的信息，领导在提拔下属时，这些是除业绩之外的重要考量因素。目前刑事司法机关领导比例中男性明显占优，这使得女性下属出于相对不利的境地。男性领导更容易与男性下属建立积极的交流互动关系，与女性下属的交流则因为某些顾忌而无法同样深入。比如，在某些机关，男性领导听取下级汇报工作时，如果汇报人是女性，男领导往往会要求另一男下属陪同该女下属汇报，从而避免出现男领导与女下属单独身处办公室的情况。

“酒文化”加剧了上述隔离。酒桌是一个增进了解、促进交流的重要环境，这是中国特有的文化现象。中国自古以来便有许多体现饮酒与交流之间关系的诗词

¹⁸ 费孝通：《乡土中国 生育制度》，北京大学出版社 1998 年版，第 46-47 页。

或俗谚，如“酒逢知己千杯少”、“酒后吐真言”等。然而，这种交流方式同样镶嵌在性别隔离的伦理背景下。男人能够更好地运用好以酒会友的环境，通过酒宴拉近与领导和同事的距离，而女性却难以达到同等力度的效果。社会给予男女两性参加酒宴的机会不同，除了家庭需要女性照料的因素之外，男性通常喜欢拉上同性一同饮酒聊天，即便只有两人也可以，但却很少只叫上一名女性，因为“男女授受不亲”；社会对男女两性醉酒的宽容度和评价也不同，男人醉酒被认为是质朴实在，女人醉酒被认为是放纵无德。¹⁹

三、刑事司法职业性别隔离对中国社会的影响

通常认为，职业性别隔离的重大影响在于它对男女两性社会经济地位不平等所起的决定性作用。但与刑事司法相关的职业性别隔离，其影响却不仅仅存在于这一层面，而是更为纵深，因为刑事司法在性质上是一项具有决断性的工作，决定着刑事案件相关利益分配的实践。这便意味着，刑事司法职场的性别分布对两性的社会生存状况产生的影响不仅存在于职业发展领域，而且将会体现在刑事案件相关利益分配之中；此外，女性视角的增强将会对刑事司法的方法和发展方向产生若干重要影响。

（一）对女性在刑事司法领域就业及职业发展的影响

1. “点”的分析

刑事司法机关女性的收入与其它国家机关女性的收入是类似的，在整个社会的经济分层中处于中等位置。刑事司法机关中相同职务的男性和女性以及不同职务的女性在薪金待遇上基本没有差别。形象地讲，在刑事司法工作内部进行“横剖”，在某一具体的“点”上，基本体现不出性别隔离对经济地位的影响，这在很大程度上可能因为司法机关是国家机关，属于距离“再分配中心”较近的工作单位。²⁰

¹⁹ 中国政法大学刘玫教授主持的“刑事司法领域中的女性参与”项目结项研讨会上，若干来自实务界的专家提到了“酒文化”对职业性别隔离的影响。

²⁰ 在社会主义国家，再分配制度是掌控社会平等的重要制度，单位与再分配中心的距离将影响该单位中男女两性的收入差距。单位的级别和所有制直接表示了其相对于再分配中心的距离。级别越高，离再分配中心

但应当看到,经济收入并非刑事司法职场女性的唯一追求。女性加入刑事司法职场的人生事业价值在于参与到其核心业务之中,并对之产生影响,而现实中却存在职位安排中的性别倾向以及作为其结果之一的女性从业边缘化状况。相关问卷调查结果表明,对工作单位不满的女性中有一定比例的人坦言不满的原因是个人发展空间小或工作枯燥无价值。

2. “线”的分析

但若对刑事司法工作进行“纵剖”,就整条职场生命线而言,刑事司法职场上的性别隔离现状对该工作领域男女两性的经济收入产生影响,女性职业生涯的整体收入低于男性。原因主要存在于两个方面:一是女性在刑事司法领域的职场生命线总体短于男性;二是纵向职业隔离导致多数女性无法实现与男性同样的晋升,而不同的职位级别意味着不同的薪金待遇。

鉴于上文已经对纵向职业隔离多有论述,这里仅对职场生命线的两性差异加以展开。一方面,女性结束职场生涯的时间早于男性,这并非刑事司法职场的特有现象,而是普遍存在于公务员体制之中。根据国家法律的相关规定,包括刑事司法机关人员在内的公务员退休年龄是男性60岁、女性55岁。另一方面,近年来一个新的现象是女性进入刑事司法职场的时间总体晚于男性,由于招聘时潜在的性别倾向,同等学历条件下的法律专业男性毕业生更容易获得工作,而女性毕业生则要么选择其他行业,要么被迫继续“深造”,等待获得更高学位后再次尝试获得这一领域的就业机会,因此,进入刑事司法职场的时间相对晚于男性。²¹

越近;国有单位离再分配中心的距离较非国有单位更近。国家政权监管更多的是保护了处于等级地位较高的女性,而对处于再分配过程边缘的基层女性影响甚微。国有单位的女性受到平等主义保护更多,她们与男性收入的差距较小;而且单位的级别越高,女性受到的平等主义保护越多,她们与男性收入的差距越小。王天夫、赖扬恩、李博柏:“城市性别收入差异及其演变:1995-2003”,载《社会学研究》,2008年第2期。

²¹ 值得一提的是,有观点认为女性受教育的程度越高,就业的可能性越大,机会也将越多。(比如彭薇、王旭东:《多学科视野下的就业保障研究》,中山大学出版社2011年版,第163页。)笔者认为,女性受教育程度并不完全与其就业机会成正比,而是呈倒U型样态分布。获得高等教育对于女性就业是非常重要的,但与受教育程度的提高相并行的是年龄的增长,随之而来的是某些导致就业效果弱化的因素增加,例如,获得博士学位的女性并不比女性硕士更容易就业,因为女性博士的年龄更大,距离婚龄、育龄更为接近,而这是相关招考单位考虑的重要条件。

（二）对中国女性的社会生存状况的影响

研究刑事司法职场中各具体职位之间性别隔离的目的在于考察女性对刑事司法核心业务的参与程度，而研究女性对核心业务的参与程度的目的并不仅仅着眼于该职业领域中女性的社会经济地位，而是更为关注核心业务的性别分布对普遍意义上中国女性生存状况的影响，因为刑事司法是一项有关利益裁断的工作。在刑事案件的利益裁断者中是否拥有足够比例能够设身处地的倾听女性，理解女性，具有女性视角并对女性利益加以关照与主张的代表，对于该司法辖区中女性的社会生存与发展状况而言至关重要。当前刑事司法职业性别隔离的情况对中国女性的生存发展状况是不利的，已有来自实践的声音表示，刑事案件中的被害女性有时难以获得司法机关足够的理解与支持，比如严重家庭暴力案件中的女性、强奸案件中的女性。此外，女性被告群体的相关利益也值得关注。

（三）对刑事司法发展方向的影响

存在职业性别隔离的刑事司法工作在效果上的“单性化”的，如果性别隔离导致男性在刑事司法核心业务占据主导地位，那么刑事司法在工作思维和工作风格上便是“男性化”的。人们曾经给法律职业贴上“男性”的标签，因为法律职业的特性与男性气质相合，与女性气质相悖。然而，近些年来刑事司法的发展方向却在日益动摇这一论断，变革中的刑事司法体现出若干与女性气质更为接近的要求。如果职业性别隔离现象维继下去，可能在一定程度上牵制司法变革的脚步。

中国的刑事司法目前正在经历着向文化传统“螺旋上升式”的回归，意在弘扬中华优秀传统文化中的和谐精神，这种价值取向是东方文化不同于西方文化的重要体现。女性视角将在这场变革中发挥重要作用。女性伦理以“关怀”为其核心，关怀视角强调对事件情境关系进行细致分析的推理模式，试图兼顾事件相关的每个人员的利益，力争形成一个使各方利益冲突达到最小的事件处理方案。²²增进女性在刑事司法职场的参与程度，提升女性在法律职业共同体中的地位，把更多的女性视角

²² 孙菲菲：“论中国传统法律文化中的女性特质”，载《浙江大学学报（人文社会科学版）》，2009年第2期。

导入刑事司法，将会使刑事司法在秉持正义的同时，更具有关怀色彩，更注重社会关系的恢复和相关当事人的回归。刑事司法职业女性在这一层面所惠及的对象已不局限于女性，而是整个社会的稳定与发展，将给传统意义上刑事司法带来新鲜的力量，有效推进中国当前所倡导的和谐司法的刑事政策。

四、未来增进女性参与刑事司法的可能途径

（一）科技与刑事司法

长久以来，体质差别是刑事司法机关（尤其是侦查机关）倾向招录男性的重要理由，认为许多工作任务女性无法胜任。增强科技在司法中的应用力度，将有助于降低男女两性因为体质不同而导致的刑事司法工作能力差别。比如，发达的定位追踪系统可以使原来需要人力在室外（甚至野外）开展的工作转移到室内进行；又如，发达的刑侦鉴定技术可以大大提升物证在案件中的证明作用，使案件的证明不再严重依赖言词证据（尤其是犯罪嫌疑人、被告人口供），于是，讯问工作在刑事司法工作中的重要性降低，女性工作人员形象上的相对柔弱便不会像目前这样成为其从事反贪工作的主要阻碍。换言之，科技使得刑事司法工作人员在体制上的个体特性被弱化了，而这种弱化将能够增进女性的工作机会。

（二）领导层的女性比例

“男女授受不亲”的传统伦理仍对社会发展产生潜在影响，因此增大领导层女性比例具有重要意义。通过扩大女性在刑事司法机关领导层中的人数比例，有助于减小女性一般工作人员与领导层之间以及女性中层领导与高级领导层之间的交流沟通障碍，进而提高女性的晋升机会。目前中国的刑事司法机关中，亟待扩大的是女性在高级领导层中的人数比例。基于上文谈到的若干障碍，目前的一般晋升考评途径难以实现女性在高层领导群体中的比例提升。此时应当考虑适当政策的介入，增大扭转局面的干预力度，即，制定相关政策，要求增加高层领导中的女性比例。

这一思路具有可行的实践基础，因为中层领导群体中的女性数量相对比较可观，能够满足进位补充高层领导中女性比例的人力储备需求。

（三）持家责任的双向化

研究者发现，中国多数刑事司法工作人员不承认性别差异影响个体在工作中的境况和机会，但基本不否认甚至坦率承认育儿持家对个体在工作中的境况和机会有较大影响。换言之，刑事司法职场上男性与女性的发展机会不同并非因为女性是女性，而是因为女性需要育儿持家。实际上，一定文化背景下，家庭负担的潜台词依旧是性别。生理特征决定了孕产行为的主体只能是女性，而产后的养育以及其他一般性的家务琐事也因历史、传统和文化而与女性产生更大关联。于是，家庭负担之影响多数情况下转化为职场发展机会及话语权的性别差异。在女性无法完全“去家庭化”（至少孕产无法与女性分离）的背景下，也许可以考虑通过其他途径将育儿持家的责任双向化。比如，使男性也为家庭承担一部分就业机会和晋升机会的风险，正如已有专家提出，可以通过法律规定丈夫必须在妻子生育后也要休一段时间的产假，这不只是照顾妻子、帮助持家意义上的，更为重要的是，这有助于降低工作单位由于女性孕产而选择男性的招聘倾向，从而在一定程度上增进女性的就业机会。

（四）司法女性的选择权

有些客观上限制了女性在刑事司法领域发展的制度或做法是以保护女性权益的形式出现的，比如某些职位不任用女性是考虑到女性的人身安全，女性怀孕期间将其调整岗位是为了减小工作压力，规定女性 55 岁退休是照顾女性，让女性早些休息。但这种保护性的做法是否获得女性的一致青睐是值得思考的，因为这些做法并非完美到无可指摘，对职位的限制或调整岗位可能使女性在刑事司法职场上从事的工作边缘化，男女不同的退休时间使得女性的职场生命线短于男性。但将这些制度或做法统统推翻的做法也许并不是解决问题的最佳途径，许多女性可能不反对甚至可能喜欢这些制度或做法。较好的变革设计是在制度中赋予女性以选择权，比如，

将男女两性的退休年龄都规定为 60 岁，但女性可以在 55 岁之后便具有提前退休的选择权。

（五）立法和政策的重要性

立法与政策的立场对女性有效参与刑事司法核心业务具有重要推进作用，这不仅客观体现在司法机关实际招募职员时对既有法律、政策的重视程度和遵循力度上，也在与刑事司法工作人员的访谈中有所反映，有人认为女性就业的确困难，有必要针对招募环节进行性别立法，还有人表示就业问题上的确有性别平等立法的必要。当前的立法与政策明确要求女性参与的司法职位往往是基于对刑事案件女性当事人生理情况的照顾，而非从女性视角影响刑事司法公正的角度切入，仍有较大的完善空间。

Methodology Used in the Project “Women’s Participation in China’s Criminal Justice System” and Direction of Future Research

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Abstract: With support from the Ford Foundation, the Criminal Procedure Law Research Institute at China University of Political Science and Law implemented the project on Women’s Participation in China’s Criminal Justice System in 2009-2011, the first of its kind in the country. During the project term, team members conducted questionnaire surveys and interviews in courts, prosecutors’ offices, police departments, and law firms in several provinces and one municipality. One of the outputs of the project is the publication of a book titled Women’s Participation in the Criminal Justice System. This paper will introduce the background of the project, the methodology used, as well as the direction of future research.

Background: Criminal justice research is sensitive and complex in China because criminal cases are often associated with national and domestic security and human rights protection, both of which draw global attention. Further, the traditional gender-based division of labor is still accepted in today’s China, so women often play weaker roles. Women, including professionally successful women, lack the self-consciousness to participate. In an effort to maintain “domestic stability,” they oftentimes refrain from participating and outperforming their husbands.

Methodology: The general approach is empirical. We conducted questionnaire surveys and in-depth interviews, and we have strictly followed the standard procedure: identifying the subject pool (male and female staff of courts, prosecutors’ offices and law firms); sampling; designing research tools (questionnaires and interviews); conducting the survey (distributing questionnaires and holding interviews); and analyzing the data collected. The survey provides a general picture of women’s participation in the criminal justice system. Aside from empirical research, the project also applies gender analysis, specifically in designing the survey questions. We paid special attention to the following issues when taking this combined approach. We surveyed not only actions but also attitudes; conducted repeat interviews for follow up questions and corrections; and made both summative and formative assessments. Given the sensitive nature of the project and the need to protect subjects, the survey was conducted anonymously, and all data collected was treated as confidential.

The Project progressed from the traditional quantitative-only research to a combined approach. By including males in the survey, we increased the openness in subject responses. In the future, the project team will attempt to introduce sociological, psychological, and statistical methods in the research. We also plan to study women’s access to employment and career development in the criminal justice system; to explore how femininity influences the operation of the criminal justice system; and to provide recommendations for gender equality law based on data obtained.

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中国“刑事司法领域中的女性参与”项目的研究方法及今后的研究方向

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2009年初至2011年初,在美国福特基金会的资助和支持下,中国政法大学刑事诉讼法学研究所组织开展了“刑事司法领域中的女性参与”项目的相关调研活动。研究刑事司法领域中的女性参与,这在我国国内尚属首次。期间,项目组成员赴S省、SH省、N省、H省以及B市的人民法院、人民检察院、公安局以及律师事务所,就女性在刑事司法领域中的参与情况深入地进行了问卷调查和座谈交流,获取了较为详尽的基础数据,取得了一定的调研成果,在此基础上,出版了《刑事司法领域中的女性参与》专著一本,引起极大的社会反响,达到了预期的调研目标。为了从整体上介绍我们的项目,让更多的人了解我们的调研目的,现对本次调研采用的研究方法及今后的研究方向做一简要介绍:

一、中国开展“刑事司法领域女性参与”研究的背景和特征

(一) 中国的刑事司法领域备受关注

刑事司法领域具有复杂性和敏感性。具体说来:一、刑事案件有时牵涉政治因素,关系国家安全和社会稳定。二、刑事司法领域一直是国内外的“焦点”之一。三、刑事司法领域与保障人权密切相关,可以直观地反映出一个国家的人权保障状况,因此备受关注。可以想象,在刑事司法领域开展研究,需要面临更多复杂的和敏感的情形。

(二) 传统文化与观念影响女性作用的发挥

根据中国传统的文化与观念,男人以社会为主,女人以家庭为主。而今,这种思想非但没有得到根本性改变,反而出现了一定程度上的“回潮”,女性表现突出²。

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² 《社会性别文化的历史与未来》王凤华 贺江平等著 中国社会科学出版社 2006年3月第1版 第179页

男性养家糊口，即男性是生产活动承担者的既定观念占支配地位。而女性则承担三重角色，包括再生产活动（生养孩子的责任），家庭中的第二创收者参与生产活动，以及参与社区的管理工作（分派有限资源以保证全家生存的责任）³。相对来讲，男性的角色单一，处于强势地位；而女性则需要协调三种角色，处于弱势地位，往往被定位为受保护的群体。值得注意的是，女性的角色和地位在中国的南方与北方也略有差异，偏重不同。在北方，“大男子主义”相对盛行，女性倾向于顺从和让步，弱势地位明显；在南方，“大男子主义”影响力较小，女性受关照的程度较高，弱势地位不明显，但是仍然没有脱离被照顾的命运。总的来讲，我国传统文化与观念从外部给女性施加了无形的压力，很大程度上影响着女性作用的充分发挥。

（三）女性自身参与的主动性和积极性不高

从女性自身来讲，她们参与社会活动的积极度不高，自我觉醒的主体意识也并不强烈。调研过程中，我们了解到，即使是在事业上已经取得了一定成就的女性，她们继续奋斗的动力也不足，会出现主动的、有意识的止步不前的想法，目的只是为了不想在事业上超过丈夫以维系家庭的稳定性。另一方面，对于普通的女性，虽然在现实的求职过程中会面临很多无奈和阻碍，但是她们漠然接受客观状况的意识胜过主动争取权利的意识。

二、“刑事司法领域女性参与”项目的研究方法

（一）一般性方法：实证研究方法

实证研究方法就是通过多种渠道和方式收集经验事实，并且按照既定步骤，采用特定方式对这些材料进行分析、推理以检验命题或者建立理论学说的科学方法⁴。具体来讲，实证研究方法分为定量分析方法和定性分析方法两类。本次“刑事司法领域女性参与”特别注重了实证研究方法中的既定步骤和地点的选择。

³ 《社会性别研究选译》王政，杜芳琴主编 三联书店出版社 1998 年版 第 270-271 页

⁴ 《刑事诉讼法哲理思维》樊崇义 著 中国人民公安大学出版社 2010 年 7 月第 1 版 第 233 页

在定量分析中,最普遍的方法是调查研究。调查研究共分为五步:第一步是识别调查总体;第二步是选取样本;第三步是设计研究工具——问卷调查表、访谈或者测试;第四步是研究实施;第五步是分析资料⁵。本次研究严格遵循了此套程序和步骤:一、识别出调查总体是法院、检察院以及律所的司法工作人员(包括男性);二、抽样选取了一定量的样本;三、根据调查对象(法院、检察院和律所)的不同,设计了略有区别的研究工具,包括问卷调查表和座谈;四、具体的研究实施,包括先期发放问卷,进行简单的分析后确定时间进行集中座谈,也包括现场发放问卷,然后临场即兴座谈等;五、在综合了问卷统计、现场记录和录音资料的基础上,运用图表等工具对数据进行分析,然后得出直观的、基础的结论。

实证研究地点的选择很重要,特别是对于中国这样一个各地发展很不平衡的国家来讲。地点的确定要综合考虑以下因素:一、自然因素;二、经济因素;三、文化因素等⁶。本次调研顾及了这些因素。总的来讲,本次调研的情况能够基本反映出中国大陆不同文化底蕴、不同发展程度地区刑事司法领域女性参与的概况。

(二) 特殊性方法:社会性别分析方法

社会性别与生理性别相对,是指由社会形成的男性或女性的群体特征、角色、活动及责任,是社会对两性及两性关系的期待、要求和评价⁷。社会性别作为一种分析方法,或者一种分析视角,就是用社会性别的理念去观察和认识社会现象,以实现性别公平和社会性别主流化的思维方法⁸。社会性别的研究方法,不仅研究妇女本身,而且也关注两性的不同特点,且重点在于两性之间的平等关系⁹。

在本次“刑事司法领域女性参与”研究中,社会性别分析方法突出表现在调查问卷的一些问题的设置上以及按性别分列数据上。调查问卷中的很多问题,希望答题

⁵ 《社会学(第十一版)》[美]戴维·波普诺 著 李强 等译 2007年10月第1版 第46-48页

⁶ 《法律实证研究方法》宋英辉 王武良 主编 北京大学出版社 2009年10月第1版 第93页

⁷ 《社会性别文化的历史与未来》王凤华 贺江平等著 中国社会科学出版社 2006年3月第1版 第24页

⁸ 《社会性别视角应用研究》张莹 著 知识产权出版社 2007年6月第1版 第27页

⁹ 《社会性别平等与法律研究和对策》谭琳 姜秀花 主编 社会科学文献出版社 2007年1月第1版 第14页

者以男性与女性的不同特点为出发点来回答，比如“您认为，相对于男性，女性工作中有哪些优势？”等。另外，本次研究按照性别分列数据，即任何按性别交叉分类的数据按照女性和男性分别提供信息。

（三）结合一般性与特殊性方法研究女性

1、一般性方法与特殊性方法相结合

目前为止，没有一套专门的女性主义研究方法。但是，我们可以尝试一个方向，那就是将已经存在的研究方法，即一般性的实证分析方法和特殊性的社会性别分析方法结合起来，将女权主义理论与具体的研究方法联系起来。

2、本次研究采用的具体方法

当研究对象主要为女性时，采用以下具体的研究方法需要注意一些问题：

（1）调查（定量）

女性主义调查不仅调查行为，也调查态度¹⁰。本次研究的调查问卷中设计的问题，目的主要就是探知被研究者的态度，特别是在对男性被研究者与女性被研究者的态度的对比中，发现他们的不同倾向。

（2）访谈（定性）

半结构式访谈或非结构式访谈调查方式重视参与者的自由交谈，是一种定性的信息收集方法。它有别于问卷调查或结构式访谈，因为它能捕捉到访谈中研究者和被访者之间的即兴互动。是否给予被访者详细阐明问题或讨论的机会，是区分访谈调查和问卷调查的标志之一¹¹。本次研究中的座谈，没有事先限定谈话的具体内容，随性讨论（包括女性与男性之间自由争论）；也没有设定主导者，主张畅所欲言。

较之单次访谈，多次访谈可能更准确，因为这样，访问者就有机会提出一些后加的问题，也能有机会就此前获得的信息得到对方的修正反馈。随着时间的推移，研究者还能体会到，受访者的想法是怎样受到具体场景影响的¹²。

¹⁰ 《女性主义研究方法》孙中欣 张莉莉 主编 复旦大学出版社 2007 年 11 月第 1 版 第 140 页

¹¹ 《女性主义研究方法》孙中欣 张莉莉 主编 复旦大学出版社 2007 年 11 月第 1 版 第 76 页

¹² 《女性主义研究方法》孙中欣 张莉莉 主编 复旦大学出版社 2007 年 11 月第 1 版 第 94 页

（3）评价（定量与定性）

评价性研究分为两种：总结性评价和形成性评价。

总结性评价是对项目结果的评价，即评判项目所达成的效果。一般可以通过调查访谈、实验研究等方法进行。形成性评价是对项目过程的评价，涉及对项目实施过程中所采用的手段和方法的评判。形成性评价中收集的资料常常是定性的，但也可以是定量的资料¹³。这两种评价在调研报告中均有所体现。

不过，鉴于一些数据的敏感性（涉及到性别）和对参与调研的单位的尊重，我们除了以匿名填写问卷为原则外，应当注意采取必要的措施确保数据的机密性和安全性。

三、“刑事司法领域女性参与”研究的收获和今后的研究方向

（一）本次“刑事司法领域女性参与”研究的收获

1、由单一的定量分析逐渐转向定量分析与定性分析相结合

一开始，在 S 省、SH 省和 N 省进行调研时，我们较关注抽取样本的数量。因此，选取的样本并没有局限于刑事司法领域。比如，法院答题者的部门，既包括非刑事审判领域，也包括一些行政部门。后来，在 B 市律所和 H 省调研时，我们在保证调查样本数量的基础上，同时将关注的主体转向从事刑事司法工作的人员。另外，一开始，我们采取现场邀请有关人员填写问卷，随性座谈的方式，而后我们改变为事先发放问卷，提前回收并对问卷做简单分析后，有针对性地对一些答题者进行深入的访谈。

2、从主要关注女性被研究者群体逐渐变为重视男性被研究者的参与

根据 S 省的调研报告，法院和检察院参与问卷调查的男性只有 19 位，占 13.1%。在 SH 和内蒙，法院和检察院参与问卷调查的男性共 31 人，占 25%。到了律所，参与调查的男性有 6 人，占到 60%。在法院和检察院方面，男性参与人数

¹³ 《女性主义研究方法》孙中欣 张莉莉 主编 复旦大学出版社 2007 年 11 月第 1 版 第 208-209 页

有小幅上升，可对比的男性样本的价值越来越大。在律所样本总数较小的前提下，男性样本的数量首次超过女性。而且，在座谈过程中，男性的参与积极性较高，提出了很多真知灼见，对我们的研究很有启发。

3、从被研究者反馈的不开放性逐渐发展到被研究者畅谈的开放性

根据 S 省的调研报告，女性对某些题目不作答的情况多于男性，而且公职人员答题呈现模式化倾向，反映出这些答题者的反馈并不开放。到了调研后期，比如律所和 H 省，参与者的热情较高，没有过多顾虑，座谈气氛轻松、融洽，我们与参与者的信息互动非常频繁和充分。

（二）探讨今后的研究方向

1、引入社会学、心理学和统计学的知识，使今后的研究更加立体化

在有限量的样本中，采取座谈方式可以探知答题者的真实想法，但是在样本数量可观的情况下，全部采取座谈方式不太现实。因此，我们可以转换角度，在问卷的设计上寻找突破。例如，利用心理学的知识来设置问题，通过巧妙设计问题来避免答题者有意地或无意地不表达自己的真实想法。而且，我们的研究团队还要补充社会学知识，目的是从研究的社会、文化背景等角度切入和思考问题。另外，必须注意对资料进行解释而作出的结论不能超出资料和分析的范围。特别是在决策者并不善于使用统计数字的情况下，更应该清楚地解释研究结果在统计学上的意义与现实意义间的差异。只有在合适的时候，在明确参考了其他解释的情况下，我们才可以作出因果性结论¹⁴。因此，在今后的研究中加入了社会学、心理学和统计学的知识后，我们的研究成果所折射的信息将更加立体化。

2、理顺刑事司法领域女性就业状况，促进刑事司法领域女性更好地发展

我们在关注刑事司法领域中这些相对强势的女性群体发挥其积极作用的同时，她们的入职、晋升、发展方向等相关权益也日益引起我们的注意。调研的结果显示，刑事司法领域的女性在入职方面没有受到明显的歧视待遇，反而近年来由于采用统

¹⁴ 《女性主义研究方法》孙中欣 张莉莉 主编 复旦大学出版社 2007 年 11 月第 1 版 第 218 页

一的笔试招录方式，女性体现出一定的应试优势，法、检机关招用女性司法工作人员的人数在增加。在调研中，我们还发现女性在中层领导中的比例在 20%-30% 之间，而在院级领导中的比例则偏低，在 10%-22% 之间¹⁵。这反映出，女性在入职后的发展阶段，缺乏必要的机会平等，绝大多数女性在入职后很有可能陷入职业“滞胀”期。实际上，女性领导的比例上升，或者说给予女性更多的发展机会，有助于提升女性在刑事司法领域的话语权和决断力。特别需要指出的是，女性在刑事司法领域的职业发展直接影响到她们今后的作用的有效发挥，因此我们在今后的研究中要更加重视。

3、关注女法官、女检察官、女律师及女公安人员，探寻女性气质对刑事司法产生的影响

女性气质，是指女性应当具有同情心，令人感到亲切，对他人关心等亲和取向的一系列性格和心理特点。女性气质固有的内容包括三个成分：与家庭或关系相关的一切，温柔，爱整洁，依赖男性，以及与一切与男性气质相对立的特征¹⁶。女法官、女检察官、女律师及女公安人员，她们身上既有女性气质，同时又承担着刑事司法工作。今后我们可以将研究方法逐步转向以定性研究为主。女性特质究竟如何影响刑事司法工作，女性特质在多大程度上作用于刑事司法工作，女性将对刑事司法领域产生什么不同的效果等，将是我们后续研究中需要探究的问题。

4、引起包括刑事司法领域女性在内的全社会的关注，为中国完善两性平等法律提供参考

我们在研究中取得的基础数据都非常珍贵。前述中曾提到，刑事司法领域中的女性自身争取平等发展的积极性不高；在我国目前的社会现实下，对两性平等宣传的力度和广度还不够。基于这样的背景，此次调研的基本目的就是希望引起包括

¹⁵具体数据详见《“刑事司法领域中的女性参与”项目 S 省 CH 市调研报告》和《“刑事司法领域中的女性参与”项目 SH 省、N 省调研报告》

¹⁶《社会性别研究导论——两性不平等的社会机制分析》佟新 著 北京大学出版社 2005 年 7 月第 1 版 第 22 页

刑事司法领域女性在内的全社会对该领域女性的发展状况的关注，更重要的是，希望为推动我国的两性平等立法完善提供富有建设性的意见和建议。

Pregnancy Discrimination: Abrogation and Restoration of Rights

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Abstract: Although prohibition of pregnancy discrimination has been written into the law in China, including the Law on the Protection of Women's Rights and Interests, the Employment Promotion Law, and the Labor Contract Law, such discrimination is still widespread at the workplace. Not only pregnant workers, but also female college graduates fall victim because of their "pregnancy potential." Some employers are blatant, in that they prevent pregnant women from entering services, or sign employment contracts under which an employee will "voluntarily leave" once she is pregnant. Others take more subtle approaches, using a variety of excuses to impose unfair treatment on pregnant employees. For example, employers often transfer pregnant women to less important or lower positions and/or reduce their pay under the excuse of "pregnancy protection."

Experience of other jurisdictions in fighting pregnancy discrimination may provide reference for China. The United States has established a legal framework under Title VII of the Civil Rights Act and the Pregnancy Discrimination Act of 1978. The U.S. Equal Employment Opportunity Commission issued guidelines against pregnancy discrimination. The U.S. approach to pregnancy discrimination is one that evolves from pregnancy discrimination to gender discrimination and from case law to statutory law. In Taiwan, feminist groups used women's rights campaigns to push forward gender legislation, culminating in the adoption of the Gender Equality in Employment Act in 2001.

The fundamental reasons for the "abrogation" of pregnant women's right to work include the conflict of local culture with the transplanted law; concern of market entities over costs; administrative regulations that violate the law; and the employers' abuse of rule-making authority in businesses. Child-bearing is considered a "domestic affair," and it is commonly accepted that a pregnant woman is not qualified for work and should be excluded from the labor market during pregnancy. Under the market economy, costs of pregnancy were formerly assumed by the government; however, currently businesses have to absorb much of the costs. Another reason for "abrogation" is administrative authorities in China are often more powerful than the judiciary, so their decisions may distort the law. Lastly, businesses often make rules and formulate contracts detrimental to pregnant women by taking advantage of legal loop holes. To solve these problems, we should take a rights-based approach and transform the social culture about births, change the ideological foundation of the legislation, and reconstruct pregnancy discrimination. On the last measure, we should legally conceptualize pregnancy discrimination; define elements of such discrimination; and include pregnancy into the labor inspection system by establishing a specialized complaint mechanism.

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“怀孕歧视”：为什么有禁不止¹

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摘要：在我国，虽然法律规定了有关禁止对怀孕歧视的内容，并规定了怀孕妇女的职业权利，但现实中用人单位对怀孕妇女的歧视现象却林林总总，五花八门，并且越来越普遍化，高端化。形成立法与现实相左的悖论，究其原因是妇女的法定权利遭遇法律文化，市场经济甚至是行政规范的多重消解，致使怀孕女性母职与职业的冲突愈演愈烈，法律规定的劳动权与生育权遭遇侵害，这些问题的复杂纠缠，最终使国家威严的立法空洞化，本文认为怀孕歧视需要本土法律概念的重构。

关键词：怀孕歧视 权利 消解 重构

In China, although the law provides content relating to pregnancy discrimination and provides for the employment rights of pregnant women, in reality cases of employer pregnancy discrimination are numerous and varied, and increasingly universal. The formation of legislation has not had real effect because women's legal rights face a legal culture, the market economy and even administrative norms that discriminate based on motherhood and pregnancy. The law provides for labor rights and reproductive rights, but the complex entanglement of these problems has hollowed out the legislation. This paper states that pregnancy discrimination requires local reconstruction of the legal concept.

怀孕歧视是就业性别歧视的一种，法律规定基本完备，却有令不止，是我国目前反就业歧视中的一种吊诡现象，耐人寻味。

法定的权利只是妇女取得权利的一种机会，如果没有权利实现的文化与社会环境，权利将会遭遇多重挤压或消解，而带来与立法宗旨相反的后果。在我国，一方面，多部立法都有禁止怀孕歧视的规定，另一方面歧视大行其道。不仅是普通女性，就是处于就业高端的女大学生、研究生就业难，职业门槛难进，因为她们被作为“潜在的怀孕者”遭受就业市场歧视。好不容易进入职业也面临生育时的再次挤压。

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据一项对 2543 名产妇所进行的调查结果显示，四成多被调查者表示休完产假后难以回到原工作岗位，约人七成多企业女中层管理人员受制于生育。³个中原委，一般国内少有研究者关注，台湾学者郭玲惠、焦兴铠等曾对美国怀孕歧视的立法与司法案例作过系统的梳理，并结合台湾的情况进行了立法建构。本文试图从怀孕歧视的社会现象出发，探讨一种具有普世意义的妇女法律议题在中国成为法定权利后遭遇的多重消解现象，并提出一种重构的权利策略。

一、问题的提出：立法与现实的反差

怀孕歧视问题在目前中国还没有成为法律的一个论域，是因为我们几乎不费吹灰之力，已将之写进了法律，但是立法与现实在却存在较大的反差，在国际社会，法定权利与现实权利的落差往往是人权度量的一个指标，在有关妇女权利的立法与现实的差距似乎更能表明这一点。这也成为我国妇女界的一个困惑，我们已把西方人很难进法律的内容早已写进了法律，却会受到那么多的国际社会的批评。

1、立法：似乎面面俱到

我国现有立法直接或间接涉及怀孕歧视的内容可分为两个部分：

一是平等倡导：从宪法到劳动法、劳动合同法，再到妇女权益保障法均有所规定，如《妇女权益保障法》：第 22 条规定，“国家保障妇女享有与男子平等的劳动权利和社会保障权利”。《就业促进法》第 27 条重申：“平等的劳动权利”。这是中国关于男女平等的典型表述。

二是怀孕歧视禁止：虽然法律并没有命名更没有定义“怀孕歧视”，但相关的内容已经包括在里面了。这一内容又可分为录用性别歧视禁止、合同婚育条款限制的禁止和怀孕解雇和降低工资的禁止：

³陈道霖，《四成多女性生了孩子丢了位子，生育对女性职场发展有多大影响？》，《中国妇女报》，2007 年 7 月 24 日。

录用性别歧视禁止：如《妇女权益保障法》第 23 条：“单位在录用职工时，除不适合妇女的工种或者岗位外，不得以性别为由拒绝录用妇女或者提高对妇女的录用标准。”2007 年《就业促进法》第 27 条再次强调这一点，从立法技术上讲，“不得”字样是禁止性规范，具有较高的强制性。因为每个女性都可能怀孕，以怀孕为名的就业限制，实际上也就是对女性的拒绝。

合同婚育限制条款禁止：如《妇女权益保障法》第 24 条：“各单位在录用女职工时，应当依法与其签订劳动（聘用）合同或者服务协议，劳动（聘用）合同或者服务协议中不得规定限制女职工结婚、生育的内容。”《就业促进法》再次作了这一规定。

因怀孕解雇、降低工资禁止：如《劳动合同法》第 42 条，第四款规定女职工在孕期、产期、哺乳期的，用人单位不能依照本法第四十条、第四十一条的规定解除劳动合同。《妇女权益保障法》第 27 条同样规定：任何单位不得因结婚、怀孕、产假、哺乳等情形，降低女职工的工资，辞退女职工，单方解除劳动（聘用）合同或者服务协议。但是，女职工要求终止劳动（聘用）合同或者服务协议的除外。

初看起来，立法虽粗陋了一些，但似乎也面面俱到，并无太大的疏漏。

2、现实：怀孕歧视林林总总

1) 歧视公开且表现极端

怀孕歧视在国内不仅普遍而且具有公开性，而且方式极端。如有些用人单位明确规定，没有怀孕的女性才有资格进入职业，于是对应聘女性体验时公开增设有尊严的身体检验项目，这就是包括未婚女性在内的招聘体检中的“孕检”。如昆明某大学毕业的女学生高某，被昆明嘉百利商贸有限公司应聘，顺利通过了笔试和面试。正式上班前，被公司人事部要求做“HCG”怀孕检查，如怀孕要在人工流产之后才可来上班，不作孕检就不许上班。事发之后记者的调查进一步发现，当地有此规定的

单位竟有四成。⁴这样，非怀孕的单一女性身体成为了一种职业资格的前提条件，社会职业在很大程度上公开地排斥母职。

2) 劳动格式合同中的禁孕条款几成惯例

有些用人单位，“怀孕就走人”是惯例，当事人怀孕甚至根本没必要去理论。尤其是对外来工打工妹，越是临时的吃青春饭的行业，越是如此⁵。另外一种就是将禁止怀孕写入劳动合同，这种合同多是格式合同，根本不是当事人合意，为了当时找到工作，当事人不得不违心签订合同。”⁶研究生毕业的王某在与单位签订聘用合同时发现，合同中竟然有这样的条款：“5年之内职员不能怀孕，否则便以自动离职处理”。当时，她心里有点担忧，也有不服，可到底是求职心切，合同就签了。28岁时发现自己怀孕，想要孩子却又害怕因为怀孕，失去这个来之不易的工作。⁷武汉某商场与该女工签订的协议包括这样的条款：育龄女员工必须年满24周岁，在公司服务满二年以上方可在公司申请怀孕指标，不在公司计划安排之内，即使已在外申请了计划生育指标而怀孕生育也不能享受生育期间公司提供的工资及福利。这样就把企业的意愿通过一个要来无效的合同，强制变成了雇员的“意愿”，全是无效合同只在法律上对簿公堂时才无效，现实尤其是“现管”的效力不争的事实。如另一合同制女工肖某，与企业订立了为期10年的劳动合同。劳动合同中约定“从签订劳动合同之日起，5年内不准领、养小孩，否则一律开除。”当时肖某等人急于上班，没有对此提出异议。后肖怀孕，并萌发了生孩子的愿望。她将情况向厂里反映，主管厂长也没有表示异议。但当肖某提出休产假地政府及待遇时，厂里不仅不予批准，并且指出其违反厂规，又有合同约定在先，宣布将其开除。⁸

⁴金鑫，《公司规定新员工怀孕须流产，不做孕检不准上班》，《生活新报》，2006年09月05日。

⁵何伟等，《怀孕自动离职竟成惯例》，www.dianliang.com/hr/fawu/jiegu/200607/hr。

⁶张雨馨，《女性求职遭歧视现象：三年不许生育，何其霸道！》，《工人日报》，2005-09-14。

⁷《女职工5至10年内不准怀孕》，《华西都市报》，2003年08月20日。

⁸姜春康，《谁有权决定女性就业者何时怀孕？》，《法制日报》，2004年10月28日。

3) 用“生育保证书”方式把用人单位意志强加给应聘者

生育保证书，不是劳动合同，看起来像是员工的一种自愿行为，但实际上是用人单位强加给她们的。如在辽宁省人才市场举行的“重点企业、重点项目”招聘，沈阳市的周女士通过几轮筛选，最终获得某企业“综合办文秘”的面试机会。但就在她以为竞聘即将胜出之际，用人单位工作人员却说：“按照公司规定，未婚女性和结婚后没生孩子的女性，我们是不能录用的，除非与我们签订协议保证三年内没有要孩子的计划。生育保证书是由雇员个人向用人单位提出的保证，保证在工作的某些时段内不生育孩子，这比合同的禁孕条款来是更彻底，干脆是你个人的保证，违反了保证也是你个人的事，用人单位可以以此规避法律。如深圳某迅通信发展公司传呼部自 1997 年起，就对传呼部的女工制订了一条“不成文”的规定，即要求凡是到适合结婚、生育年龄的女职工在填写“续约征询表”的同时，如果想继续留任的，均要立下一份名为“生育保证书”的字据，内容如下：本人某某保证在某年某月至某年某月的合同期内不怀孕，如有违反将做自动离职处理。⁹由于妇联的介入，引起社会关注导致诉讼。

4) 以“孕期”保护为名降低工资或职务

职业妇女的“四期”尤其是孕期保护性立法，具有中国特色，用人单位也往往打着保护孕妇的旗号，待遇怀孕妇女的待遇或降低职务。这是一种最普遍的现象，因其往往以照顾母婴健康为名，又难以进行权利救济。笔者在长期的妇女法律援助工作中，遇到求助最多的也是这种情况。而当事人常常为照顾孩子，不想与单位因打“官司”打坏了“关系”只能忍气吞声。如某基业大厦物业管理公司任总经理助理的曾女士公开自己怀孕的消息后，即被调任保洁员。不仅职位降低，工资也从几千元降到几百元。曾女士认为，公司此举是在挤兑她，是变相辞退。她将此事反映到劳动

⁹ 解丽，《女工被迫签下“生育保证书”生育权能否被担保？》，《创业者》，2004 年 03 期。

仲裁部门，要求恢复原职原薪。后来也找公司沟通，但被告知“其实你怀孕应主动提出辞职”。¹⁰

5) 以道德过错或工作失误为名进行怀孕解雇

怀孕解雇是女雇员因怀孕而遭遇的解雇的现象，但为了规避法律妇女怀孕期不得解雇的规定，用人单位往往寻找借口，辞退员工，轰动一时的国家商务部与唐女士诉讼案是这种情况的典型。2005年4月1日，唐女士作为原告就自己因结婚怀孕被国家商务部在公务员试用期取消资格一案向东城区人民法院提起民事诉讼。唐女士于2004年7月大学毕业后，趁工作前的时间空档，领取了结婚证。于8月1日就被商务部录用为人事教育劳动司公务员，并签订了公务员录用协议，按规定试用期为1年。在11月份的一次单位例行体检中，她被检查出已经怀孕，她和丈夫商量后决定要把孩子生下来。并把自己的情况向领导做了汇报，以争取计划生育指标。单位认为她在填写的单位录用登记表上，在婚姻的选择栏里选填的是未婚，于是以原告对组织“不诚实”弄虚作假，不符合公务员条件为名，同时也认为唐与单位签证的试用协议约定中的或“体检身体失真”条款，取消其公务员试用资格。但原告认为商务部辞退她的理由实际是因为她的结婚和怀孕，所谓的“不诚实”成为单位辞退她的借口。她的救济过程更有意思，首先，唐女士以单位辞退违法向国家人事部的申诉控告处提出申诉，国家人事部以唐女士还不是正式公务员，申诉资格不适格而没有受理；其次，唐女士向中央国家行政机关所属事业单位人事争议仲裁委员会提出人事仲裁，仲裁委表示该案应由人事公正厅负责。然而，国家人事部人事公正厅已被撤销；唐女士于是向法院提起诉讼，2005年04月01日上午北京市东城区法院开庭这一案件，但因原告未到而宣布休庭。2005年04月21日上午，东城法院对本案做出一审判决，认为她属于商务部录用公务人员，该案不属法院受理范围，

¹⁰ 《高管怀孕被任保洁员 工资数千降为几百元》，
<http://www.yuerzhinan.com/zbhy/yqzs/200801/256.html>。

原告应向被告同级人民政府人事部门申诉因此裁定驳回唐女士的起诉。¹¹这样一起典型的怀孕歧视案在“不诚实”的说辞和管辖的推诿中消解。

以上的案例时有发生，但并不总能进入法律救济渠道，虽有个别案子艰难胜诉，但仍然困境多多。回顾一下怀孕歧视问题在他域的法律化或对我们有某种启示。

二、他山之石：“怀孕歧视”的法律禁止之路

就业中妇女因“怀孕”遭遇不公平待遇，最早在七十年代美国引起重视，虽然民权法第七章关于性别歧视的规定是一个反性别歧视的核心法律。该章规定：雇主不得因受雇者的种族、肤色、宗教信仰、性别与原始国籍等因素，而拒绝雇用或解雇，或在薪资、工作条件、工作待遇或优遇等雇用条件上，有任何歧视之情形¹²。但是美国国会并未明确规定可以适用在禁止怀孕歧视方面。平等就业机会委员会

（EEOC）为性别歧视所颁布之指导原则，这一原则认为：雇主对怀孕受雇者给予差别待遇，属于表面歧视（*facially discriminatory*），构成性别歧视（*gender discrimination*），而违反民权法第七章之规定¹³，但也只是个指导原则而已。联邦地方法院及上诉法院是不是接受指导要看法官的认识。

这样，在司法实践中美国最高法院的判决，因法官看法不同，几个具有怀孕歧视里程碑式的案子判决结果却大相径庭。在 *Geduldig v. Aiello*¹⁴一案中，理由是被告在为公司员工提供的地份福利计划：因伤病导致“失能”：也就是为不能上班的员工提供带薪病假，但是不包括女员工怀孕。原告认为这是性别歧视，要求以宪法平等保护条款（*Equal Protection Clause*）作为怀孕女工保障的依据。但法院不这么看，而认为被告将员工区分成“怀孕”与“非怀孕”两类，并不等同于区分成“男性”与“女

¹¹ 《怀孕女公务员状告商务部一案被裁定驳回》，<http://www.66law.cn/archive/news/2006-08-24/1204312266.aspx>.

¹² Title VII of the Civil Rights Act of 1964 §703(a), 42 U.S.C. §2000e-2(a) (1976).

¹³ 这些法院判决主要有 *Berg v. Richmond Unified School Dist.*, 528 F.2d 1208, 1213 (9th Cir. 1975); *Holthaus v. Compton & Sons, Inc.*, 514 F.2d 651, 654 (8th Cir. 1975); *Wetzel v. Liberty Mut. Ins. Co.* 511 F.2d 199, 206(3d Cir. 1975); *Hutchinson v. Lake Oswego School Dist.*, 374 F. Supp. 1056, 1060 (D. Ore. 1974)等。

¹⁴ *Geduldig v. Aiello*, 417 U.S. 484 (1974).

性”。不是基于性别（sex）而是基于身体状况（physical condition）的区分，所以不构成性别歧视。¹⁵但在 *Nashville Gas Co. v. Satty*¹⁶一案中，最高法院却认为公司要求怀孕女雇员在生产期间必须请无薪病假，以及在生产后返回工作岗位时将会丧失年资等措施，对女性造成差别影响，违反民权法第七章之规定，属于性别歧视。

同样事发生在加拿大，在“布里斯(Bliss)对加拿大首席检察官”¹⁷一案中，原告诉《失业保险法案》规定失业怀孕妇女只有在已经受雇佣10个星期后才有资格享受母亲津贴，对怀孕妇女的区别对待是不平等行为，要求最高法院考虑法定救济金供应的有效性。但最高法院拒绝打破已有的歧视性救济金供应制度，因为它认为找不到违背平等规则的地方。相反，最高法院得出一个怪诞的结论：对孕妇的区别对待并不是对性别基础的歧视。判决的准确叙述如下：假定被告已受到歧视，那也不是因为她的性别。（《失业保障法案》）第46部分适用于怀孕妇女，当然并不适用于男性。如果第46部分把失业孕妇与其它失业男性和女性区别对待我想这是因为她们怀孕了，而不是因为她们是妇女。布里斯(Bliss)案的判决表明：男性的规范标准的适用性太窄，不能将妇女生活的特殊性和不同性考虑进去。由于没有把怀孕作为性别的组成部分，所以歧视的含义将妇女的平等限制在与男人具有同一性范围内。¹⁸

问题的讨论在平等的实质和形式逻辑层面进行，怀孕的区别对待是不是性别歧视，是不是就业上性别歧视中的一个组成部分，能不能适用这一法律，争论甚为激烈。“禁止就业上怀孕歧视之形式法律依据，系由援引较抽象或概括之法律或条文，逐步发展至具体之法律及条文”。¹⁹由于法院这些判决常“怀孕”与性别分离，认为雇主对怀孕的职业限制并不基于性别，而无视只有女性才会怀孕这一事实，甚至不

¹⁵ Id. at 496-497.

¹⁶ *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977).

¹⁷ 凯瑟琳 马奥尼，《作为人权的妇女权利：各种理论观点的分析及其实施战略》，白桂梅主编，《国际人权与发展，中国和加拿大的视角》，法律出版社，1998，P314。

¹⁸ *Bliss v. Attorney General of Canada* (1979), 1 S.C.R. 183.

¹⁹ 翁仪龄，职场怀孕歧视禁止之理论与实务，国立台北大学/法律专业研究所/95/硕士/095NTPU0195005 研究生：指导教师：郭玲惠博士，
www.gender.edu.tw/academy/index_dr.asp?cate=&p.

进行简单的逻辑推论，因此遭遇妇女团体的强烈反对。几经周折，经过实质论证和逻辑推理得出结论：以男性为标准的平等没有办法包涵女性所经验，没有一个男性会遭遇此种困境与问题。而且现有科学背景下，只有女性才能怀孕，事实上因怀孕而在职场中受到差别待遇者只有女性，因此，怀孕歧视应被视为雇主基于“性别”而采取的差别待遇。在妇女运动的压力下，美国国会在 1978 年专门制定了《禁止怀孕歧视法》（Pregnancy Discrimination Act of 1978）²⁰。该法对 1964 年民权法第七章有关性别歧视之定义加以修正，特别规定该法案中“因性别因素（because of sex）”和“基于性别因素（on the base of sex）”均应包括（但不限于）因为或基于怀孕、分娩或其它与怀孕相关之医疗情况在内，包括享受附加福利方面都要与受雇时情形一样，与没有受到影响到雇员有工作能力和无工作能力的人所享受到待遇一样。20000e-2(h)不得解释为“因性别”或“基于性别”而给予妇女以其它非平等待遇。

1978 年《禁止怀孕歧视法》公布之后，联邦最高法院之后的判决结果大多数有利于怀孕女雇员。例如在 *California Federal Savings and Loan Association v. Mark Guerra*²¹一案中，认定加州法律要求给予怀孕员工复职的规定是合法的，并无违反禁止怀孕歧视法之规定。

怀孕歧视是性别歧视，今天中国人看来并不复杂，但喜欢较真的美国人却走了很长的路，表现出法律人的一丝不苟。也反映了妇女权利的进步中经历的充分博弈，一个个司法判例在女雇员权利和雇主权利之间一直在找一个平衡点再将其规则化。而且在建构妇女权利的同时也在兼顾雇主的权利，每一场诉讼，都一是激烈的讨论与斗争，权利的进步是一点一滴的论争，通过一个一个诉讼实现的。美国的怀孕歧视禁止之路是从怀孕歧视到性别歧视，从判例走向成文法的一个艰苦而漫长的过程。

3、从反对单身禁孕条款到性别平等立法

台湾的经验是另一种类型，通过典型事件用妇女运动的压力来推动性别平等法律的发展。改变制度对怀孕女性造成的结构性不平等，并以政府责任来保证权利实

²⁰ Pregnancy Discrimination Act of 1978, 42 U.S.C.

²¹ *California Federal Savings and Loan Association v. Mark Guerra*, 479 U.S.272(1987).

现。1987 年 8 月，国父纪念馆 57 位女性员工及高雄市立文化中心 44 位女性员工，因于招考时与馆方约定，凡是女性员工年满三十岁，或是结婚、怀孕就自动离职，而被迫离职之事件，类似这样的“单身条款”在当年其实非常普遍，只是这次女性员工愿意集体出面申诉，因此在妇女新知等妇女团体之声援下，要求国父纪念馆及高雄市立文化中心废止这一不合理规定，并要求教育部下令所有文化机构废除此种“单身条款”之不合理规定，且召开记者会，呼吁社会正视妇女在工作职场上所受到之不平等待遇。妇女团体在声援的过程中，却发现境内并没有相关法律可以规范这种不合理的性别歧视。²²经过十多年的妇运工作者和学者的努力，由妇女自己参与起草法案，历经十二年台湾终于推动了立法。走过政治沧桑的《两性工作平等法》（后于 2008 年改为《性别工作平等法》终于在 2001 年 12 月 21 日立法院三读通过，并于 2002 年 3 月 8 日正式施行。该法一方面保障女性在就业市场的平等权利，另一方面亦宣示育儿是社会和政府的大事，应由男女两性及政府社会共同承担责任。把怀孕歧视作为性别歧视的一种。1992《就业服务法》第五条规定：“对求职人或所雇用员工，不得以种族、阶级、语言、思想、宗教、党派、籍贯、性别、容貌、五官、残障或以往工会会员身分为由，予以歧视。”违反本条规定者，依本法第六十二条第一项规定，主管机关对雇主得处新台币 3000 以上 30000 以下罚金。此外，按照《就业服务法》施行细则第五条第一项第一款规定，直辖市、县（市）主管机关负责就业歧视的认定，同条第二项规定：直辖市、县（市）政府为认定就业歧视，得邀请相关政府单位、劳工团体、雇主团体代表及学者专家组成就业歧视评议委员会，审理有关就业歧视之案件。²³如台湾部分航空公司规定，空姐怀孕，应该在得知怀孕 8 个周前根据医生的证明申请留薪停职或者暂时调离，如果不原意调离，或停薪留职，公司可以予以开除。台北市劳工局针对航空公司这种强制空姐怀孕留职停薪的规定举办公听会，会上认为这种规定不只是性别歧视，更是对做母亲的一种

²² 尤美女，《从立法到执法谈两性工作平等法之落实》，[台]《全国律师》，2002 年第 6 期。

²³ 参阅潘秀菊，《职场怀孕歧视禁止之理论与实务》，

www.labor.tpc.gov.tw/web66/_file/1075/upload/.../20173_980811_3.pdf。

惩罚，无疑是“变相的禁孕条款”、“新形式的禁孕条款”。²⁴这样对就业中怀孕歧视的投诉就有了政府保障。

三、阳光下的坚冰，遭遇多重消解的怀孕妇女工作权

我国现有法律和制度虽然表面上看都有关于怀孕（已怀孕或将怀孕）妇女的职业保障，但是在制度和制度之间甚至在制度与制度之间存在的潜在冲突，这种冲突从多个方面消解这项法定的女性权益，使有关权利的说辞空洞化，最终只能沦为一种立法的倡导姿态。

1、法律移植带来的文化冲突

法律文本可移植，但权利及意识却难栽培。权利背后是一系列的与权利相关的文化。作为重要性别法律议题的禁止怀孕歧视与性别理论进入中国后的际遇有关，社会性别遭遇了二元对立思维的挑战，特别容易将之教条化和简约化，而忽视其权力关系的核心。理论上说，“性别定义由两大部分和若干小部分组成：1）性别是组成以性别差异为基础的社会关系的成份，涉及到四个互相关联的方面：具有多种再表现形式的文化象征；规范性概念；组织、机制；主体认同；2）性别理论可以概括为：性别是区分权力关系中的基本方式，是权力形成的主要源头和主要途径。”²⁵反映了一个性别对另一个性别的权力控制关系。而“性别歧视”指某一性别基于其性别的一系列与个人的潜能或能力无关的因素在现实社会中遭遇的不公平对待。这里包括女性与国家，女性就业者与用人单位，甚至是女性与工会的权力关系，这些关系均需要清理，才能建立有关性别歧视的理念。而性别歧视则是禁止怀孕歧视的基础理论、文化背景和立法的依据。

一个性别主导或实际主导，对另一个性别歧视，在形式上均基于区分、排斥或限制。其基础则是性别的特征，不同的特征构成了歧视的前提。而怀孕正是一种女

²⁴ 《破除禁孕就业歧视》，www.frontier.org.tw/bongchhi/?p=119。

²⁵ 琼·斯科特，《社会性别：一个有用的历史分析范畴》，原载《美国史学评论》，1986年，见李银河编《妇女，最漫长的革命》，三联书店，1997版，P167。

性特征，雇主将女性怀孕的身体置于职业的选择之外，暗含着以男性身体为标准对女性身体的改造和排斥，因为不怀孕的女体才更接近于男性劳动力。如何看待怀孕，是传统生育文化，社会经济及国家意识的反映。区分本没有问题，但是区分后的负面评价却是问题的所在。歧视性的区分是建立在不合理的和主观的标准之上的区分。妇女怀孕而带来的性别歧视源于古老的性别分工，传统父权制认为，生育是女人的事，女人是主内的，生育是家庭私领域的事，不能在公领域解决，妇女要生孩子就得退回家庭，一个怀孕的妇女的身体，不管多么暂时，都不具备劳动力的资格，理应受到劳动力市场的排斥。而这一点在我国既没有过理论的论证，也没有通过运动的对文化的改造，即便是在中国计划生育中普遍“一胎化”的今天，怀孕也理所当然地被职业排斥。一种没有文化根基的立法在现实中往往不堪一击。

2、 福利向权利转型中雇主对权利成本的算计

我国现行法律有关职业妇女怀孕的规定，主要有两个来源，一是革命根据地和社会主义建设时期为了动员妇女走向革命和建设，国家福利保障主义对生育保护的法律规定和政策；二是国际妇女运动的影响，尤其是《消除工一切对妇女的歧视公约》以性别平等和反歧视为目标的国际妇女权利策略的影响，前者到后者有既有一个从福利到权利的转型，也有一个权利意识的内化。妇女走向社会，参加工作，在中国革命和建设历史上经历了一个被动员的过程，这个过程中国家千方百计以福利方式解决妇女的生育负担，也是对妇女作为生育工具的某种奖励。在妇女与儿童的利益方面，国家更看重的是革命接班人的利益，保护母亲有目的是为了儿童。在九十年代企业改制之前，企业利益与国家利益甚至妇女利益具有某种一体性，生育保障的成本由国家统一承担。但改制后，虽有生育保险将生育负担部分转向社会，但企业仍要负担大部分，这也造成中国目前生育保险因所处单位性质不同而福利程度不同的原因。更是企业为规避生育负担而歧视怀孕妇女的一个原因。

3、一个行政执法批复的消解作用

有关劳动的权利救济在中国很有特色，在相当程度上行政权大于司法权，劳动争议有诉前程序，先调解，再仲裁，最后才能走司法程序，而在现实中行政权力过大，对法律有相当的变通性。这种变通性在怀孕辞退上表现出来：针对上海市劳动局的请示：国家劳动部办公厅对《关于外商投资企业女职工在孕期、产期、哺乳期间解除、终止劳动合同问题的请示》的复函（1990年7月18日劳办计字<1990>21号）：明确函复：一、对外商投资企业实行计划生育的女职工在孕期、产期、哺乳期间解除劳动合同的问题，现应按国务院《女职工劳动保护规定》（以下简称《规定》）的有关条款执行。二、孕期、产期、哺乳期间的女职工在合同规定的试用期内发现不符合录用条件的，可以辞退。但不得以女职工怀孕、休产假、哺乳为由辞退。三、《规定》第四条“不得在女职工怀孕期、产期、哺乳期解除劳动合同”的规定，是指企业不得以女职工怀孕、生育和哺乳为由解除劳动合同，至于女职工在“三期”内违纪，按照有关规定和劳动合同应予辞退的，可以辞退。由于这一批复与立法的精神相左，造成了很多实践中的问题，多数女性因怀孕被解雇，有了上方宝剑。而且一些单位照猫画虎，明明是因怀孕，而用其它借口辞退女性成为合法，由于妇女组织的不断反对，直到2000年1月20日，劳动和社会保障部办公厅才发出了关于废止劳办计字〔1990〕21号文件的通知（劳社厅函〔2000〕8号），文件只例行公事地说：经研究，决定废止《劳动部办公厅对<关于外商投资企业女职工在孕期、产期、哺乳期间解除、终止劳动合同问题的请示>的复函》（劳办计字〔1990〕21号）。废止文件中没有任何理由，该法规虽已被废止，但是其有效时间长达十年，而其影响至今都没有消除，而且从立法的位阶上，行政执法机构只能解释而无权变通上位法的规定。

审视立法，规定的过于原则，力度不够，更没有什么操作性，尤其是在中国没有专门平等救济机制的今天，执行程序法严重缺位，而且行政法规也起了负面的作用，消解和扭曲的立法原意。

3、用人单位劳动规章和劳动合同权力的滥用

另外用人单位之所以胆大妄为，敢于公开进行怀孕歧视，与劳动法规定的漏洞有相当的关系。《劳动法》第四条：用人单位应当依法建立和完善规章制度，保障劳动者享有劳动权利和履行劳动义务。《全民所有制工业企业法》第五十条规定：职工应当以国家主人翁的态度从事劳动，遵守劳动纪律和规章制度，完成生产工作任务。也就是说国家授权企业制定劳动规章，以至于其产生间接的法律效力，很多劳动仲裁依据的就是劳动规章，但是没有规定权利的下限，也没有对劳动规章的上级单位的审查机制，以至于市场经济后，企业劳动规章成为损害员工权利的制度性原因。“一些用人单位滥用劳动规章制定权，侵害劳动者权益的现象屡有发生，由此引发的劳动纠纷因法律规定的空缺而难以公断。”²⁶

造成这一切的原因，一是立法的先天不足。表现为立法时没有进行严格的论证，甚至法律没有概念化，怀孕歧视不是一个明确的法律概念，只是法律规定中有这样的含义。怀孕歧视也不过是性别歧视的一部分，但是性别歧视本身也不是一个法律概念，其违法行为构成、如何认定、相应的法律责任、救济程序等，均是问题。二是对妇女权益的保障成本在市场经济转型中由原来的国家福利模式（国家作为动员妇女参加社会主义建设而提供的照顾性福利）转化为市场经济的权利模式，但保障成本只通过生育保险并不足以弥补，何况法律又赋予了过大权力，雇主滥用权力千方百计地规避成本也就顺理成章了。至于用行政手段变通法律也是中国法治现代化中的通病，需要各方面的制约。

四、禁止“怀孕歧视”本土的建构

为什么在我国有关怀孕歧视的立法会遭遇现实的冲击与消解，其中重要的原因之一是这一国际妇女议题根本没有经过一个本土化的再建构，加之有关妇女立法的边缘化和非可诉性，禁止怀孕歧视的一项法定劳动民就业保障权就只能是妇女取得

²⁶ 王俊英，宋新潮，《论用人单位的劳动规章的法律效力》，《河北法学》，2003年9月。

权利的一种机会。法律概念的本土化不仅仅是法律文字的简单拷贝，背后的社会法律文化及国家对妇女的立法意识也需要改变。本文试提出以下的本土化策略：

1、 对生育行为的社会文化改造和人权倡导

中国是一个人口大国，也是一个有几千年生殖崇拜文化传统的国家，想想“女娲造人”的古老传说，再看看遍布华夏的古塔（塔是男性生殖器崇拜的象征），历代统治者重民数，才成为一个人口的泱泱大国，并有深厚而悠远的生育文化。然而女性一直是被看作一个生育工具对待的，即使到近代，也没有得到完全的改变，大革命以至于社会主义计划经济时代，对女性的保护也多是从保障儿童的利益出发。²⁷ 作为妇女问题，一直没有解决的是妇女为谁生孩子的问题。妇女承担着人类再生产的重任，却无法得到合理的补偿，不仅如此，在一个“人定胜天”年代，妇女的身体作为生育工具受到保护，而在一个计划生育的年代，妇女的身体又成为生育控制的工具。以至于将能生育的妇女身体——怀孕作为一个职业障碍和短处来处理，这也内化为现代知识妇女的生育恐惧意识，“生了孩子丢了位子”，使很多女性不得不在生育和工作之间作出不得已的“二选一”选择。正因为这一歧视的存在并具有较广泛的社会影响，不仅导致普通女性，甚至高学历女性：女大学生、女研究生甚至女博士也找工作难，更导致了不少在职女性因职业压力过度晚婚、晚育，甚至有人决定当“丁克”，终身不生育。或者干脆在研究学习期间突出结婚生孩子。这无论是对妇女的身体，还是未来的孩子造成严重的影响。然而，对职业女性而言，怀孕是只是职业生涯中某一个时刻的种短期失能，从十月怀胎到分娩后三个月生产休假（按独生子女计），一般只有一年多时间，而人的职业女性的职业生涯一般会有二三十年以上，何以成为职业的一道难以跨越的门槛？

与生产后的育儿假期不同，产假福利和因此产生的家务劳动本来是应该分开认识和计算的，但人们将之一体化，背后的文化、社会机制比较复杂。生育不仅仅是

²⁷ 玛格丽特·吴，《中国女工保护与平等》，引自李小江，朱虹，董秀玉主编，《性别与中国》，三联书店，1994年，P93-94。

妇女的事，更是国家社会和全人类的事，生育需要受到全社会的尊重，政府需要承担责任和成本，也有能力承担责任。否则如果的一个妇女抵制生育的运动或倡导，政府能管吗？工作权和生育权均为妇女人权的一部分，国际妇女运动的经验证明：“人权要想有效，就必须成为特定社会的文化和传统中的一部分……除非国际人权在特定文化和传统中具有充分的合法性，否则它们的实施将受到阻挠，尤其是在国内法上，缺少这种合法性，几乎就不可能通过法律或其它社会变革力量来改善妇女的地位。在妇女法定地位和权利问题上应激发“国内话语”和跨文化对话。以加强国内活动者的能力，了解和论及他们自己生活环境下妇女屈从的性质。深化的拓宽妇女免受一切形式歧视的国际权利概念和规范内容的普遍性文化合意。²⁸ 但是中国却不同，我们先接过了有关的权利话语，很快又制定了法律，以对应国际人权的挑战，但实质上，问题依然存在。

2、国家立法意识的转变

关于歧视理论有两大学说：差异论和不平等论，也是立法采取的立场。“差异派主张男女两性无论在社会上还是在生物结构上都存在差异，但反对有预设立场和不正确的分类。对处理男女的不对称性和相似性很敏锐。特别有助于矫正性别偏见的谬误。认为男人女人都受性别偏见的毒害。不平等论则认为不仅是受到后天社会的分化，并且还受到不平等的待遇。因此所有使女人附属男子的行为都应该禁止。认为女性的处境是结构性的问题。女性被强加的次级性需要根本的改造。在社会环境下，女性的性条件和物质生存条件会因此结合起来，共同构成对妇女的不利处境。”²⁹但是在女性怀孕中的与职业相关的区别对待是不是一种性别歧视，在理论上的澄清却不是简单的事，差异派认为，区别对待是合理的，平等派认为这是一种性别歧视。市场经济转型后对妇女的就业的歧视在一定程度上是过去在革命和社会主义计划经济时期国家为了儿童对妇女过度的福利性保护造成的，使得福利保护的

²⁸[加]丽贝卡·J库克编着，黄列译，《妇女的人权——国家和国际的视角》，中国社会科学出版社，2001年，P9。

²⁹凯瑟琳·麦金依着，赖慈芸，雷文玫，李金梅合译，《性骚扰与性别歧视——职业女性困境剖析》《性骚扰与性别歧视》，[台]时报出版 1993年，P13。

成本过大，如包括孕期在内的“四期”保护，正如有学者指出“中国近期对于城市女工制订了区分男女生理差异的保护性立法。虽然这些法律致力于满足在劳动场所妇女再生产的需求，但也说明了当前‘妇女问题’是作为生理问题而非社会问题处理的。这显然区别于文革期间强调男女无差別的政策。”“重要的是，这些法律和法规包含了中国政府与妇女的相互矛盾和复杂关系的多重目标的内在联系。简言之，就其基调和重点而言，这些中国法律源于儒家传统和不断变革中的社会主义目标。”妇女的生育问题在中国的法律中一直采取的生理保护目标而不是着眼于公平的社会负担，在原计划经济中由于是国家承担保护成本，到市场经济后不合理地转嫁给用人单位是企业不愿承担这部分成本，怀孕妇女的工作效率会降低雇主的成本会增加，“保护”的负效应正好成了企业拒绝接受女职工的潜在理由。之所以如此，“是因为法律理论的大部分历史上占主流的只有男人一种声音，妇女声音得不到重视。……结果，男人制定法律、执行法律、解释法律并且这种解释来自男人想象力的创造。”“由于缺乏女性的觉察力，使法律的目的、本质和概念受到深刻影响，主要反映在法律存有偏见和不完全性。³⁰

3、怀孕歧视的重构

怀孕歧视在立法，不仅需要完善，更需要重构，重构至少包括以几个方面：

1) 性别歧视的需要法律概念化

美国的经验是如果没有民法关于歧视的规定，根本不可能处理怀孕歧视问题，怀孕歧视只是性别歧视的子概念。性别歧视国内法律概念化的依据是我国作为缔约国的《消除一切对妇女歧视公约》，公约关于性别歧视的定义是：基于性别而作的任何区别、排斥或限制，其影响或目的均足以妨碍或否认妇女不论已婚未婚在男女平等的基础上认识、享有或行使在政治、经济、社会、文化、公民或任何其他方面的人权和基本自由。这是细化怀孕歧视法律概念的前提

2) 界定怀孕歧视的违法行为构成

³⁰凯瑟琳 马奥尼，《作为人权的妇女权利：各种理论观点的分析及其实施战略》，白桂梅主编，《国际人权与发展，中国和加拿大的视角》，法律出版社 1998 年，P310。

台湾将参照美国的经验将怀孕歧视主要分为三种：直接歧视、差别影响歧视和混合动机歧视³¹、结合国际经验和我国的情况，立法拟将怀孕歧视行为界定为：基于妇女怀孕在员工录用、劳动合同、工作调整、辞退而进行的区别、限制和排斥，其结果影响了妇女法定的平等劳动权和健康权。作为歧视例外就业歧视的豁免是：妇女自己要求的工作岗位调整；依法对妇女的特殊保护；“真实职业资格”和“业务必要”，但需要雇主举证。在我国则需要对怀孕歧视的主体，行为特征，损害后果等认真界定。

4、将怀孕歧视纳入劳动监督，并建立专门的劳动歧视的投诉机制

没有一个独立的类似于平等机会委员会机构及动作机制，很难处理好有关歧视案件的投诉，在很多国家平等机会委员会的设置，有的属于政府，有的属于一种独立的法定机构。如美国平等机会委员会根据民权法第七条专设，专门负责处理不同类型的就业歧视案件，该委员会由五位总统提名，经参议院同意后组成委员会，任期为五年，主席与副主席由总统任命，总部设在华盛顿特区，在全国分设五十个地区性机构，有权力颁布平等机会的指导性原则，设有专门律师，协助政府处理平等机会投诉。与工会协作，处理各种平等机会纠纷。美国还设有联邦契约遵循署，隶属劳工部，设立若干监察使，负责监督与协调有关承包联邦政府契约与建筑工程者对就业平等就业法的执行。这些经验值得我们借鉴，在中国可以在劳动保障部门建立一专门部门处理就业平等投诉，也可以成立专门平等机会委员会，暂时也可以劳动督察部门代行。介需要加强其权力，另外各级妇女儿童工作委员会也可以实体化，加强这一工作。

³¹ 参阅潘秀菊，《职场怀孕歧视禁止之理论与实务》

www.labor.tpc.gov.tw/web66/_file/1075/upload/.../20173_980811_3.pdf。

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Defending Rural Women's Land Rights through Action: Experience of Zhongze Women's Center

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Abstract: Beijing Zhongze Women's Legal Consulting and Services Center (formerly Peking University Law School Center for Women's Law Studies and Legal Services) is the first non-governmental organization specializing in legal services for women. The Center focuses on impact litigation and research. Since 2004, the Center has taken on over 100 public interest cases involving rural women's land rights. While working on the cases, the Center also conducted field studies to better understand the problems and find solutions.

Major land issues involving rural women include: women's loss of land rights at marriage, divorce and widowhood; women's lack of a right to claim a share or fair share of collective income; and women's limited right to compensation from land expropriation. During its work over these years, the Center has encountered several difficulties and challenges.

It first encountered inadequate judicial remedy through the court's denial of access due to political intervention, difficulty in executing court orders even if the plaintiff prevails, court's reluctance to accept the case due to concern that once the door opens the court will be flooded by similar cases, and judges' refusal to accept cases due to their poor understanding of law. The government also lacks interest in stopping infringements for political, cultural and legal reasons. Another challenge is there is no mechanism in place to review the legality of village rules, which are often the source of infringement. Lastly, the legislation is inoperable, lacks gender perspective, and fails to recognize women as a stakeholder in the land system.

The issue of rural women's land rights is much more complex than just a legal issue. To resolve this issue and identify solutions, multiple approaches must be taken. The Center will continue to use public interest litigation, in combination with training, conferences, media coverage, and other complementary measures, to address the problem.

The Center will launch pilot projects to roll out best practices in protecting rural women's land rights. Currently, pilots have been established in Hebei, Hunan, Jiangsu and Heilongjiang provinces. Meanwhile, the Center is pushing for administrative solutions in which the government will play a leading role, and it is working to establish a mechanism to review the legality of village rules. The Center will also continue to advocate legal and judicial reforms to improve women's access to justice.

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在行动中探寻解决农村妇女土地权益问题的途径

——从中心的维权实践谈起

郭建梅

北京众泽妇女法律咨询服务中心（原北京大学法学院妇女法律研究与服务中心）作为中国第一家民间妇女法律援助组织，以保护妇女人权、推动法制进步为己任，注重办理典型性、代表性，尤其是具有研究和倡导价值的公益诉讼案件。农村妇女土地权益案件就是近些年我们在众多的妇女权益领域中选择出来的突出问题。2004年以来，中心从2600多个申请援助的案件中选择代理了100件，共涉及近2000人，22个省市自治区。目前100起案件的情况是：胜诉14件（其中5起通过调解结案，共为农村妇女挽回经济损失1500多万元）；法院不受理51件；败诉24件；尚无结果11件（这些案件中心已尽力进行协调但已无取得实质性进展的可能，因此基本上可以将这11起未结案件归结为法院不受理或协调失败）。在代理案件的同时，中心还分别在云南、浙江、河北、湖南四省的一些地区进行了调研。办案和调研使我们注意到：农村妇女土地权益受侵害已成为一个普遍而严重的问题，一些地方农村妇女的生存状况令人堪忧，而以保障农村妇女土地权益为目的的维权行动，也遇到了严峻的挑战。此结论，除了来自中心的实践，也来自近些年遍及全国各个层面关于农村妇女土地权问题的调研报告及越来越多的上访事件和强烈呼吁。

1、农村妇女土地权益现状及问题

农村妇女土地权益问题集中在三个方面：一是出嫁女、离婚女、丧偶妇女土地承包经营权被限制和剥夺；二是在农村集体经济组织中的经济收益分配权被限制和剥夺；三是在土地征用补偿分配中的权益被限制和剥夺，而这些限制和剥夺的方式方法，又呈现复杂性和多样性的特点。具体表现如下：

1、妇女因出嫁而失地。一些妇女出嫁后，或嫁到外村，或嫁到城里，无论其

户口是否迁移，无论能否取得城镇户口，无论能否获得夫家村庄的土地，其原承包地都要被村民组织强制收回，她们在丧失土地承包权的同时，也自然丧失了与土地相关的一切权益，而嫁入村也往往拒绝分给她土地。

2、农村妇女因婚姻状况改变（丧偶、离异、改嫁）而丧失土地。无论她们能否从娘家或再婚夫村庄获得土地，村民组织常常会通过强制性措施，将其户口取消，迫使其将户口迁回娘家，并取消其土地承包经营权，而其娘家村也往往拒绝恢复其土地承包经营权。甚至一些妇女丈夫死后，村里只保留其子女的户口和土地，而将女方户口取消，并收回土地。

3、对婚前妇女不分或少分土地。许多地方对未婚女性进行“测婚测嫁”，取消未婚姑娘和待嫁女的土地承包资格，因此也丧失了土地分红或土地征收分配中的权益。有的地方规定，未出嫁女到了一定年龄，虽未出嫁，也要收回土地。有的甚至干脆规定，新出生的男孩享受村民待遇，而女孩不能享受村民待遇。

4、土地征用补偿中的权益被剥夺。随着城镇化建设步伐的加快，大量城乡结合部的土地被征用，土地征用补偿费成为一些农村的重要收入，或成为农民的生活养老金。由于利益的冲突，部分村民组织以“村规民约”的方式强制剥夺出嫁女的分配权，此类情况日益突出。

5、男到女家落户而丧失土地。因结婚男到女家落户，该男方及其子女在该居住村土地承包经营权同样受到不平等待遇。其实质是对女方作为农村集体经济组织成员应享有的土地权的侵害，这是另一种值得关注的侵害妇女土地权的现象。

土地权益的丧失，对农村妇女的影响是深刻的。较之农村的男性群体，她们对土地的依附性更强，土地往往是其生存的唯一根本，丧失了土地及收益，就是让她们丧失了生存的根基，成为物质，精神乃至家庭生活中多重的漂泊者。

2、中心的诉讼实践及面临的困难与挑战

针对上述情况，中心下大力气系统地办理了一批典型的严重侵犯农村妇女土地

权益案件。但是，维权的经历充满了艰难，风险和无奈，正如我们已办理的 100 起案件所表明的结果。我们所感受到的困难和问题是多层面、复杂的和沉重的。可以说，法律所规定的每一条救济渠道都是不畅通的。概括起来有以下几个方面：

1、司法救济手段不力。对于大多数农村妇女所面临的土地纠纷，一般首先要经过村委会、乡镇、妇联、甚至县区的信访部门及相关政府部门的协调处理，直至诉至法院。很多妇女往往是在走尽了所有渠道仍无结果的情况下向法院多次起诉或年年上访。但是，绝大多数地区的法院拒绝受理此类案件，原因和情况也是多方面的：一是行政干预，政府有关部门下发通知不允许受理；二是执行难，即使法院判决受害妇女胜诉，也无法执行，往往是村里已经把钱分光，或有钱也拒不给付，强制执行又怕引起更大的村民矛盾；三是不敢受理，顾忌一起胜诉的案件可能会引发类似案件的大量涌现，法院负担过重，难以承受。而且，难以执行的判决也会影响法院的案件结案率和效绩考核。为避免承担过大压力，法院往往执行更为严格的程序和证据标准，将诉讼风险转嫁到当事人头上；四是一些法官法律意识缺乏，职业素质及对法条的理解能力差，寻找各种理由不予受理。

2、行政干预和监督职能缺失。大部分基层干部了解国家法律和政策，更了解村民组织通过“村规民约”剥夺妇女土地权益的情况，但是，他们对处理此类问题的态度却是被动、漠视、不作为的，有的甚至采取压制或堵、截的办法。原因：一是维护社会稳定高于一切的思想影响着他们的工作态度和力度。防止群体性事件发生，保障社会治安稳定，是当前基层政府的头等大事，这使得基层政府倾向于维护现有的利益格局，以免引起群众矛盾；二是传统文化习俗在基层干部的观念中根深蒂固，影响着他们处理问题的态度；三是部分基层干部法律意识缺乏，职业素质低下，和村干部有着密切的社会关系，在处理利益纠纷的立场上丧失公正。

3、村民组织的“高度自治”缺乏国家公权力的有效监督和规范。《村民委员会组织法》赋予村民“自治”的权利，但民主的给与，在缺乏民主和法制传统的乡土农村，却遇到了歪曲和挑战。虽然法律规定“村规民约”不能违背国家法律和政

策，但当利益发生冲突时，村民组织就会以“村民自治”为借口，堂而皇之“合法”地剥夺妇女的权益。造成这种结果的原因是显而易见的：农村土地资源稀缺；农民对土地的依赖；农村人口过多使得人均占有土地不足；农村社会保障制度缺失；利益的争夺与博弈；土地制度改革所带来的土地利益增值的驱动；最关键的是“男尊女卑”、“从夫居”、“出嫁的女泼出的水”等传统观念的深刻影响。对于这种膨胀权力下产生的“村规民约”，法律却没有规定由谁来监督和规范它的“合法性”和“公正性”，这就给村民自治留下了一个非常大的权力空间，也给我们的维权工作留下了一个无奈的盲点。

4、立法和制度存在缺陷。毫无疑问，国家保护农村妇女土地权益的法律和政策几近“体系化”，表面看有法可依。但是，对于这些案情并不复杂，事实很清楚，法律关系也很明确的农村妇女土地权案件，为什么解决起来困难重重呢？我认为，除了上述执法不力、行政不作为以及传统旧观念的影响外，与法律和政策本身的缺陷不无关系。问题主要有三个方面：一是相关法律规定过于原则和笼统，具体实施中缺少可操作性和程序性的条文。原则性宣言性的法律条文，在传统势力和约定俗成的“民间法”的抗拒面前就会失去应有的效力而成为一纸空文；二是法律和政策缺乏性别视角。虽然法律和政策表面看是中立的、公平的，甚至是强调保护妇女的，但由于没有考虑到法律所依存的中国社会是男女不平等的性别文化和不利于女性的社会和家庭结构，所以这些无性别差异的法律政策在实施过程中形成了对女性不利的后果；三是相关法律和制度设置中女性地位和权利缺位。现行土地制度，是土地集体所有、家庭为单位承包经营的模式，是在“增人不增地，减人不减地”基础上的30年长期承包制。这种制度一方面没有考虑“从夫居”婚姻习俗下土地长期稳定对女性带来的负面影响，另一方面，以“户”为单位的家庭承包经营模式，在中国这样以男性为“户主”的家庭结构中，主体资格缺失、“名下”没有土地的妇女自然会因婚姻关系的改变而丧失土地。这实际上是在法律制度的设置中又固化了“从夫居”的男权家庭文化模式。

3、对农村妇女土地权益保护策略的思考与行动

上述情况使我们深刻认识到：农村妇女土地权益问题不是孤立存在的，它涉及的因素很多，关系复杂，交融着历史与现实、法律与传统、政治经济与文化、改革与发展等诸多方面的矛盾和冲突。因此，解决中国农村妇女土地权问题，不是靠单一的诉讼或某一种单一的方法就能奏效的，必须构建一个以政府为主导、以社会为依托、以司法为支撑的多方力量联合的多元的长效机制。

作为以结果为导向、以行动为主要手段的民间妇女法律组织，我们如果要在解决农村妇女土地权方面有所作为，就需要有战略性的眼光和创新性的策略。我们的基本思路是：

1、运用公益诉讼的理念和方法，有针对性地探索解决问题的途径。我们认为，农村妇女土地权益保护，是践行公益诉讼的最佳领域和阵地，这是一项极具价值和意义并具有实验性和开创性的工作。因为公益诉讼不仅仅是诉讼本身，而是一项系统工程，是综合手段和策略的灵活运用。我们将通过诉讼并放大诉讼效果和影响、调研、研讨会、公益上书、培训、行政干预、调解、媒体报道及区域性试点等多种手段和途径，推动问题解决。

2、建立试点，形成模式，自下而上推动法律的改革。在目前国家政策和法律严重滞后的情况下，进行地方性的制度创新更具有现实意义。我们了解到，在一些地方，有着很好的经验和做法，尚未被挖掘和复制。我们希望在试点尝试这些经验，培育模式，通过各种方式使好的模式得以推广。目前，我们已在河北、湖南、江苏、黑龙江等省市建立了试点并顺利运行。

3、力推政府在解决农村妇女土地权益问题中的主导作用，探索通过行政手段解决此类问题的新途径。一方面，诉讼过程中辅之以行政干预或行政诉讼的手段而使案件获得解决是我们的一项成功经验。诉讼过程中的诸多困难，如法院不受理、村民组织的抗拒、执行的艰难等，往往在行政的干预下获得解决。对于政府不依法行政的情况，可以尝试用行政诉讼的方法，间接地推动土地权案件的解决。另一方

面，对于有着几千年行政本位传统的中国社会，政府机关对社会的影响力和控制力最大，其所发布的政策和指导性意见所具有的导向性和约束性作用尤为突出。因此，动员行政干预解决个案，以及推动地方政府制定和实施地方性政策或指导性文件，以解决某个地区的普遍性问题，也是我们的一项成功经验。

4、推动建立“村规民约”的监督审查机制。“村规民约”是村民组织以所谓的“合法”形式剥夺农村妇女土地权的主要手段，但对它的“合法性”却一向缺少监督和制约。虽然《村民组织法》第四条规定了乡级人民政府对“村规民约”有指导的义务，但乡政府往往是不作为的，这一点可以尝试通过行政诉讼去推动。另一方面，令人欣喜的一点进步是，2007年颁布的《物权法》第63条第二款，采用了北大妇女法律中心所提出的建议：“集体经济组织，村民委员会或者其负责人作出的决定侵害集体成员合法权益的，受侵害的集体成员可以请求人民法院予以撤销。”这一规定，虽然没有进一步明确相关部门的监督检查职能和权力，但为启动“村规民约”的监督程序打开了一扇门，为受害妇女开通了一条救济渠道，虽然它也许仍然是不通顺的。我们计划就此提起第一个针对违反国家法律的“村规民约”的诉讼，这将是一个具有重要价值和意义的新探索。

5、倡导立法改革，推动司法救助渠道的畅通。法律是解决妇女土地权问题最权威最有力的工具，司法救助是权利实现的最可靠最规范的途径。针对法律的上述缺陷和执法中存在的问题，一方面，我们继续通过公益上书等方式倡导法律的改革，在涉及妇女土地权益的多个具体问题上，如妇女的主体资格、土地权益家庭成员共有、个人权利从婚姻家庭关系中剥离，及法律的可操作性等方面进行呼吁和倡导。另一方面，大力进行诉讼探索，推动法院对此类案件的受理，推动法律实体和程序方面的完善。

以上所谈不一而足。除此之外，培训，调研，及对农村妇女法律意识、维权能力的宣传教育等都是必不可少的。农村妇女土地权问题的解决，是一个长期而艰苦的系统工程，不能一蹴而就。同时，我们也深知，推动此问题的解决，也是需要

担当风险和压力的。但是，我们有耐心、有信心通过我们的努力探索，为此作出一点贡献。

Protection of Women's Rights during the Exercise of Police Power: From the Perspective of Several Criminal Cases

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Abstract: The exercise of police power is given much attention worldwide for several reasons. The police are often the starting point of a criminal case, and they play a critical role in the success of the following proceedings. More importantly, the exercise of police power may affect the personal liberty of the “opposite party”, including the suspect, the victim, or the witness. More emphasis, therefore, should be placed on the protection of the opposite party, especially women victims and suspects. This paper uses several cases to elaborate how women's rights should be protected during the exercise of police power and provides recommendations for improvements.

In one case, a middle-school teacher was raped by a local official. She complained to the police but was told that this was not rape since the man was wearing a condom. This remark caused an uproar in the country. Rare as it is, the case demonstrates re-victimization by the police. Police officers often underestimate the psychological impact of sexual offences, and consequently utilize improper methods to question the victim. To protect female victims, female officers should be appointed for the interview; officers should be empathetic and avoid aggressive questions; necessary assistance should be provided to victims; and the procedural rights of victims should be respected.

In another case, a 16-year old girl was detained for prostitution. A male officer interrogated the girl alone in his office, which is in violation of regulations. During the interrogation, the officer raped the girl and threatened to inform her parents about her indecent behavior should she tell others about the rape. This case shows that female suspects can be more disadvantaged and vulnerable in front of the police. Women suspects should be better protected during interrogation, body searches, and the collection of biological samples. Meanwhile, channels should be created for speedy remedies against violations. To protect suspects during interrogation, female and empathetic male police officers should be arranged for interrogation; a lawyer should be present during the interrogation; and the interrogation process should be recorded. During body searches of female suspects, the Criminal Procedural Law and relevant police protocols all require search by female officers, protocols which should be carried out strictly. Further, the author recommends the use of high-tech equipment for no-contact body search. When searching certain crime scenes, such as prostitution shelters, the police should respect the dignity and rights of the female suspects. In the collection of body samples, female medical workers should be arranged to work with suspects.

In the third case, a 16-year old girl was detained for beating a neighbor. She was jailed in the same room with 20 men for 117 days and was sexually harassed. Although such cases are rare, the special needs of women prisoners are often neglected, and the prison policies are not gender-sensitive. Based on UN documents, the author argues that female defendants should be jailed separately and should be subject to special security measures. The author further argues that they should be provided with health services specially designed for them and should be allowed to have periodical contact with family members.

Enhanced protection of women during the exercise of police power will be important for preventing the state's abuse of power and for enforcing human rights under the Constitution and international instruments.

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警察权力行使中的女性权利保护：以刑事案件为视角

郑曦*

摘要：在警察行使权力的过程中，女性相对人的权利可能受到影响或侵害，应当加强在此过程中的女性权利保护。既需要探讨女性作为被害人和嫌疑人的角色与警察权力发生关系时的权利保护问题，也需要研究女性在受到监禁时的权利保障问题。由于目前这些问题都没有得到政府和社会的足够关注，故本文试从一些典型案例入手，讨论警察权力行使中的女性权利保护问题，以期对司法实践中的性别平等的实现提供有益的意见和建议。

关键词：警察；权力；女性相对人；权利保护

引言：

在整个刑事诉讼中，无论中外，警察权力的行使均是受到关注最多的问题之一，因为警察权力的行使往往是刑事案件的起点，关系着整个刑事诉讼进程的顺利与否。更为重要的是，警察权力的行使涉及对行为相对人（例如犯罪嫌疑人、被害人、证人等）的权利限制。而从某种角度看，对于公民实施限制自由的程序已经构成对公民的惩罚。¹ 由于其涉及法益的重大性，对于任何一个法治国而言，都是不能不审慎为之的。因此刑事案件中警察权力的行使不但向来为人们所关注，学者们对此的研究也较为深入，而且它也受到了法律的多重规制。

然而与警察权力行使受到密切关注和严格限制的情况不同，警察权力行使中的女性权利保护并不为法律和人们所重视。不同的女性个体由于其自身生理、心理、婚姻家庭、文化程度、工作事业和社会角色等因素的不同，在面对刑事案件发生以及警察权力行使的情况之时，其心理反应和行为方式会有较大的差异。在这一点上，

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¹ See Malcolm M. Feeley, *The Process is the Punishment*, Russell Sage Foundation, 1992, p199.

作为警察权力行使的相对人，女性与男性并无区别。但是，女性作为整个社会性别的群体，由于其生理和心理方面的特征与男性存在现实的差异，因此一定的特别保护是必要的。这种特殊保护非但不是一种“反向歧视”，相反表明社会对女性尊重的态度。

可是在中国，尽管随着女性犯罪率的提高，² 女性以犯罪嫌疑人的身份受到警察调查的数量也随之增长，而女性作为犯罪受害人或者刑事案件证人而受到警察权力行使影响的情况也非常常见。然而，与大量女性作为警察权力的行为相对人与警察权力行使发生关系的现实情况不同，警察权力行使中的女性权利保护问题不但没有引起立法机关和政府的足够重视，甚至学界对其的研究也甚少。这种情况的出现一方面是由于社会性别意识的欠缺，另一方面则是由于有强势“男性文化”传统的中国法学界对女性权利保障的重视程度不足。

鉴于这种情况，本文将对警察权力行使中的女性权利保护问题进行一番尝试性的研究。本文将从几个典型的刑事案件着手，分析中国现实下警察权力行使中女性权利保护的现状，并加以评论，从而提出应当加以改进和完善的建议。第一部分将讨论警察权力行使对刑事案件中的女性被害人的影响以及由此而需要的权利保护。第二部分研究警察权力行使与女性嫌疑人的关系，探讨在面对警察权力时女性犯罪嫌疑人应有的权利及其保护措施。第三部分将研讨受到警察监禁（例如留置、拘留等）的女性在监禁过程中应有的待遇和特殊保护。最后本文将得出结论，警察权力行使中的女性权利保护需要长期的努力。

一、警察权力行使与女性被害人保护

贵州省毕节阿市中学英语老师周琴（化名）举报称，2011年5月17日，她被迫陪8位领导喝酒后，被毕节阿市乡国土资源管理所所长王忠贵趁醉强奸，报案后

² 例如根据北京市第一中级人民法院于2006年公布的一份女性犯罪调研报告显示，连续3年女性犯罪增长率均超过男性。参见新华网“女性犯罪调研报告：犯罪增长率连续3年超男性”，http://news.xinhuanet.com/legal/2006-03/07/content_4267652.htm（2011-11-7）。

阿市乡派出所警察钟显聪对她说：“戴避孕套不算强奸”；在记者向钟显聪求证事实情况时，钟显聪向记者解释说，这个案件“暴力特征不明显”，而且有避孕套，在强奸罪方面，很难认定。³ 一时间全国舆论哗然，“带套不算强奸”一语在网络上疯狂流传，成为民众讽刺警察包庇犯罪嫌疑人的流行语。尽管最终发表“带套不算强奸”这一惊人言论的警察钟显聪因工作时间饮酒以违反公安部“五条禁令”⁴ 为由被撤职，⁵ 但这一事件在社会上引起的波动仍然远未停息。

性侵害犯罪的被害人主要以女性为主。作为被害人的女性，在受到性侵害之后，本身出于一种脆弱和羞耻的心理状态。再加之中国传统的贞操观念在一些时候仍然影响着社会对性侵害案件被害人的评价，因此作为性侵害犯罪被害人的女性尤其需要来自以警察为代表的公权力机关的支持和保护。然而在向警察求助报案的时候，却听到所谓“带套不算强奸”的解释，这样的说辞犹如一盆冷水泼在女被害人的头上，让本身已经受伤冰冷的心更加寒意萧瑟。作为专门从事刑事侦查工作的警察，没有人会怀疑其对于“强奸”这一法律用语的概念是否理解正确，也没有人会相信这只是一名无知警察的一时信口雌黄，唯一的解释就是警察在用其手中的公权力为同为政府官员的犯罪嫌疑人开脱罪责。根据被害人周琴的回忆，当时她在校长的要求下向各位领导敬酒时，身为警察的钟显聪和犯罪嫌疑人王忠贵正是在一个酒桌上同食共饮。当公权力和公权力之间达成了一种相互遮掩丑行的默契时，公民的权利就会像风雨飘摇中的浮萍一般，失去其存在的根基。作为保护公民利器的警察权力，在这些“钟显聪”们的手中反倒成为了对女性被害人进行“二次伤害”的一把尖刀。警察“带套不算强奸”的观点强奸了女性被害人的权利，也强奸了法律的尊严。

³ 参见“带套不是强奸”，《长江商报》2011年7月17日A02版。

⁴ 2003年，公安部发布“五条禁令”：（1）严禁违反枪支管理使用规定，违者予以纪律处分；造成严重后果的，予以辞退或者开除；（2）严禁携带枪支饮酒，违者予以辞退；造成严重后果的，予以开除；（3）严禁酒后驾驶机动车，违者予以辞退；造成严重后果的，予以开除；（4）严禁在工作时间饮酒，违者予以纪律处分；造成严重后果的，予以辞退或者开除；（5）严禁参与赌博，违者予以辞退；情节严重的，予以开除。

⁵ 参见新华网“贵州‘戴避孕套就不算强奸’追踪：违纪民警钟显聪被撤职”，http://news.xinhuanet.com/society/2011-07/20/c_121697227.htm（2011-11-7）。

尽管这只是一个非常罕见的案件，但从这个案件的分析中可以折射出我国司法实践中忽视对于女性被害人的权利保护的现实。在刑事司法领域，性侵犯案件、贩卖人口案件和家庭暴力案件是主要以女性作为犯罪对象的三类案件。在这些案件中，女性遭受了生理和心理的双重伤害，不但身体和健康在犯罪中可能受到损害，而且由于这些案件给女性造成的巨大屈辱和压力，女性在心理方面也会遭受严重的创伤。例如这些女性被害人可能在心理方面受到强烈刺激，产生强烈的痛苦感受，导致气愤、屈辱、无助、安全感和公平感丧失等心理状态，甚至可能出现对自己身体的支配能力下降以及较长时间心理障碍的情况。尤其是女性在遭受性侵害之后，来自社会的不公平目光、自身心理的屈辱感和羞耻感，都可能给他们造成了巨大的压力，使她们的生活、学习、工作、婚姻、家庭、人际交往等方面都发生一些她们不愿意发生的变化。尽管我国刑事诉讼法和其他法律对于警察权力行使中的女性被害人权利保护有一些相关的规定，例如刑诉法第105条规定：

“为了确定被害人、犯罪嫌疑人的某些特征、伤害情况或者生理状态，可以对人身进行检查。……检查妇女的身体，应当由女工作人员或者医师进行。”公安部发布的《公安机关办理刑事案件程序规定》第194条也有类似的规定。然而在我国司法实践中，却常常发生来自警察和司法机关的“二次伤害”，让本已受到犯罪伤害的女性被害人的处境雪上加霜。其中一个最为重要的问题是，我国对于警察对女性被害人的询问方式并无特殊规定，因此在实践中，警察常常使用不恰当的询问方式向女性被害人询问案件情况。这些不当询问方式主要包括紧追询问式、责难询问式、恐吓威胁询问式、居高临下询问式、轮番轰炸询问式、公开询问式、诱导询问式、臆测询问式、反问询问式和单刀直入询问式等。⁶这种行使警察权力的方式对于女性被害人的权利保护非但无益而且有害。

⁶ 马忠红：“性侵害案件中女性被害人的调查访问”，载《中国人民公安大学学报》2005年第5期，第78-79页。

保护女性被害人的权利，一方面是我国宪法“保障人权”条款⁷的落实，另一方面也是为了避免“被害逆变”⁸的有效手段。在笔者看来，我国要加强警察权力行使中的女性权利保护，要注意以下几个方面的问题：第一，尽可能在与女性被害人接触的时候安排女警察在场。在警察与女性被害人进行接触、了解案件情况的时候，有女警察在场，可以有效地舒缓女性被害人的紧张情绪。而且由于同性之间易于理解的特征，女警察比较了解女性被害人的心理和生理状况，较易与被害人沟通，有利于了解整个案件的具体情况。第二，注意询问女性被害人时的方式。警察询问时宜采用开放平和的方式，询问的语气应当温和，尽量避免侵略式（aggressive）的询问方式，以免加重被害人不良情绪和内心的压抑感。对于女性被害人在询问过程中的倾诉需要要有充分的理解，并让其有充分的机会进行陈述。对于女性被害人的合理诉求，应当表达肯定和支持的态度。我国目前正在审议的刑法修正案草案第120条规定侦查人员在讯问犯罪嫌疑人的时候可以对讯问过程进行录音或者录像，⁹在对女性被害人的询问过程中也可以借鉴使用录音录像制度，一方面以固定证据，另一方面以避免日后对女性被害人进行重复询问。第三，必要时引入专业人士协助侦查。女性被害人如果出现生理或心理上的问题，警察应当及时向医生或心理治疗师等专业人士寻求帮助，由专业人士为其提供帮助。第四，为女性被害人提供必要的救助和保护。在美国有专门的被害人救助组织如National Organization for Victims Assistance，而在中国随着被害人保护制度逐渐受到重视，被害人救助制度也正在被逐步建立起来。例如2009年中央政法委、最高人民法院、最高人民检察院、公安部等八个部门联合发布《关于开展

⁷ 《中华人民共和国宪法》第33条，英文版参见中华人民共和国全国人民代表大会网站“中国人大网” http://www.npc.gov.cn/englishnpc/Constitution/2007-11/15/content_1372964.htm（2011-11-8）。

⁸ 指女性被害人向加害人转化。参见莫洪宪：“论女性刑事被害人权益救济”，载《法学评论》2000年第6期，第49页。

⁹ 刑法修正案草案第120条，参见《〈中华人民共和国刑事诉讼法〉修正前后对照表》，载“刑事诉讼法修正案（草案）条文及草案说明”，中华人民共和国全国人民代表大会网站“中国人大网” http://www.npc.gov.cn/npc/xinwen/lfgz/2011-08/30/content_1668503.htm（2011-11-8）。

刑事被害人救助工作的若干意见》，根据该意见，警察应该对于生活因犯罪而导致重大困难的女性被害人提供必要的经济方面的救助。另外对于家庭暴力案件的女性被害人，必须制定个别化的安全保护措施，以避免被害人受到其家人的威胁和伤害，并注意防止因案件处理导致被害人迁居、失业等情况的出现。第五，严格保密制度，避免女性被害人隐私泄露。河北邯郸市曾经发生过强奸案警察询问笔录被泄露的案件，给女性被害人的生活和精神造成了严重的影响。¹⁰因此必须要求警察严格遵守保密制度，不允许非法公布案件情况；如果侦查中确实需要公布案件时，公布的内容要严格掌握，不容许公布案件细节，不允许公布被害人姓名、身份、住址和工作单位以及案情细节。第六，保障女性被害人的程序性权利。在性犯罪案件中，警察不应使用女性被害人的先前性行为的证据，而且除非有特别情形，否则不应要求被害人接受测谎等可能使女性被害人承受巨大心理压力的侦查手段。无论是家庭暴力案件还是性犯罪案件，在决定是否释放犯罪嫌疑人时，警察均应当听取女性被害人的意见，让其说明被告人的人身危险性和对其造成的损害程度，以作为警察作出决定的参考因素。

二、警察权力行使中女性嫌疑人的保护

2010年10月15日，温岭市新河派出所查获了一起涉嫌卖淫嫖娼案件，涉嫌卖淫的女性嫌疑人为未满16周岁的冯某。当天晚上7点多，当值警察陈昌涛违反审讯规定，让协警将冯某带到自己办公室，独自一人对冯某进行询问。询问过程中，冯某非常害怕，多次请求陈昌涛不要把自己卖淫的事告诉家里人。陈昌涛利用冯某的这点心理，乘机对冯某动手动脚。冯某表现出抗拒，百般躲闪。陈昌涛就开始言语威胁，对冯某说要是不听话的话，就把她卖淫的事告诉她的父母。遭到威胁后冯某不敢再反抗，于是陈昌涛与其强行发生了性关系。晚上9点多，陈昌涛把冯某放了。几个小时后，他跟所领导汇报，说证据不足，把女嫌疑人放了。10月18日，冯某和同伴在一位出租车司机的帮助下，向公安局举报自己被拐骗

¹⁰ “谁泄露了强奸案询问笔录”，《中国青年报》2010年5月20日法治社会版。

到温岭新河镇，并被强迫卖淫的时候，无意中说到 10 月 15 日晚上被抓到派出所，一名警察强行与自己发生性关系，之后才准离开的事情。冯某的这条信息，引起了警方的高度关注。温岭市公安局迅速成立专案组，10 月 19 日刑事 拘留了陈昌涛。10 月 22 日，陈昌涛被温岭检察院批捕，10 月 28 日被移送法院起诉。法院认为，被告人陈昌涛身为公安民警，在履行职务过程中违背妇女意志，采用胁迫手段，强行与妇女发生性关系，其行为已构成强奸罪，因此判刑六年零六个月。¹¹

作为年龄未满 16 周岁的未成年女子，受到诱拐被迫从事卖淫，本身已经令人唏嘘怜悯，然而被警察作为嫌疑人进行调查之时，居然受到警察的性侵犯，真是“刚出虎穴又入狼窝”。尽管这个案子只是个特例，但在警察权力的行使过程中，嫌疑人本身处于弱势的地位，而女性嫌疑人由于其生理上和心理上异于男性的特征，在她们以嫌疑人的身份与警察权力发生关系的过程中可能使其处于相较于男性嫌疑人更易受到损害的状况，因此对女性嫌疑人采取特殊的权利保护实属必需。加上警察权力行使的过程中 往往有秘密性的特征，倘若不加强监管和保护，女性嫌疑人的权利更易受到侵犯。

目前我国法律中关于女性嫌疑人在警察行使权力过程中的特殊保护的规定较少，例如刑诉法仅规定女性犯罪嫌疑人只受女工作人员或医师搜查身体而不受男工作人员搜查身体的权利，但并未就女性嫌疑人的权利保护作出全面规定。因此有的社会团体和学者在此次刑诉法修改的过程中提出意见，要求加入社会性别视角，注重对女性嫌疑人、被告人的平等保护，主张规定：讯问女性嫌疑人，经嫌疑人或其辩护人申请，可以派出女性办案人员在场；讯问未成年女性嫌疑人，应当有女性办案人员在场；在采取强制措施的种类、保障羁押条件、改善讯问环境等方面，都应该充分考虑女性的身心特点、生活经历、工作环境与家庭关系，包

¹¹ 参见“温岭一民警派出所里强奸卖淫女：昨一审获刑六年半并赔偿受害人 3 万元”，《现代金报》2010 年 11 月 13 日 A07 版。

括其抚养的未成年子女等。¹² 但是就目前的情况看，这些意见为立法机关所采纳并被纳入新修改的刑法的几率不大。

“路漫漫其修远兮，吾将上下而求索。”¹³ 尽管女性嫌疑人的特别权利保障并不可能一蹴而就，但努力和建议还是促进女性权利保护所必要的。笔者认为，在警察权力行使过程中对女性嫌疑人的保护集中于三个法律程序中：讯问、搜查、生物样本采集。除此之外，赋予女性嫌疑人在受到警察权力侵害之时便捷的救济途径，也是保障女性嫌疑人权利的有效手段。

1. 讯问。由于警察讯问过程的封闭性和秘密性特征，女性嫌疑人被孤立分离于其他人，一旦警察滥用权利，女性嫌疑人的权利简直如“俎上之肉”一般难以保障，前文所述的警察强奸女性嫌疑人的案件正是发生在讯问过程中的。笔者认为在讯问女性嫌疑人之时可以做三方面的权利保障工作。第一，尽量安排女警察进行讯问。可以在讯问之前询问女性嫌疑人是否需要女警察进行讯问，这样一方面是因为同性之间在谈及隐私、家庭、恋情等问题时会比较自然，容易沟通，另一方面则是根据司法实践的经验表明女警察进行的讯问更容易从女性嫌疑人处得到真实的案件情况。第二，尽量以温和的方式进行讯问。北京市朝阳区人民检察院的女案组在讯问女性嫌疑人时常用“来，先喝点水，小心别烫着”这类温和的语言开场，¹⁴ 避免了讯问人员与被讯问人之间的敌对情绪，为讯问奠定了良好的基础，这种做法值得警察讯问时借鉴。第三，引入讯问时录音录像和律师在场制度。录音、录像和律师在场这三项制度中，录音、录像制度已经为刑法修正案草案所采纳，极有可能被正式纳入

¹² 此为武汉大学公益与发展法律研究中心向全国人大法工委提交的刑事诉讼法修订意见第四条，参见“公益法中心向全国人大法工委提交刑事诉讼法修订意见”，武汉大学公益与发展法律研究中心网站 <http://www.pidli.cn/html/xinwenyushijian/20110930/82.html>（2011-11-9）。

¹³ “The way was long, and wrapped in gloom did seem, As I urged on to seek my vanished dream.”（战国）屈原：《离骚》，杨宪益、戴乃迭英译版。

¹⁴ 参见北京检察网“别样的风采——京城第一女案组”，<http://www.bjjc.gov.cn/bjoweb/minfo/view.jsp?DMKID=113&ZLMBH=0&XXBH=23019>（2011-11-9）。

到修改后的刑诉法中，但律师在场制度仍未能实现。这三项制度对于保障嫌疑人权利有着重要的意义，对于女性嫌疑人来说更是如此。

2. 搜查。搜查包括两类，一为对人身的搜查，一为对物品、场所等的搜查。对女性嫌疑人的人身搜查，各国法律及警察守则等均有规定，例如美国马萨诸塞州剑桥市警察局《政策与程序规定》第424号“截停、拍身搜查和初步询问”第VI条B中规定“如果系对某一异性嫌疑人实施拍身搜查，警察应当使用较好的方法对该异性嫌疑人实施拍身搜查（例如使用手背或警棍）”¹⁵而在中国前文所述的刑诉法和《公安机关办理刑事案件程序规定》均有规定对女性的搜身须由女性工作人员进行。但除此之外，笔者认为可以引入扫描等现代高科技设备进行没有身体接触的搜查。另外，对场所的搜查也应当避免对女性嫌疑人造成不必要的尊严和权利的损害，例如在我国常常出现警察“扫黄”搜查卖淫场所时女性嫌疑人衣冠不整地被带回警局的情况，实不应该。

3. 生物样本采集。刑诉法修正案草案第129条在原有条文的基础上增加了对被害人、犯罪嫌疑人采集指纹、血液等生物样本的规定。¹⁶事实上生物样本的采集也属于广义上的人身搜查的内容，但其与普通人身搜查不同之处在于其“穿透性”；生物样本采集对于嫌疑人的隐私权和身体权的影响更大。由于在生物样本采集的过程中被采样人往往被迫暴露身体某些部位甚至是生殖器官，被迫让采样人从其身体上提取某些体液，很可能让被采样人感到屈辱和羞耻，因此在女性嫌疑人被采样时，应当由女性工作人员进行，并按照比例原则，在能够以较小侵犯性的方式进行时就不采用较强侵犯性的生物样本采集方式。

¹⁵ 美国马萨诸塞州剑桥市警察局《政策与程序规定》系笔者访问剑桥市警察局时由该局提供，并允许笔者在著述中使用。

¹⁶ 参见《〈中华人民共和国刑事诉讼法〉修正前后对照表》，载“刑事诉讼法修正案（草案）条文及草案说明”，中华人民共和国全国人民代表大会网站“中国人大网”
”http://www.npc.gov.cn/npc/xinwen/lfgz/2011-08/30/content_1668503.htm（2011-11-9）。

4. 救济措施。救济之于权利，犹如迦南地之于逃离埃及后的希伯来人，它是人民在饱经磨难后最后的避难所。在女性嫌疑人权利受到侵害之后，赋予其足够便捷的控诉和举报手段，可以一方面起到减少损害、回复权利的作用，另一方面也可以起到震慑警察，防止警察日后侵害女性嫌疑人权利的作用。

三、被警察监禁的女性的权利保护

1996年11月9日上午，天台县城关镇洋头洪村发生了一场邻里纠纷。这一纠纷的两方主角都是未成年人，一个是村民邱某16岁的女儿邱彩萍，一个是其邻居14岁的儿子邱伟江。15日，公安部门受理此案，案由是在这场争执中邱伟江被邱彩萍打伤。11月18日晚，天台县对邱彩萍实施留置盘问，被关进一间十几平方米的羁押室里，里面竟是拥挤着20多个面目各异的男人！邱彩萍脚上穿的鞋被脱掉，她的腰带也不准系。据邱彩萍讲，几天的时间里，那里的公安人员曾几次让她承认打人的事，但她一直说“我没有打人”。11月23日晚上，邱彩萍要用卫生间，没想到，当她正在解手的时候，其中的一个男人突然拉开门，将尿撒在了邱彩萍的身上。后来，“老大”让她表演“金鸡独立”——一只脚着地站在水泥地上，不做就把衣服脱下来！再后来，就先后有人在她的身上乱摸……不久，邱彩萍被送进了县法制学校接受强制教育。直到1997年3月14日，邱彩萍向学校交足了2510元的各种费用后，她才终于回到家里。这时，她已在这所法制学校“学习”了117天。后多次上访，但却得不到答复。1997年7月28日，邱彩萍与她的母亲向天台县人民法院提起诉讼，要求天台县公安局赔偿其经济损失及精神损失，并要求其赔礼道歉。1997年11月4日，天台县法院对此案进行了不公开审理。庭审中，县公安局承认其对邱彩萍进行“男女同囚”的事实，但指出“事出有因”。法院判决邱彩萍败诉。1999年9月，邱彩萍的母亲王素琴代表女儿对县法院的判决表示不服，并向台州市中级人民法院提起上诉。这年11月，台州市中级人民法院对这一上诉案进行了审理，又以少女邱彩萍的终审败诉而告终。2001年12月28日上午，浙江省高级人民法院对邱彩萍关于“男女同囚”的申诉案进行了公开审理。2002年1月14日，邱

彩萍收到了浙江省高级人民法院下达的行政判决书：将身为女性的邱彩萍与其他男性关押一室，显属违法，已造成对邱彩萍名誉权的损害，根据国家赔偿法第三十条之规定，天台县公安局赔偿邱彩萍共计11309.75元。¹⁷

在邱彩萍案中，姑且不论轻微的邻里纠纷是否需要大动干戈地出动警察对当事人采取留置措施，仅根据法医鉴定的结论，邱彩萍只是将邱伟江打成轻微伤，至多按照当时的《治安管理处罚条例》第22条规定殴打他人造成轻微伤害的处十五日以下拘留、二百元以下罚款或者警告，但天台县公安局却错误地对该案进行了刑事立案，按照刑事诉讼程序处理该案。而根据我国《看守所条例》的规定，应当男女分监关押，但天台县公安局却无视法律规定，将少女与二十多名男性关押在一起，16岁的少女在男监室中受到了男性犯罪嫌疑人的侮辱和猥亵，时间长达7天7夜，身心都受尽凌辱。既然自称“羁押室内一切活动都在看守人员视线范围内”的天台县公安局民警对此却“视而不见”；甚至在后来的行政诉讼庭审中辩称该羁押室内一切活动都在看守人员视线范围内，故不可能发生对邱彩萍人身实施侵权行为。警察对于受到监禁的女性疏于保护，导致其在监禁期间权利受到侵犯和损害，身心都遭受了巨大的创伤，不但违反法律的具体规定，甚至挑战了社会的公理。

这样特殊的公然违反法律侵害女性受监禁人权利的案件固然少之又少，但当前的现实情况是，女性在被监禁者的数量中占少数，因此她们的特殊健康需求常常被忽略。在受到监禁后，女性会迅速发现自己身处于男性为女性设计的监禁环境之中。主要体现在女性特殊的生理和健康需求没有得到充分的考虑，例如卫生间的数量不足、洗浴的设施有限、为妇女提供特殊医疗的条件较差（如没有专业的妇科医生或医生专业水准不足）等等。尤其是妇女在经期、更年期等特殊时期，妇女生殖健康需求因年龄和处境的不同而有差异的实际情况没有得到充分考虑。包括中国在内的许多国家在女性受监禁人的保护方面均存在不足，这方面证据

¹⁷ 参见人民网“法律应该像阳光一样”，

<http://www.people.com.cn/GB/guandian/26/20020415/709704.html>（2011-11-7）。

包括监狱政策和实践中缺乏性别敏感性、违反女性人权、拒绝接受监禁女性与男性囚犯相比有更多不同的常常与生殖健康问题、精神健康问题、药物依赖性以及暴力和虐待史相关的医疗需要。¹⁸除此之外，妇女的其他需求，例如与家庭或子女保持联系的需求等往往也因为受到监禁而被忽视。

联合国《囚犯待遇最低限度标准规则》规定：“尽量将男犯和女犯拘禁于不同监所；同时兼收男犯和女犯的监所，应将分配给女犯的启舍彻底隔离”¹⁹；“女犯监所应特别提供各种必需的产前和产后照顾和治疗”²⁰；“监所兼收男女囚犯时，其女犯都应由一位女性负责官员管理，并由她保管该部全部的钥匙；除非有女性官员陪同，男性工作人员不得进入监所中的女犯部；女犯应仅由女性官员照料、监督”²¹。

2010年联合国大会又通过了《联合国女性囚犯待遇及女犯非监禁措施规则》（简称《曼谷规则》），对《囚犯待遇最低限度标准规则》进行了补充。根据这些联合国文件的规定，笔者认为，受到监禁的女性，即使是因警察行使其权利而受到短期的行政性监禁或刑事审前监禁（例如拘留²²）的女性，也至少应当在监禁中享有以下几个方面权利：

1. 与男性分隔监禁和特殊安保管理制度。男女分别关押是保证女性被监禁人安全的最基本要求，像邱彩萍案件中发生的事情不但是为法律所不允许的，也是对人们良心的挑战。女性在被收监时需要进行必要的人身搜查，应当由女性警卫对其进行搜身；在条件允许的情况下，可以安装电子扫描设备代替直接身体接触的搜查方式。尽管女性监禁区域中并不像男性监禁区中的危险系数那么高，但

¹⁸ Brenda J van den Bergh, Alex Gatherer, Andrew Fraser & Lars Moller, *Imprisonment and Women's Health: Concerns about Gender Sensitivity, Human Rights and Public Health*, Bull World Health Organ 2011;89:689–694.

¹⁹ 联合国《囚犯待遇最低限度标准规则》第8条。

²⁰ 联合国《囚犯待遇最低限度标准规则》第23条。

²¹ 联合国《囚犯待遇最低限度标准规则》第53条。

²² 但根据我国法律规定，拘留的期限其实并不算短。根据现行《刑事诉讼法》的规定拘留期限可长至37日，而根据《公安机关办理刑事案件程序规定》第112条规定，在犯罪嫌疑人不讲真实姓名、住址、身份不明的情况下拘留期限可能突破37天的限制。

也是充满危险的，其中最主要的危险来自于同为被监禁的囚犯之间斗殴、性侵犯等行为²³。因此合理的安全管理制度、足够的女性警卫人员和必要的电子安保设备是应当具备的。在使用男性警卫或其他工作人员时，要特别注意防止他们利用职权对女性被监禁人进行性侵犯。

2. 必要的特殊卫生健康条件。在女性被收监时，应当对其进行全面的身体检查，对其所患的疾病及时治疗，并安排定期的体检。应当为女性囚犯提供对女性具有特别意义的预防性保健措施，例如定期妇科检查、乳腺癌检查等。这些检查或治疗在女性被监禁人要求时应当由女性医生进行，如果需要由男性医生进行的，必须保证至少有一名女性工作人员在场。其中尤其应当注意其是否患有传染性疾病（尤其是血液传播疾病如性病、艾滋病等）、是否有药物滥用成瘾的情况以及精神状况是否正常等，对于这些情况应当按照不同的需求提供治疗与帮助，例如对于因监禁而精神状态出现异常有自杀自残等危险的女性被监禁人，应该提供专业的心理疏导和适当的监管。女性监室应配备女性特别卫生需求所需的设施和物品，例如热水、卫生巾等，并提供适当的洗浴设备和被褥衣物消毒设备，尤其对于女性在例假等特殊期间的卫生给予足够重视。

3. 与家人和外界联系和接触的权利。应当允许父母、配偶、子女、兄弟姐妹等家人在适当的情况下对被监禁人进行探视，尤其应当尽量保障其与子女联系和接触的时间与便利。在未成年子女与被监禁人相聚的时候，警卫应当为其创造较为轻松友好的氛围，避免使用过于严厉的语言，以免给未成年人造成心理压力和伤害。而对于未成年的女性被监禁者，应当保证其受父母探视的时间，并鼓励社会公益团体人士对未成年女性被监禁者提供帮助。所有的女性被监禁者，如果聘请了律师的，其与律师交流通讯的权利应当得到保障，如果没有聘请律师但符合法律规定的提供

²³ 例如在美国就有关于女性在监室中受到其他女性囚犯使用瓶子或手指进行“强奸”或被强行索要财物或被殴打的相关报道。See Joycelyn M. Pollock, *Women, Prison & Crime*, 2nd edition, Wadsworth Thomson Learning, 2002, p.123.

法律援助条件的，监禁机构应当为其办理申请法律援助的相关事宜，并保证其与律师交流的权利。

结语：

在警察权力行使的过程中，赋予作为警察权力相对人的女性更多的权利和保护，至少有两方面的意义。一则在于以权利规制权力。公权力是一把双刃剑，虽为社会生活所需要，但一旦权力的行使超出了边界，即极有可能对公民的权利造成损害。而警察权力则是一种极具扩张性的权力，缺乏限制的警察权力行使将使“良民亦罹其害”²⁴。而赋予女性相对人足够的权利，用权利对警察权力进行规制，可以减少权力滥用的情况。其二，女性相对人权利保护是宪法“保障人权”条款²⁵的具体落实。由于历史和现实的原因，时至今日，司法领域仍然是男性视角为主导的，实践中女性相对人权利被侵犯现象大量存在；再加上自身生理和心理方面的特点，在警察权滥用的情况下受到的损害往往较男性更为严重。对女性相对人进行特殊人权保护是当今文明社会的普遍做法，更是对宪法规定的遵守。根据联合国《消除对妇女一切形式的歧视公约》等一系列公约和文件的要求，消除在司法领域对妇女的不平等对待，给予女性适当的权利保护，不但不会导致女性弱势地位的加剧，也不是“反向歧视”；反而是性别平等在司法领域的应有之义。然而目前我国在法律文本上和司法实践中，对于警察行使权力中的女性权利保护问题都缺乏足够的重视，这是导致女性相对人面对警察权力时弱势状态明显、权利易受侵犯的主要原因。若不改变这种对女性权利保护不力的状况，警察权力行使与女性权利保护的冲突将进一步加剧，像前文所述的那些听起来如天方夜谭一般令人难以置信的案件也有可能再次发生。

²⁴ 沈家本语。转引自张晋藩：《中国法律的传统与近代转型》，法律出版社1997年版，第458页。

²⁵ 前引注7。

不过，由于“法是一种对应，因此法的整体并非条文的复合体，并非规范的统一体，而是关系的统一性”²⁶，因此警察权力行使中女性相对人的权利保护并非一个单独的问题，而是需要相关的配套制度的完善予以支撑的。法律制度的形成和发展都是一个循序渐进的过程，既然司法领域对女性的歧视“冰冻三尺非一日之寒”，相应的，女性相对人的权利保障也是“滴水石穿非一日之功”。警察权力行使中女性相对人权利的充分有效保护的实现，还有很长的一段路要走，笔者在前文中提出的改革和完善的意见在目前看来尚难以全部实现。但是前路的艰难不但不应当成为我们逡巡不前的借口，反而应当是我们推动变革的动力。警察权力行使中女性相对人权利保护的完善需要来自立法机构、司法机关、学界和社会方方面面的共同努力。而只有在共同的努力下，通过法律文本的修改完善和司法实践中的严格执行，女性在面对行使中的警察权力时才有挺直腰杆的一天。

²⁶ [德]亚图·考夫曼：《类推与“事物本质”——兼论类型理论》，吴从周译，台湾学林文化事业有限公司 1999 年版，第 41 页。

APPENDIX

Rachel Wang
Research Assistant to Prof. Nina Pillard, Georgetown University

Abstract: As outlined by several experts within this publication, advertisements for job opportunities are yet another way that China's employment gender discrimination problem persists. In her study, Rachel Wang, a research assistant and Wilson Center public policy intern for Professor Nancy Pillard, compiled and translated recruitment listings for civil service jobs in the City of Nanjing, the capital city of the Jiangsu province.

In her landmark compilation, Wang outlines the specific language used in the job announcements. Her research complements Liu Xiaonan and Wang Liwan's findings on gender discrimination in job advertisements in their article *Gender Discrimination in Civil Service Recruitment*, as well as Liu Xiaonan's *Research Report on Employment Discrimination in 2011 Civil Service Recruitment*. In her research, she often finds that "male" is often delineated as criteria to discourage women from applying to various positions. The widespread nature of gender bias in the City of Nanjing's job announcements reflects the discrimination found across China as a whole.

To preface her research, several clarifications are necessary: The Job Category section designates different types of jobs. More specifically, A indicates policy and administrative jobs, while B represents more tech-oriented jobs. The Test Ratio section outlines the ratio of registered candidates/interview candidates and final hires.

Ruiqiong (Rachel) Wang is a native of Nanchang, PRC, and a senior at the University of Michigan, where she is pursuing her B.A. with a major in economics and minor in statistics. As a result of her academic achievements at the Communications University of China, Ms. Wang was recognized as a National Scholarship student (awarded to the top 2% of students in China). Ms. Wang was a Public Policy Intern at the Woodrow Wilson International Center for Scholars during Fall 2012, where she conducted research for Georgetown Law Professor and Public Policy Scholar Cornelia Pillard on the law and practice against sex discrimination in China. Her findings included the job announcements for public-sector jobs, which are included in this volume.

2012 Recruitment Listing of Nanjing (City of Nanjing; Municipal Level; 010000)

Department Code	Department Name	Job Code	Job Name	Job Description	Job Category	Test Ratio	Openings	Educational background	Major	Others
501	City Commission for Discipline Inspection	01	Clerks	Paperwork related jobs	A	3	2	Undergraduate and above	Chinese Secretarial	Obtain the appropriate degree, Communist Party members, have two years of basic-level work experience
501	City Commission for Discipline Inspection	02	Clerks	law-related jobs	A	3	1	Undergraduate and above	Law	Obtain the appropriate degree, Communist Party members, have two years of basic-level work experience
531	City People's Congress Office	01	Clerks	Administrative jobs	A	3	2	Graduate	Finance, Public Finance, Finance	Obtain the appropriate degree, have two years of basic-level work experience
532	City Chinese People's Political Consultative Committee Office	01	Clerks	Secretarial work	A	3	2	Undergraduate and above	Chinese Secretarial	Obtain the appropriate degree, have two years of basic-level work experience
533	City Court	01	Judge Assistant	Trials related work	A	3	7	Graduate	Law	Obtain a master's degree and above, passed the national judicial examination (A), law major during the undergraduate study, with more than two years of basic level work experience
533	City Court	02	The executor Assistant	Execution work	A	3	3	Graduate	Law	Obtain a master's degree and above, passed the national judicial examination (A), law major during the undergraduate study, with more than two years of basic level work experience, male
533	City Court	03	The executor Assistant	Execution work	A	3	3	Graduate	Law	Obtain a master's degree and above, passed the national judicial examination (A), law major during the undergraduate study, male
533	City Court	04	Clerks	Forensic science work	A	3	1	Graduate	Forensic Science	Master's degree, clinical medicine major for undergraduate studies, with two years of basic level work experience and practitioner qualifications, male
533	City Court	05	Clerks	Software Development work	A	3	1	Graduate	Computer Science	Obtained a master's degree, computer (software) major during undergraduate studies

Department Code	Department Name	Job Code	Job Name	Job Description	Job Category	Test Ratio	Openings	Educational Background	Major	Other
534	City Procuratorate	01	Prosecutor Assistant	Prosecution related work	A	3	1	Graduate	Law	Obtain a master's degree and above, passed the national judicial examination (A), law major during the undergraduate study, with more than two years of basic level work experience
534	City Procuratorate	02	Prosecutor Assistant	Prosecution related work	A	3	1	Graduate	Administrative Law	Obtain a master's degree and above, passed the national judicial examination (A), law major during the undergraduate study, with more than two years of basic level work experience
534	City Procuratorate	03	Prosecutor Assistant	Prosecution related work	A	3	1	Graduate	Civil and Commercial Law	Obtain a master's degree and above, passed the national judicial examination (A), law major during the undergraduate study, with more than two years of basic level work experience
534	City Procuratorate	04	Prosecutor Assistant	Prosecution related work	A	3	2	Undergraduate	Law	Obtain an appropriate degree , passed the national judicial examination (A), with more than two years of basic level work experience
534	City Procuratorate	05	Prosecutor Assistant	Prosecution related work	A	3	1	Undergraduate	Law	Obtain an appropriate degree , passed the national judicial examination (A)
534	City Procuratorate	06	Judicial appraisal	Trace examination work	A	3	1	Undergraduate	Physical evidence and Technology Studies	Obtain an appropriate degree , passed the national judicial examination (A)
534	City Procuratorate	07	Investigators	Detection related work	A	3	2	Undergraduate	Criminal Investigation	Obtain an appropriate degree , passed the national judicial examination (A), with more than two years of basic level work experience, male
534	City Procuratorate	08	Investigators	Detection related work	A	3	1	Undergraduate	Criminal Investigation	Obtain an appropriate degree , passed the national judicial examination (A), male
543	Nanjing Municipal Committee of China National Democratic Construction	01	Clerks	Secretarial work	A	3	1	Undergraduate or above	Chinese, Secretarial, Economics	Obtain an appropriate degree, with more than two years of basic level work experience, male

Department Code	Department Name	Job Code	Job Name	Job Description	Job Category	Test Ratio	Openings	Educational Background	Major	Other
544	Nanjing Municipal Committee of China Association for Promoting Democracy	01	Clerks	Secretarial and communication work	A	3	1	Graduate	Chinese, Secretarial	Obtain an appropriate degree, with more than two years of basic level work experience
544	Nanjing Municipal Committee of China Association for Promoting Democracy	02	Clerks	Secretarial and organizational work	A	3	1	Undergraduate or above	Sociology, Political Science	Obtain an appropriate degree, with more than two years of basic level work experience
545	Nanjing Municipal Committee of Chinese Peasants' and Workers' Democratic Party	01	Clerks	Secretarial work	A	3	1	Undergraduate or above	Chinese, Secretarial	Obtain an appropriate degree, with more than two years of basic level work experience, non Chinese Communism Party Member
555	National Municipal Women's Federation	01	Clerks	Female and children's rights protection work	A	3	2	Undergraduate or above	Law	Obtain an appropriate degree, with more than two years of basic level work experience
555	National Municipal Women's Federation	02	Clerks	Social Development work	A	3	1	Graduate	Sociology, Chinese, Secretarial	Obtain an appropriate degree, with more than two years of basic level work experience
556	Nanjing Municipal Federation of Literary and Art Circles	01	Clerks	job includes management, art critics and analyses, art pieces publication and academic exchanges	A	3	1	Graduate	Chinese, Secretarial	Obtain an appropriate degree, with more than two years of basic level work experience
558	Nanjing Municipal Association for Science and Technology	07	Investigators	Detection related work	A	3	2	Undergraduate	Criminal Investigation	Obtain an appropriate degree, passed the national judicial examination (A), with more than two years of basic level work experience, male

Department Code	Department Name	Job Code	Job Name	Job Description	Job Category	Test Ratio	Openings	Educational Background	Major	Other
581	Nanjing Municipal Party School of the Communist Party of China	01	Clerks	Secretarial work	A	3	1	Undergraduate or above	Chinese, Secretarial	Obtain an appropriate degree, with more than two years of basic level work experience
581	Nanjing Municipal Party School of the Communist Party of China	02	Clerks	Finance and accounting work	A	3	1	Undergraduate or above	Finance, Accounting	Obtain the appropriate degree, two years of basic level work experience, obtain accounting qualification certificates
585	Nanjing Municipal Taiwan Democratic Self-Government League	01	Clerks	Comprehensive writing work	A	3	1	Undergraduate or above	Chinese, Secretarial, Sociology, Political Science, Public Management	Obtain the appropriate degree, two years of basic level work experience
002	Nanjing Municipal Development and Reform Commission	01	Clerks	Economic management work	A	3	1	Graduate	Economics, Laws	For graduate majored in economics required to have a law degree or passed National Judicial Examination during undergraduate; for graduates majored in Law required to be major in economics during undergraduate studies
002	Nanjing Municipal Development and Reform Commission	02	Clerks	Economic management work	A	3	1	Graduate	Economics	
002	Nanjing Municipal Development and Reform Commission	03	Clerks	Social affair management work	A	3	1	Graduate	Sociology or public management	with more than two years basic level work experience
003	Nanjing Municipal Commission of Economy and Information	01	Clerks	industrial economy and information management work	A	3	1	Graduate	Information and Technology	Obtain the appropriate degree, obtaining the Sixth Level of College English Test certificate, has two years of basic level work experience
003	Nanjing Municipal Commission of Economy and Information	02	Clerks	industrial economy and information management work	A	3	1	Graduate	Mechanical Engineering	Obtain the appropriate degree, obtaining the Sixth Level of College English Test certificate, has two years of basic level work experience

Department Code	Department Name	Job Code	Job Name	Job Description	Job Category	Test Ratio	Openings	Educational background	Major	Others
003	Nanjing Municipal Commission of Economy and Information	03	Clerks	industrial economy and information management work	A	3	1	Graduate	Computer (Software)	Obtain the appropriate degree, obtaining the Sixth Level of College English Test certificate
007	Nanjing Municipal Public Security Bureau	01	Clerks	Secretarial work	A	3	8	Undergraduate or above	Chinese, Secretarial	Obtain the appropriate degree, male
007	Nanjing Municipal Public Security Bureau	02	Clerks	Finance work	A	3	6	Undergraduate or above	Finance, Accounting	Obtain the appropriate degree, male
007	Nanjing Municipal Public Security Bureau	03	Clerks	Finance work	A	3	2	Undergraduate or above	Finance, Accounting	Obtain the appropriate degree, female
007	Nanjing Municipal Public Security Bureau	04	Clerks	Medical work	A	3	3	Undergraduate or above	Clinical medicine (general and internal medicine)	Obtain the appropriate degree, two years of basic level work experience, and has a medical practitioner's qualification certificate and qualification certificates, male
007	Nanjing Municipal Public Security Bureau	05	Clerks	Computer related work	A	3	8	Undergraduate or above	Computer	Obtain the appropriate degree, male
007	Nanjing Municipal Public Security Bureau	06	Clerks	Digital information related work	A	3	3	Undergraduate or above	Information and Technology	Obtain the appropriate degree, male
007	Nanjing Municipal Public Security Bureau	07	Clerks	Auditing related work	A	3	2	Undergraduate or above	Auditing	Obtain the appropriate degree
007	Nanjing Municipal Public Security Bureau	08	Clerks	Public security management work	A	3	2	Undergraduate or above	Chemical Engineering	Obtain the appropriate degree, male
007	Nanjing Municipal Public Security Bureau	09	Clerks	Forensic work	A	3	5	Undergraduate or above	Forensic Science	Obtain the appropriate degree, male

Department Code	Department Name	Job Code	Job Name	Job Description	Job Category	Test Ratio	Openings	Educational Background	Major	Others
007	Nanjing Municipal Public Security Bureau	10	Clerks	Law related work	A	3	2	Graduate	Economic Law, International Economic Law	Obtain the appropriate degree, male
007	Nanjing Municipal Public Security Bureau	11	Clerks	Engineering related work	A	3	3	Undergraduate or above	Civil Engineering, Engineering and construction	Obtain the appropriate degree, male
009	Nanjing Municipal Bureau of Civil Affairs	01	Clerks	District work	A	3	1	Graduate	Geographic Information Systems, Geography, Human Geography, Urban Planning	Obtain the Master degree
009	Nanjing Municipal Bureau of Civil Affairs	02	Clerks	Social work	A	3	1	Undergraduate or above	social work, sociology, urban and rural social management	Obtain the appropriate degree, has two years of basic level work experience, obtain the social work professional level certificate
013	Nanjing Municipal Bureau of Land and Resources	01	Clerks	Land resources management work	A	3	2	Graduate	Land management	Obtain the appropriate degree, has two years of basic level work experience
013	Nanjing Municipal Bureau of Land and Resources	02	Clerks	Land resources management work	A	3	1	Graduate	Land management	Obtain the appropriate degree
013	Nanjing Municipal Bureau of Land and Resources	03	Clerks	Land resources management work	A	3	1	Graduate	Law	Obtain the appropriate degree, has two years of basic level work experience
013	Nanjing Municipal Bureau of Land and Resources	04	Clerks	Land resources management work	A	3	1	Graduate	Finance and accounting	Obtain the appropriate degree, has two years of basic level work experience
016	Nanjing Municipal Ministry of Water Resources	01	Soil and conservation management position	Land and water resources management work	A	3	1	Undergraduate or above	Agricultural soil and water engineering, agricultural water conservancy, agriculture environmental protection, soil and water conservation and the prevention and control of desertification, afforestation and environmental science	as two years of basic level work experience

Department Code	Department Name	Job Code	Job Name	Job Description	Job Category	Test Ratio	Openings	Educational background	Major	Others
017	Nanjing Municipal Agricultural Commission	01	Agricultural Equipment Department Clerk	Farm management work	A	3	1	Undergraduate	Agricultural mechanization, agricultural mechanization and automation, mechanization of agriculture, engineering, agricultural machinery repairs	取得相应学位，具有两年以上基层工作经历
017	Nanjing Municipal Agricultural Commission	02	Development of agricultural industrialization and cooperation Department Clerk	Agricultural industrialization management work	A	3	1	Graduate	Land management, agriculture, forestry, economic management, rural area development, economic management of agriculture, modern agriculture, Agricultural and Resource Economics and Land Use	Obtain the Master degree
021	Nanjing Municipal Population and Family Planning Commission	01	Clerks	Population Development Research	A	3	1	Graduate	Population and sociology, social work, psychology, early infant education	Obtain the appropriate degree, has two years of basic level work experience
022	Nanjing Municipal National Audit Office	01	Clerks	Auditing work	A	3	1	Undergraduate	Finance, financial, tax, investment economic	Obtain the appropriate degree and obtain a Fourth or Sixth Level in College English Test, obtain the second level of National Computer Rank Examination certificate or second level of Jiangsu Province college Computer Rank Examination Certificate of Competency
022	Nanjing Municipal National Audit Office	02	Clerks	Auditing work	A	3	1	Undergraduate	Auditing, international auditing, financial management, infrastructure accounting	Obtain the appropriate degree and obtain a Fourth or Sixth Level in College English Test, obtain the second level of National Computer Rank Examination certificate or second level of Jiangsu Province college Computer Rank Examination Certificate of Competency

Department Code	Department Name	Job Code	Job Name	Job Description	Job Category	Test Ratio	Open ings	Educational background	Major	Others
022	Nanjing Municipal National Audit Office	03	Clerks	Auditing Work	A	3	1	Undergraduate	Environmental planning and management, planning and environmental protection, Environmental Science and Engineering, Environmental Engineering	Obtain the appropriate degree and obtain a Fourth or Sixth Level in College English Test, obtain the second level of National Computer Rank Examination certificate or second level of Jiangsu Province college Computer Rank Examination Certificate of Competency, with two or more years of basic level work experience
022	Nanjing Municipal National Audit Office	04	Clerks	Auditing Work	A	3	1	Undergraduate	Civil engineering, industrial and civil engineering, civil engineering, construction budget estimate of Construction Cost	Obtain the appropriate degree and obtain a Fourth or Sixth Level in College English Test, obtain the second level of National Computer Rank Examination certificate or second level of Jiangsu Province college Computer Rank Examination Certificate of Competency, with two or more years of basic level work experience
023	Nanjing Municipal Environmental Protection Administration Commission	01	Clerks	Environmental management and law-enforcement work	A	3	1	Graduate	Environment and Resources Protection Law and similar professional	Obtain a Master degree, with two or more years work experience
023	Nanjing Municipal Environmental Protection Administration	02	Clerks	Environmental management and law-enforcement work	A	3	1	Graduate	Environmental pollution and Governance & similar professional	Obtain a Master degree, with two or more years work experience
025	Nanjing Municipal State-owned Assets Supervision and Administration Commission	01	Clerks	Finance work	A	3	1	Graduate	Finance and accounting	Obtain the appropriate degree and obtain a Sixth Level in College English Test, with two or more years of basic level work experience

Department Code	Department Name	Job Code	Job Name	Job Description	Job Category	Test Ratio	Openings	Educational background	Major	Others
029	Nanjing Municipal Bureau of Statistics	01	Clerks	Statistical work	A	3	3	Undergraduate or above	Statistics	
032	Nanjing Municipal Bureau of Quality and Technical Supervision	01	Clerks	Examination and legal work	A	3	1	Undergraduate or above	Law	
032	Nanjing Municipal Bureau of Quality and Technical Supervision	02	Clerks	Food security supervision work	A	3	1	Undergraduate or above	Food Engineering	
032	Nanjing Municipal Bureau of Quality and Technical Supervision	03	Clerks	Examination and legal work	A	3	1	Undergraduate or above	Law	
032	Nanjing Municipal Bureau of Quality and Technical Supervision	04	Clerks	Special Equipment Safety Supervision work	A	3	1	Undergraduate or above	Chemical machinery, chemical equipment and machinery, chemical process equipment, chemical equipment and control, mechanical engineering and automation, thermal engineering, thermal engineering and power machinery, chemical safety engineering	Work at height required, male appropriate

Department Code	Department Name	Job Code	Job Name	Job Description	Job Category	Test Ratio	Openings	Educational background	Major	Others
037	Nanjing Municipal Administration Bureau For City-level Departmental Affairs	01	Clerks	Energy saving management work	A	3	1	Graduate	Building intelligent building environment and equipment engineering, thermal engineering, thermal detection and control engineering, thermal power engineering	Obtain a Sixth Level in College English Test, obtain the second level of National Computer Rank Examination certificate or second level of Jiangsu Province college Computer Rank Examination Certificate of Competency, with two or more years of basic level work experience, must studied the related majors in both undergraduate and graduate
113	Nanjing Municipal Branch of Law-Enforcement and Supervision of Land Resources	01	Clerks	Land resources management and law- enforcement work	B	3	1	Graduate	Law	Obtain the appropriate degree
123	Nanjing Municipal Environmental Supervision Team	01	Supervisor	Land resources management and law- enforcement work	B	3	1	Undergraduate or above	Environment and Resources Protection Law and similar professional	with more than two years basic level work experience, job includes encounters thus men appropriate
123	Nanjing Municipal Environmental Supervision Team	02	Supervisor	Land resources management and law- enforcement work	B	3	1	Undergraduate or above	Electromechanical control and similar professional	with more than two years basic level work experience,male
132	Nanjing Municipal Quality and Technical Supervision Inspection Detachment	01	Clerks	finance management	A	3	1	Undergraduate or above	Finance and Accounting	with more than two years basic level work experience
165	Nanjing Municipal Supply and Marketing Cooperatives	01	Clerks	finance and auditing work	A	3	1	Undergraduate	Auditing, accounting and auditing, accounting, auditing, infrastructure audit	Bachelor degree required, with more than two years basic level work experience

Department Code	Department Name	Job Code	Job Name	Job Description	Job Category	Test Ratio	Openings	Educational background	Major	Others
165	Nanjing Municipal Supply and Marketing Cooperatives	02	Clerks	Personnel Management work	A	3	1	Undergraduate	Labor and social security, human resource management, labor and personnel management, personnel management	Bachelor degree required, with more than two years basic level work experience
302	Dalianshan Labor Camp	01	Clerks	Personnel Management	B	3	1	Undergraduate	Physical education, ideological and political education, political education and humanities education	Male
302	Dalianshan Labor Camp	02	Clerks	Personnel Management work	B	3	1	Undergraduate	Nursing	Male
303	Nanjing Municipal Finance Office	01	Clerks	Finance and coordinating work	A	3	2	Graduate	Finance, fiscal and financial, international finance, international trade and finance, financial audit	Obtain a Fourth Level in College English Test, with more than two years basic level work experience
601	Nanjing Municipal Supervision Office	01	Clerks	Word related work	A	3	1	Graduate	Chinese, Secretarial	Obtain the appropriate degree, with more than two years basic level work experience
601	Nanjing Municipal Supervision Office	02	Clerks	Law related work	A	3	1	Graduate	Law	Obtain the appropriate degree, with more than two years basic level work experience
602	Nanjing Municipal Office of the City Administrative Services Management	01	Clerks	Software coding work	A	3	1	Graduate	Finance, fiscal and financial, international finance, international trade and finance, financial audit	Obtain the appropriate degree, with more than two years basic level work experience

2012 年南京市考录职位简介表

单位 代码	单位名称	职位 代码	职位名称	职位简介	职位 类别	开考 比例	招考 人数	学 历	专 业	其 它
501	市纪委	01	科办员	从事文字工作	A	3	2	本科及以上	中文、文秘类	取得相应学位，中共党员，具有两年以上基层工作经历
501	市纪委	02	科办员	从事与法律相关工作	A	3	1	本科及以上	法律类	取得相应学位，中共党员，具有两年以上基层工作经历
531	市人大办公厅	01	科办员	人大机关工作	A	3	2	研究生	财务管理与审计、文秘与财务管理、财务管理、财政学、财政税收、财政与金融、财政与法律	取得相应学位，具有两年以上基层工作经历
532	市政协办公厅	01	科办员	文秘工作	A	3	2	本科及以上	中文、文秘类	取得相应学位，具有两年以上基层工作经历
533	市法院	01	法官助理	从事审判工作	A	3	7	研究生	法律类	取得硕士及以上学位，通过国家司法考试（A），本科段为法律类专业，具有两年以上基层工作经历
533	市法院	02	执行法官助理	从事执行工作	A	3	3	研究生	法律类	取得硕士学位，通过国家司法考试（A），本科段为法律类专业，具有两年以上基层工作经历，男性
533	市法院	03	执行法官助理	从事执行工作	A	3	3	研究生	法律类	取得硕士学位，通过国家司法考试（A），本科段为法律类专业，男性
533	市法院	04	科办员	从事法医工作	A	3	1	研究生	法医学	取得硕士学位，本科段为临床医学类专业，具有两年以上基层工作经历和执业医师资格证书，男性
533	市法院	05	科办员	从事计算机软件开发工作	A	3	1	研究生	计算机软件、计算机软件及应用、计算机软件与科学、软件工程、计算机软件与理论	取得硕士学位，本科段为计算机(软件)类专业

534	市检察院	01	检察官助理	从事检察工作	A	3	1	研究生	法律类	本科段也为法律类专业，取得硕士学位，具有两年以上基层工作经历，通过国家司法考试（A）
534	市检察院	02	检察官助理	从事检察工作	A	3	1	研究生	行政法学	本科段也为法律类专业，取得硕士学位，具有两年以上基层工作经历，通过国家司法考试（A）
534	市检察院	03	检察官助理	从事检察工作	A	3	1	研究生	民商法学	本科段也为法律类专业，取得硕士学位，具有两年以上基层工作经历，通过国家司法考试（A）
534	市检察院	04	检察官助理	从事检察工作	A	3	2	本科	法律类	取得相应学位，具有两年以上基层工作经历，通过国家司法考试（A）
534	市检察院	05	检察官助理	从事检察工作	A	3	1	本科	法律类	取得相应学位，通过国家司法考试（A）
534	市检察院	06	司法鉴定	从事文、痕检工作	A	3	1	本科	物证技术学	取得相应学位
534	市检察院	07	侦查员	从事侦查工作	A	3	2	本科	侦查学	男性，取得相应学位，具有两年以上基层工作经历，通过国家司法考试（A）
534	市检察院	08	侦查员	从事侦查工作	A	3	1	本科	侦查学	男性，取得相应学位，通过国家司法考试（A）
543	民建南京市委	01	科办员	从事文秘工作	A	3	1	本科及以上	中文、文秘类，经济类	取得相应学位，具有两年以上基层工作经历
544	民进南京市委	01	科办员	从事宣传及文秘工作	A	3	1	研究生	中文、文秘类	取得相应学位，具有两年以上基层工作经历
544	民进南京市委	02	科办员	从事组织及文秘工作	A	3	1	本科及以上	社会、政治类	取得相应学位，具有两年以上基层工作经历
545	农工党南京市委	01	科办员	从事文秘工作	A	3	1	本科及以上	中文、文秘类	取得相应学位，具有两年以上基层工作经历，非中共党员
555	市妇联（参公管理）	01	科办员	维护妇女儿童权益	A	3	1	本科及以上	法律类	取得相应学位，具有两年以上基层工作经历
555	市妇联（参公管理）	02	科办员	社会发展工作	A	3	1	研究生	社会或中文、文秘类	取得相应学位，具有两年以上基层工作经历

556	市文联（参公管理）	01	科办员	从事协会管理，文艺作品、文艺现象和文艺动态评析，推介、宣传优秀文艺人才和文艺成果，开展学术交流	A	3	1	研究生	中文、文秘类	取得相应学位，具有两年以上基层工作经历
558	市科协（参公管理）	01	科办员	从事国际科技学术交流、外事接待、赴国（境）外科技考察的组织协调等工作	A	3	1	本科及以上	英语或理工类	取得相应学位，取得英语专业八级考试证书，或理工类考生雅思成绩7分以上或托福成绩100分以上，具有两年以上基层工作经历；掌握2门以上外语者优先
581	市委党校（参公管理）	01	科办员	从事文秘工作	A	3	1	本科及以上	中文、文秘类	取得相应学位，具有两年以上基层工作经历
581	市委党校（参公管理）	02	科办员	从事财务会计工作	A	3	1	本科及以上	财务财会类	取得相应学位，具有两年以上基层工作经历，取得会计从业资格证书
585	台盟南京市委	01	科办员	从事综合文字写作工作	A	3	1	本科及以上	中文、文秘类，社会、政治类，公共管理类	取得相应学位，具有两年以上基层工作经历
002	市发改委	01	科办员	从事经济管理等相关工作	A	3	1	研究生	经济类或法律类	研究生专业为经济类的要求本科为法律专业或者通过国家司法考试；研究生专业为法律类的要求本科为经济类专业
002	市发改委	02	科办员	从事经济管理等相关工作	A	3	1	研究生	经济类	
002	市发改委	03	科办员	从事社会事务管理相关工作	A	3	1	研究生	社会类或公共管理类	具有两年以上基层工作经历
003	市经信委	01	科办员	从事工业经济和信息化管理工作	A	3	1	研究生	电子信息类	取得相应学位，取得大学英语六级考试证书，具有两年以上基层工作经历
003	市经信委	02	科办员	从事工业经济和信息化管理工作	A	3	1	研究生	机电控制类	取得相应学位，取得大学英语六级考试证书，具有两年以上基层工作经历
003	市经信委	03	科办员	从事工业经济和信息化管理工作	A	3	1	研究生	计算机(软件)类	取得相应学位，取得大学英语六级考试证书

007	市公安局	01	科办员	从事文秘相关工作	A	3	8	本科及以上	中文、文秘类 (不含文艺学、中国民间文学、广告学、历史学、哲学)	男性,取得相应学位
007	市公安局	02	科办员	从事财务工作	A	3	6	本科及以上	财务财会类	男性,取得相应学位
007	市公安局	03	科办员	从事财务工作	A	3	2	本科及以上	财务财会类	女性,取得相应学位
007	市公安局	04	科办员	从事医务工作	A	3	3	本科及以上	临床医学(全科或内科)	男性,取得相应学位,具有两年以上基层工作经历,并具有医师资格证书和执业资格证书
007	市公安局	05	科办员	从事计算机相关工作	A	3	8	本科及以上	计算机类	男性,取得相应学位
007	市公安局	06	科办员	从事与电子信息相关的工作	A	3	3	本科及以上	电子信息类	男性,取得相应学位
007	市公安局	07	科办员	从事审计相关工作	A	3	2	本科及以上	审计类	取得相应学位
007	市公安局	08	科办员	从事治安管理工作	A	3	2	本科及以上	化学工程类	男性,取得相应学位
007	市公安局	09	科办员	从事法医工作	A	3	5	本科及以上	法医学	男性,取得相应学位
007	市公安局	10	科办员	从事法制工作	A	3	2	研究生	经济法学、国际经济法、金融法学、涉外经济与法律	男性,取得相应学位
007	市公安局	11	科办员	从事与工程管理相关的工作	A	3	3	本科及以上	工民建、建筑工程、土木工程、建筑工程与管理、建筑工程造价、工程管理、建筑管理	男性,取得相应学位

009	市民政局	01	科办员	从事区划地名工作	A	3	1	研究生	地理信息系统、地理科学、人文地理、城市规划	取得硕士学位
009	市民政局	02	科办员	从事社会工作	A	3	1	本科及以上	社会工作、社会工作与管理、社会学、城乡社会管理	取得相应学位，取得社会工作者职业水平证书，具有两年以上基层工作经历
013	市国土资源局	01	市局及分局科办员	从事国土资源管理相关业务工作	A	3	2	研究生	土地管理类	具有两年以上基层工作经历，取得相应学位
013	市国土资源局	02	市局及分局科办员	从事国土资源管理相关业务工作	A	3	1	研究生	土地管理类	取得相应学位
013	市国土资源局	03	市局及分局科办员	从事国土资源管理相关业务工作	A	3	1	研究生	法律类	具有两年以上基层工作经历，取得相应学位
013	市国土资源局	04	市局及分局科办员	从事国土资源管理相关业务工作	A	3	1	研究生	财务财会类	具有两年以上基层工作经历，取得相应学位
016	市水利局	01	水土保持管理岗	承担水土保持的管理工作	A	3	1	本科及以上	农业水土工程、农业水利工程、农业环境保护、水土保持与荒漠化防治、绿化与环境科学	具有两年以上基层工作经历
017	市农委	01	农业装备处科员	从事农机管理工作	A	3	1	本科	农业机械化、农业机械化及其自动化、农业机械化工程、农机修理	取得相应学位，具有两年以上基层工作经历

017	市农委	02	农业产业化发展和合作处科员	从事农业产业化管理工作	A	3	1	研究生	土地管理、农林经济管理、农村区域发展、农业经济管理、现代农业、农业资源经济与土地利用	取得硕士学位
021	市人口计生委	01	科员	人口发展研究工作	A	3	1	研究生	人口与社会学、社会工作、心理学、婴幼儿早期教育	取得相应学位，具有两年以上基层工作经历
022	市审计局	01	科办员	从事审计工作	A	3	1	本科	财政学、金融学、税务、投资经济	取得相应学位，取得大学英语四（六）级考试证书，取得全国计算机等级考试2级以上证书或江苏省高等学校计算机等级考试2级以上合格证书
022	市审计局	02	科办员	从事审计工作	A	3	1	本科	审计学、国际审计学、财务管理、基建会计	取得相应学位，取得大学英语四（六）级考试证书，取得全国计算机等级考试2级以上证书或江苏省高等学校计算机等级考试2级以上合格证书
022	市审计局	03	科办员	从事审计工作	A	3	1	本科	环境规划与管理、规划与环境保护、环境科学与工程、环境工程	取得相应学位，取得大学英语四（六）级考试证书，取得全国计算机等级考试2级以上证书或江苏省高等学校计算机等级考试2级以上合格证书、具有两年以上基层工作经历
022	市审计局	04	科办员	从事审计工作	A	3	1	本科	工民建、工业与民用建筑工程、土木工程、建筑概预算、建筑工程造价	取得相应学位，取得大学英语四（六）级考试证书，取得全国计算机等级考试2级以上证书或江苏省高等学校计算机等级考试2级以上合格证书、具有两年以上基层工作经历
023	市环保局	01	环保局科办员	环境管理与环境执法	A	3	1	研究生	环境与资源保护法学及相近专业	取得硕士及以上学位，具有两年以上基层工作经历

023	市环保局	02	环保局科办员	环境管理与环境执法	A	3	1	研究生	环境污染与治理及相近专业	取得硕士及以上学位，具有两年以上基层工作经历
025	市国资委	01	科办员	从事财务、资产管理工作	A	3	1	研究生	财务财会类	取得相应学位，取得大学英语六级考试证书，具有两年以上基层工作经历
029	市统计局	01	科办员	从事统计工作	A	3	3	本科及以上	统计类	
030	南京市工商行政管理局	01	市局科办员	食品安全监管工作	B	3	3	本科及以上	食品工程类	
030	南京市工商行政管理局	02	市局科办员	法制工作	B	3	3	本科及以上	法律类	具有两年以上基层工作经历
030	南京市工商行政管理局	03	市局科办员	信息化工作	B	3	2	本科及以上	计算机及应用、计算机科学与技术、计算机软件、计算机网络	具有两年以上基层工作经历
030	南京市工商行政管理局	04	市局科办员	文字工作	B	3	1	本科及以上	中文、文秘类	具有两年以上基层工作经历
030	南京市工商行政管理局	05	市局科办员	档案工作	B	3	1	本科及以上	文秘与档案、档案学、图书馆学、情报学	具有两年以上基层工作经历
032	市质量技术监督局	01	六合分局科员	从事稽查法制工作	A	3	1	本科及以上	法律类	
032	市质量技术监督局	02	六合分局科员	从事食品安全监督管理工作	A	3	1	本科及以上	食品工程类	
032	市质量技术监督局	03	高淳县局科员	从事稽查法制工作	A	3	1	本科及以上	法律类	

032	市质量技术监督局	04	溧水县局科员	从事特种设备安全监察工作	A	3	1	本科及以上	化工机械、化工设备与机械、化工过程机械、化工装备与控制、机械工程及自动化、热能工程、热能工程与动力机械、化工安全工程	需高空作业，适合男性
037	市市级机关事务管理局	01	科办员	节能管理	A	3	1	研究生	建筑物智能化、建筑环境与设备工程、热能工程、热工检测与控制工程、热能动力工程	具有两年以上基层工作经历，本科与研究生所学专业均需相关专业，取得全国计算机等级考试2级或江苏省高等学校计算机等级考试2级及以上证书，取得大学英语六级考试证书
113	市国土资源局执法监察支队（参公管理）	01	科办员	从事国土资源巡查执法工作	B	3	1	研究生	法律类	取得相应学位
123	市环境监察支队（参公管理）	01	监察员	环境监察执法	B	3	1	本科及以上	环境与资源保护法学及相近专业	具有两年以上基层工作经历，一线执法适合男性
123	市环境监察支队（参公管理）	02	监察员	环境监察执法	B	3	1	本科及以上	机电控制类及相近专业	具有两年以上基层工作经历，男性
132	市质量技术监督稽查支队（参公管理）	01	办公室科员	从事财务管理工作	A	3	1	本科及以上	财务财会类	具有两年以上基层工作经历
165	市供销社（参公管理）	01	科办员	从事财会审计工作	A	3	1	本科	审计学、会计与审计、财会审计、基建审计	取得学士学位，具有两年以上基层工作经历

165	市供销社（参公管理）	02	科办员	从事人事管理工作	A	3	1	本科	劳动与社会保障、人力资源管理、劳动人事管理、人事管理	取得学士学位，具有两年以上基层工作经历
302	大连山劳教所	01	大队管教科员	从事劳教人员管理工作	B	3	1	本科	体育教育、思想政治教育、政治教育、人文教育	男性
302	大连山劳教所	02	劳教人员医疗管理科员	从事劳教人员临床护理	B	3	1	本科	护理学	男性
303	市金融办	01	科办员	从事金融服务、协调类工作	A	3	2	研究生	金融学、财政与金融、国际金融、国际贸易与金融、金融审计	取得大学英语四级及以上证书，具有两年以上基层工作经历
601	市督察办	01	科办员	从事与文字相关工作	A	3	1	研究生	中文、文秘类	取得相应学位，具有两年以上基层工作经历
601	市督察办	02	科办员	从事与法律相关工作	A	3	1	研究生	法律类	取得相应学位，具有两年以上基层工作经历
602	市政务服务管理办公室	01	科办员	从事与计算机软件编程等相关工作	A	3	1	研究生	计算机软件及应用、计算机软件与科学、软件工程、计算机软件、计算机（软件）	取得相应学位，具有两年以上基层工作经历