

Human rights and international labour law issues  
concerning migrant women working as domestic helpers in China

Mensenrechten en vraagstukken van internationaal arbeidsrecht met  
betrekking tot vrouwelijke migranten die werkzaam zijn als huishoudelijke  
hulpen in China

*(met een samenvatting in het Nederlands)*

Proefschrift

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## List of Abbreviations

ACFTU	All-China Federation of Trade Unions
ACWF	All-China Women's Federation
ADR	Alternative Dispute Resolution
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEACR	Committee of Experts on the Application of Conventions and Recommendations
CEDAW	Convention to Eliminate All Forms of Discrimination Against Women
CESCR	Committee on Economic, Social and Cultural Rights
CHSA	China Home Service Association
CMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
CPC	Communist Party of China
CRPD	Convention on the Rights of Persons with Disabilities
ECHR	European Convention on Human Rights
ECOSOC	The Economic and Social Council
EU	European Union
FLT	Feminist Legal Theory
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
IHRL	International Human Rights Law
ILC	International Labor Conference
ILO	International Labor Organization
IOM	International Organization for Migration
LAB	Labor Advisory Board
MDGs	Millennium Development Goals
MHURD	Ministry of Housing and Urban-Rural Development
MOE	Ministry of Education
MOFCOM	Ministry of Commerce
MOHRSS	Ministry of Human Resources and Social Security
NBS	National Bureau of Statistics
NDRC	National Development and Reform Commission
NGO	Non-Governmental Organization
NHRI	National Human Rights Institutions
NPC	National People's Congress
NSE	Not-Self-Executing
OHCHR	Office of the United Nations High Commissioner for Human Rights
OP	Optional Protocol
PRC	People's Republic of China
ROC	Republic of China
SCNPC	Standing Committee of National People's Congress
SDGs	Sustainable Development Goals
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNC	Charter of the United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNCRC	The United Nations Convention on the Rights of the Child
UNGA	United Nations General Assembly
UNHCHR	United Nations High Commissioner for Human Rights
UNHRC	The United Nations Human Rights Council
UNRISD	United Nations Research Institute for Social Development
UNSC	United Nations Security Council

UNTS	United Nations Treaty Series
UPR	Universal Periodic Review
VCLT	Vienna Convention on the Law of Treaties

### 1.1 An illustrative case of Cai Minmin

It was in the jolly atmosphere of the Chinese New Year in 2001 that a 14-year-old girl named Cai Minmin, from the remote village of Jiangdian in Henan Province, embarked on the journey to Zhuhai City in Guangzhou Province to work. She had discontinued her schooling in order to earn some money for her family, which lived in abject poverty. This is a common story for Chinese girls in the poor rural areas where traditional families put all their limited income into educating boys, while girls run errands at home, or work in big cities to support their male siblings. She was grateful to a personal contact who had introduced her as a domestic servant for Ms. Wei Juan, whom she used to call "Sister Juan". However, what happened in the following five years was unpredictably cruel and more than a young country girl earning about 200 RMB (roughly 28 Euros) a month could bear. The lady of the house, Ms. Wei, had violently abused Minmin continuously for five years, with all kinds of tools including hammers, scissors, vases, chopsticks and clothes hangers. "I did this to her for educational purposes, because Minmin has serious hygiene problems and she is lazy at work," explained Ms. Wei when she was cross-examined in court.<sup>1</sup> Minmin was rescued by the local police in 2006 by which time she was already severely deformed. Minmin had had her nose broken, one of her ears was damaged, her lips were chapped and 12 teeth had been knocked out by Ms. Wei with a rolling pin. Minmin had bruises and scars all over her body, and had been left with a disabled arm.

For those five years, she dared not report her experience to either her family or the police because she had been threatened by Ms. Wei that she would be killed if she dared to tell anyone. Due to the severity of Cai Minmin's injuries, Ms. Wei was sentenced to 15 years' imprisonment because she had committed the crime of *wilful and malicious injury in an extremely brutal manner*, Zhuhai Intermediary Court found. After the appeal procedure, Ms. Wei was sentenced to 12 years' imprisonment by Guangzhou High Court.<sup>2</sup>

This astonishing case was quickly forgotten by the society. But I wonder how many silenced Cai Minmins are out there, travelling thousands of miles from rural areas to a strange city, providing domestic service to a family, usually without a contract, keeping silent about abuse and violence. What lives do they live? Are they aware of their labour rights? Do they know where to seek a remedy? Can they afford expensive judiciary/arbitral procedures? Are there any domestic laws or institutions that offer protection for them? Are there international human rights/labour standards that can offer guidance to improve Chinese domestic legislation for the benefits of these migrant women workers who act as domestic helpers? What social mechanism can be used to ensure their access to justice given that there is a limited choice concerning remedial procedure for them?

### 1.2 Multiple disadvantages faced by migrant women working as domestic helpers in China

The Cai Minmin case is astonishing and thought-provoking. There are numerous women just like Cai Minmin, who migrate to a strange urban area, working as domestic servants for a well-off family but excluded from basic labour law protection<sup>3</sup> because they are often not regarded as normal employees according to Chinese labour law (see Chapter 2 for more details of Chinese labour law). As a matter of fact, due to the limited educational resources in rural areas, these migrant workers often lack sufficient knowledge and social resources to seek a remedy when their rights are violated. More often than not, they choose to keep silent in cases of disputes or violation, for fear of being dismissed or of revenge being taken. Migrant women workers who act as domestic helpers are a multiple marginalized group in Chinese society based on their gender, their social origin,<sup>4</sup> and their occupation. They work invisibly in a private household, they have insufficient social welfare, are excluded from the basic protection of labour law.

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<sup>1</sup> See Wei Juan, *Wilful and Malicious Injury*, Primary Trial 2006 Criminal Judgment, Document No. 98, Zhuhai Intermediary Court, Criminal Court III, No.98 (2006). See also Wei Juan, *Wilful and Malicious Injury*, Appellant Trial 2007 Criminal Judgment, Document No. 53, Guangzhou High Court, Criminal Court III, No.53 (2007).

<sup>2</sup> Ibid.

<sup>3</sup> For more details of the scale of migrant women workers acting as domestic helpers, see Sections 2.4. and 2.5.

<sup>4</sup> Discrimination based on social origin, means an individual's membership of a class, socio-occupational category or caste determines his or her occupational future, either because he or she is denied access to certain jobs or activities, or is assigned only certain jobs. See ILO CEACR, *Direct Request to China, on Equal Remuneration Convention, 1951 (No. 100)*, adopted 2012, published 102<sup>nd</sup> ILC session, 2013.

Generally speaking, there are still explicit gender preferences for potential employees,<sup>5</sup> be it in private enterprises or state-owned entities, and even government departments.<sup>6</sup> A gender pay gap also exists in various industries and occupations. Stereotypically ascribed to their family roles, women are often segregated in relatively low paid service sectors such as caring and serving in society.<sup>7</sup> Furthermore, sexual harassment of women workers in the work place in China is a social problem requiring attention.<sup>8</sup> This gender segregation in the labour market is particularly conspicuous amongst migrant workers. Most of the migrant women workers, with little education and few skills, are pushed into the low-skill and low-payment economic sectors, such as domestic service. Thus, there can be seen a predominance of female and migrant female workers in the domestic service market, with high risks of exploitation and abuse against women migrants.<sup>9</sup>

In China, the household registration system, known as the Hukou system, classifies all Chinese citizens into either the urban-born or the rural-born. A person born in a rural area is registered as an agricultural Hukou holder, whereas a person born in an urban area will be registered as an urban Hukou holder. Such a system segregates Chinese citizens into Hukou-based classes: agricultural Hukou holders are supposed to work as farmers, whereas urban Hukou holders are supposed to work in urban factories. In recent years, with the speeding-up of urbanization, many rural-born people have migrated into urban areas to work for better livelihoods, but the registration system and the consequent inferior treatment shown to these rural migrant workers builds an invisible wall around them. Being migrant workers holding non-urban Hukou, they are not included in many social benefit plans and public services subsidized by local governments, such as housing subsidies, pension plans and public education for children, which are only accessible for local urban citizens with local urban Hukou. (The institutional implications of the Hukou system will be further elaborated in Chapter 2.)

Based on this reality, migrant women workers face a compounded disadvantageous situation due to their agricultural Hukou status and their gender. In addition, public welfare benefits, such as maternity insurance funded by many major cities, are only made available to local residents, not to migrant women workers.<sup>10</sup> Culturally, it is also very difficult for them to fit into mainstream society given their limited educational background and their socio-economic status; because they do not have family or friends in the urban areas, their social networks are limited to the other migrant workers working in the same place or in the same business. Working as a domestic helper in China is not regarded as a promising career, either. Rather, such helpers are likely to work under inferior working conditions such as prolonged working hours, insufficient rest periods, exclusion from trade unions, working without a contract and exclusion from social welfare plans. In particular, where a private house is the work place, abuse and harassment are even more likely to happen to female domestic servants where there is no labour inspection or any form of supervision, resulting in a grey area in labour law.

Not being recognized as employees in legal terms in China, these self-employed domestic helpers are thus not entitled to those decent working conditions and work-related benefits arising from a social welfare plan supported by the Chinese labour law system, which is designed to protect workers' interests and rights against

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<sup>5</sup> See The Constitutionalism Research Institute in China University of Political Science and Law, *A Questionnaire Survey of Employment Discrimination in China's Ten Largest Cities*, Table B1-a, ed. Cai Dingjian, *The Employment Discrimination in China, Current conditions and anti-Discrimination Strategies* (Beijing: China Social Science Press, 2011), 512.

<sup>6</sup> For example, some positions in the public servants' recruitment system are only offered to male candidates because they require business trips frequently or because they require heavy labour, such as in the railway, public security, quarantine, and customs systems. It is summarized by the report that gender discrimination in national civil servants' recruitment amounted to 15.6% in all vacancies. See The Constitutionalism Research Institute of China University of Political Science and Law, *The Research Report of Employment Discrimination in the National Civil Servants Recruitment* (Beijing: China University of Political Science Press, 2011).

<sup>7</sup> See Juliet Mitchell, "Women: The Longest Revolution," *New Left Review*, No. 40 (1966), accessed 24 February 2017, <https://www.marxists.org/subject/women/authors/mitchell-juliet/longest-revolution.htm>.

<sup>8</sup> See e.g. cases: He Yingzhi filed a sexual harassment suit against her colleague Sheng Ping in Jiang Han Basic People's Court in Wuhan, Hubei Province on 4 July 2002 while no specific law against sexual harassment was applicable at that time. After the defendant's appeal, the appellant court, Wuhan Intermediate People's Court, ruled against him and made him apologize to the plaintiff, and quashed the judgment of mental damage compensation. Liu Lun was sent to prison for five months on a charge of harassment according to the Law of the People's Republic of China on the Protection of Women's Rights and Interests. See "First Sexual Harassment Case Gets 5 Months' Jail", *Chengdu Commercial Daily*, 24 July 2008. See also Lei Yang, "First Sexual Harassment Case Gets 5 Months' Jail," *Women of China*, 25 July 2008, accessed 15 February 2017, <http://www.womenofchina.cn/html/womenofchina/report/93602-1.htm>.

See also Tania Branigan, "Chinese Man Jailed in First Sexual Harassment Case Under New Law," *The Guardian*, 17 July 2008, accessed 15 February 2017, <http://www.guardian.co.uk/world/2008/jul/17/china.gender>

<sup>9</sup> See International Labour Organization, *Women and Men Migrant Workers: Moving towards Equal Rights and Opportunities* (Geneva: International Labour Organization, 2008), 3.

<sup>10</sup> See *Beijing Government Stipulation on Employee's Maternal Insurance*, Beijing Municipal Government, 5 January 2005.

employers.<sup>11</sup> Consequently, relationships between the host families and the domestic helpers are regarded as civil contract relationships which are seen as equal in law, but which, as a matter of fact, are not because, for most of the time, a migrant woman domestic helper has far less bargaining power than her host family in reality. In such cases, labour inspections to supervise such working conditions are not applicable for<sup>12</sup> domestic helpers working in a private family, as is explained before. Furthermore, when their rights are violated, or when they are in labour disputes with their host families, labour arbitration is not an option for these domestic helpers. On the other hand, going to court is costly, intimidating, wasteful of their time and with potential of damaging their reputation in the neighbourhood. Because they do not have recognized employee status, their working conditions are not supervised and they have a limited number of channels through which to claim their rights and seek justice.

Domestic service itself, as an occupation with a large number of workers in China, is, however, disproportionately under-regulated by law. Thus the decent working conditions and remedy-seeking channels for people working in domestic service are not clearly set out. Just as it is reflected in the wider world where women represent 83% of 53-100 million people working as domestic helpers,<sup>13</sup> women in China are stereotypically perceived as the right suitable providers of home services: nearly 90% of 20 million domestic workers are female.<sup>14</sup> Female domination of the sector, an enclosed working environment, and the informal nature of household services make women working as live-in care providers extremely vulnerable to physical and mental abuse.<sup>15</sup> Even worse, more than 50% of domestic workers in Guangzhou and Chengdu work without any form of contract, making the journey to seek justice even more arduous for them.<sup>16</sup> Employment instability is another problem for domestic helpers, who usually start off by working for one family and then are transferred to another family for various reasons.

The micro-environment of working is also not agreeable. The prolonged working hours and the variety of health risks are not covered by appropriate social insurance protection supported by the government. Domestic workers are often required to work continuously, especially for those who live in. 35% of domestic workers work over 10 hours a day in Guangzhou and Beijing; in Nanjing the percentage working such long hours rises to 70%.<sup>17</sup> The prolonged and irregular working time, exposure to cleaning chemicals, constant isolation from any social life and limitation of privacy can affect both the physical<sup>18</sup> and mental health of such workers.<sup>19</sup> Despite the unfavourable working conditions, there are still more than 60% of domestic workers in Beijing and Chengdu who are not part of the social insurance system because they are not included in the labour law system as normal employees.<sup>20</sup> Most domestic workers have to purchase commercial insurance for themselves with their meagre wages.

As we can tell from the above short narrative, the condition of migrant women working as domestic helpers is far from being rosy due to the multiple levels of their social categories, such as being women, being migrants with agricultural Hukou, and being domestic helpers. Their real life situation can be even more complicated

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<sup>11</sup> Article 1, *Labour Law of the People's Republic of China*, adopted at the Eighth Session of the Standing Committee of the Eighth National People's Congress, by Order of the President No.28, 5 July 1994.

<sup>12</sup> According to an ILO report, women represent 83% of 53-100 million people working as domestic helpers in the world. Domestic Work Policy Brief 4-Global and regional estimates on domestic workers, ILO, 19th, May, 2011. P7. Available at: [http://www.ilo.org/travail/whatwedo/publications/WCMS\\_155951/lang-en/index.htm](http://www.ilo.org/travail/whatwedo/publications/WCMS_155951/lang-en/index.htm)

See also Decent work for domestic workers: A matter of gender equality and human rights, ILO program introduction. Available at: <http://www.ilo.org/global/topics/domestic-workers/lang-en/index.htm>

<sup>13</sup> According to an ILO report, women represent 83% of 53-100 million people working as domestic helpers in the world. See ILO, *Decent work for Domestic Workers: Achievements since the Adoption of C189* (Geneva: International Labour Organization, 2016), 2. See also ILO, *Domestic Work Policy Brief No. 4: Global and Regional Estimates on Domestic Workers* (Geneva: International Labour Organization, 2011), 7.

<sup>14</sup> See ILO, *Fact Sheet: Domestic Workers in China, Project to Promote Equality and Decent Work for Women through Trafficking Prevention, Protection for Domestic Workers, and Gender* (Geneva: International Labour Organization, 2009), 1.

<sup>15</sup> See "Domestic Helpers Speak about Abuses in Their Works," *Wallstreet China*, 22 June 2016, accessed 15 February 2017, <http://wallstreetcn.com/node/250920>

<sup>16</sup> See ILO, *Fact Sheet: Domestic Workers in China*, 2009, 1.

<sup>17</sup> "There Lacks Legal Protection for Domestic Helpers, Whose Working Condition Worth Attention," *China News*, 12 January, 2010, accessed 15 February 2017, <http://www.chinanews.com/gn/news/2010/01-12/2067331.shtml>

<sup>18</sup> "Housemaids in Shanghai: Frequently Visited by Occupational Hazards and Fatigue," *People.com*, 9 March 2009, accessed 15 February 2017, <http://sh.people.com.cn/GB/138654/8926669.html>

<sup>19</sup> For example, a 2010 medical report listed 10 depression-prone jobs, among which there are 4 service related jobs. On this list, home-care work comes as the first kind. See Halah Touryalai, "10 Jobs with High Depression Rates," *Forbes News*, 12 October 2010, accessed 15 February 2017, <http://www.forbes.com/sites/halahouryalai/2010/12/10/10-jobs-with-high-depression-rates/>

<sup>20</sup> See ILO, *Fact Sheet: Domestic Workers in China*, 2009, 2.

because difficulties may arise from different combinations of their social categories: the difficulty of finding a good job in a city area may be the result of urban social prejudice against rural migrants and against women; the exclusion from certain social benefits or welfare plans may be the result of their agricultural Hukou status and their occupation in the informal sector; the sexual harassment or violence they face may be attributed to their gender and their private places of work. Given the multiple levels of barriers which they face in society, this study aims to find ways to improve the existing Chinese legal system, so as to better safeguard the basic human rights of domestic workers and improve their working conditions. In order to do this, the study seeks guidance from the vast ocean of international standards in the international human rights treaties and international labour conventions, especially those which have been ratified by China.

### **1.3 Research questions and theories applied**

#### **1.3.1 Research questions**

The multiple problems faced by migrant women workers reflect many layers of social problems. This research aims to come up with a systemic set of legal recommendations to improve the Chinese domestic legal system so that the basic human rights and decent working conditions of migrant women working as domestic helpers are legally ensured. Given the lack of appropriate access to justice for these workers, the study will further propose solutions in this regard with due consideration of the concrete social conditions faced by them. In order to do this, the study will apply a gender analysis and an intersectionality approach to analyse the status quo of migrant women working as domestic helpers so that we can better understand the overlapping forms of disadvantages faced by them. The study will use the available international human rights treaties and labour conventions as guidance to generate some recommendations for the improvement of Chinese domestic laws, as China is a State party to and shoulders State obligations for many international human rights conventions and labour conventions. The study will also be contextually sensitive enough to come up with suggestions that might solve concrete problems in a concrete social setting. Bearing all these elements in mind, the central research question is as follows.

**What is the current condition of the social and economic rights of rural migrant women working as domestic helpers under the existing Chinese legal system and what improvements in the Chinese legal system can be made to enhance their basic human rights, decent working conditions and access to justice, referring to the ratified international human rights conventions and labour rights conventions?**

To tackle the central research question, several research sub-questions will be dealt with:

- **What is the condition of migrant women working as domestic helpers in terms of their human rights and decent working conditions due to their social categories, such as their gender, their Hukou status, and their occupation in China? What has been provided in existing Chinese law regarding their situation? (Chapter 2)**
- **How can a gender analysis and an intersectionality approach perspective applied in the study help us to better understand the multiple disadvantages faced by migrant women working as domestic helpers, and their needs? (Chapter 3)**
- **How are the ratified international human rights and labour rights legal standards incorporated in the Chinese legal system? How can these conventions offer guiding principles for the improvement of current Chinese law, according to the major needs of migrant women working as domestic helpers, taking into account both a gender analysis and an intersectionality approach? (Chapter 4)**
- **Based on the guiding principles on state obligations generated from the existing international human rights and labour rights standards tailored to the needs of migrant women working as domestic helpers, what concrete recommendations can be offered to the Chinese government in order to fulfil its national obligation, with due consideration of the conditions in the workplace faced by migrant women working as domestic helpers? (Chapter 5)**

#### **1.3.2 Research perspective: gender analysis and intersectionality approach**

Applying a gender analysis and an intersectionality approach, this study analyses the living and working conditions of migrant women working as domestic helpers in the concrete social power discourse. The gender analysis adopted in this research proposes that gender as an analytical category for social power relations can help us better understand that the dilemma faced by migrant women working as domestic helpers has a

broader social background of a gender power struggle in society. A gender analysis applied in legal studies proposes that social reforms must be carried out in order to achieve a de facto gender balance in society. In this particular case about migrant women working as domestic helpers, when seen from a gender analysis, the poor treatment suffered by them is partly attributed to the imbalanced gender power relations in society: women workers' lower position and gender pay discrepancies in the labour market, and also the predominant percentage of women working as domestic helpers.

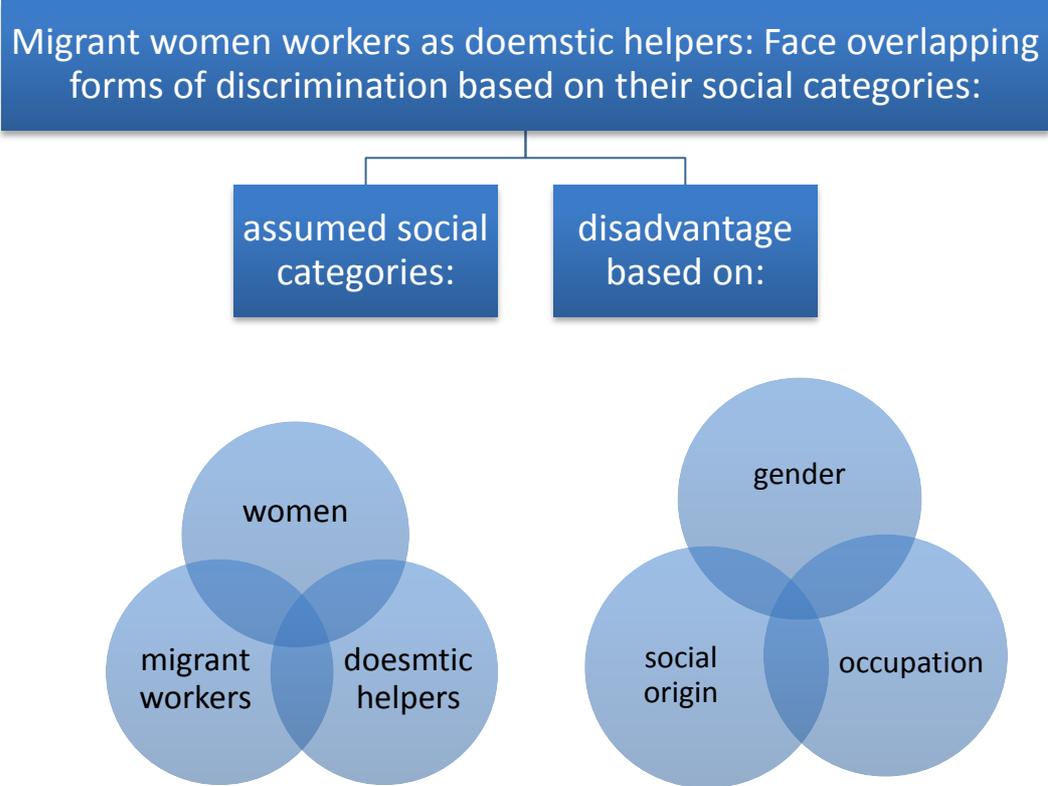
Besides a gender analysis, an intersectionality approach is also adopted in this research. Intersectionality considers that social subjugation does not entirely exist on a dichotomic basis, namely, men and women, white and black, urban and rural, etc. Instead, social oppression should be understood as based on interrelated and intersectional axes of identities such as gender, colour, ethnicity, social status and so on. In the case of migrant women working as domestic helpers, an intersectionality approach offers a lens through which to see the social power imbalance in front of them. The intersectional disadvantage experienced by migrant women working as domestic helpers can be understood via three levels of comparison: women workers' social position and treatment in comparison with that of male workers; the situation of migrant workers with agricultural Hukou in comparison with that of workers with local urban Hukou; and the working conditions of domestic helpers who are in most cases not protected by labour laws compared with that of other normal protected employees. Beyond these three levels of comparison, the study will use intersectionality to analyse how the three social categories interact and interrelate with each other, with the consequence of multiple disadvantages faced by migrant women working as domestic helpers.

The figure below shows more detail as to the situation: (1) as women, they would face gender discrimination due to their gender identity; (2) as migrant workers, they would confront Hukou discrimination due to their rural social origin;<sup>21</sup> (3) as domestic workers, they are likely to be subjected to occupational discrimination arising out of the informality of their job. Whereas migrant women working as domestic helpers in the overlapping parts of the circles will face various kinds of disadvantages that are derived from their gender, social origin and their particular occupation in varying degrees of intensity, as is shown in the figure below. This means that all the social barriers faced by women, rural migrant workers and domestic helpers are likely to be faced by the intersectionally disadvantaged migrant women working as domestic helpers. Also, the disadvantaged social categories in which they find themselves are likely to contribute to overlapping and even aggravated situations. For example, the difficulty of finding a good job in the city area may be the result of urban social prejudices against rural migrants and against women; the exclusion from certain social benefits or welfare plans may be the result of their agricultural Hukou status and their occupation in the informal sector; the sexual harassment or violence they face may be attributed to their gender and their private workplaces. To sum up, migrant women working as domestic helpers may face at one and the same time: difficulty in finding stable well-paid jobs, exclusion from certain social benefit plans and potential risks of being abused. In reality, the combination of social barriers may come up in a more complicated way.

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<sup>21</sup> ILO CEACR, *Direct Request to China, on Discrimination (Employment and Occupation) Convention, 1958 (No. 111)*, adopted 2012, published 102<sup>nd</sup> ILC session, 2013, paras. 1 and 7.

Figure 1.1. Overlapping social categories and ensued overlapping disadvantages



**1.3.3 International human rights treaties and labour conventions as guidance for improvement**

In order to come up with pertinent suggestions for the improvement of Chinese domestic laws regarding the protection of human rights and working conditions for migrant women working as domestic helpers, this study seeks guidance from the relevant international human rights treaties and international labour conventions respectively in the United Nations treaty system (hereafter: UN System) and the International Labour Organization treaty system (hereafter: ILO System), on the basis of the identified problems and concrete needs of these migrant women working as domestic helpers. In the UN System, the relevant provisions in the International Covenant on Economic, Social and Cultural Rights (ICESCR) and in the Convention to Eliminate All Forms of Discrimination against Women (CEDAW) are examined because both have been ratified by China and their subject matters are highly relevant to the topic of this study. The treaty bodies’ General Comments and country-specific observations made by the ICESCR Committee and the CEDAW Committee will be examined as well to further understand the implications of the provisions. In the ILO system, several core ILO conventions such as ILO Conventions Nos. 87 and 98 on freedom of association and collective bargaining are studied because China, as an ILO member state, will have to abide by these core conventions regardless of the ratification status. Additionally, ILO Conventions Nos. 100 and 111 on equal remuneration and non-discrimination in the labour market will be examined as they have both been ratified by China. The General Survey, Direct Request and Observation to China issued by the Committee of Experts on the Application of Conventions and Recommendations (CEACR)<sup>22</sup> will also be referred to so as to better understand the implication of the provisions. At the same time, the study also pays first and foremost attention to those conventions that have been ratified by China rather than to those that are based on the IHRL/ILO’s position in

<sup>22</sup> The ILO CEACR is composed of 20 independent eminent jurists from all over the world appointed by the Governing Body for three-year terms. About CEACR, see more at Jean-Michel Servais, *International Labour Law* (the Netherlands: Kluwer Law International, 2011), 147.

China, because the ratified conventions generate State obligations unlike unratified conventions. This does not mean that the study ignores those pertinent conventions such as CMW on the rights of migrant workers<sup>23</sup> and ILO No. 189 on decent working condition for domestic helpers, though not ratified by China yet, are of high relevance to the topic.

First, migrant women working as domestic helpers need to be granted equal rights; unfavourable treatment based on their gender, social origin and occupation must be eliminated. Accordingly, this study looks into the available international human rights and labour rights conventions to establish: what is the meaning of the obligation to ensure equality and prohibit discrimination; the definition of direct and indirect discrimination; and which are the justified exceptions to the prohibition of discrimination as is prescribed in Article 1(3) of the Charter of United Nations,<sup>24</sup> Article 2 of Universal Declaration of Human Rights,<sup>25</sup> Article 2(2) of ICESCR,<sup>26</sup> Article 11 of CEDAW,<sup>27</sup> and Article 1 of ILO No. 100.<sup>28</sup> Furthermore, from a gender analysis, this study specifically focuses on the provisions and interpretations on gender equality and non-discrimination against women in the labour market, including provisions regarding equal pay for work of equal value, maternity protection, prohibition of and remedy for gender-based violence and harassment, and temporary special measures. Additionally, from an intersectionality approach, this study introduces the development of “multiple discrimination” as an emerging legal concept in some of the UN legal documents. Implications for such a development are drawn for the reference of domestic legislation. Second, migrant women working as domestic helpers need to be assured of just and favourable conditions of work, which is required in Article 7 of the ICESCR in further details.<sup>29</sup> For this need, the study further looks into provisions found in UDHR, ICESCR, CEDAW and ILO Conventions Nos. 87 (Freedom of Association and Protection of the Right to Organize Convention),<sup>30</sup> 97 (Convention concerning Migration for Employment),<sup>31</sup> 98 (Right to Organize and Collective Bargaining Convention),<sup>32</sup> 143 (Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers),<sup>33</sup> and 189 (Convention on Decent Work for Domestic Helpers)<sup>34</sup> for reference of guidelines. Third, the study also pays attention to ensuring sufficient access to justice for these marginalized groups of people and will thus propose appropriate channels in the Chinese-specific context to ensure their access to justice, with due consideration of the specificity of their working environment.

## 1.4 Research methodology and structure of the book

### 1.4.1 Research methodology

In order to find answers to the above-mentioned research questions, this study adopts various methods to collect information and to present the research results. The methods adopted mostly rely on desk work, such as synthesizing statistics and surveys into a general picture of the facts, analysing legal documents and literature, comparing international legal standards with municipal laws (i.e. traditional legal research). In general, the research pays great attention to the situation on the ground because the research questions are raised on the basis of the real-life experience of a specific group of people, namely migrant women working as domestic helpers in China. Hence the study spends some sections on describing the status of these people, the Chinese legal system and the position of international human rights and international labour rights standards in China, as background information for readers. In sum, the main line of the research is concerned with the

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<sup>23</sup> UN General Assembly, *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, 18 December 1990, A/RES/45/158.

<sup>24</sup> United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

<sup>25</sup> UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

<sup>26</sup> UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations Treaty Series, vol. 993, p. 3.

<sup>27</sup> UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations Treaty Series, vol. 1249, p. 13.

<sup>28</sup> ILO, *Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value*, C100, 29 June 1951.

<sup>29</sup> UN Committee on Economic, Social and Cultural Rights, *General Comment No. 18, regarding Article 6 of the International Covenant on Economic, Social and Cultural Rights*, 6 February 2006, E/C.12/GC/18.

<sup>30</sup> ILO, *Freedom of Association and Protection of the Right to Organize Convention*, C087, 9 July 1948.

<sup>31</sup> ILO, *Convention concerning Migration for Employment*, C097, 01 July 1949.

<sup>32</sup> ILO, *Right to Organize and Collective Bargaining Convention*, C098, 1 July 1949.

<sup>33</sup> ILO, *Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers*, C143, 24 June 1975.

<sup>34</sup> ILO, *Convention Concerning Decent Work for Domestic Workers*, C189, 16 June 2011.

following topics: to present the problem; to analyse the problem; to create a map with targets; and to come up with suggestions for routes to reach the international human rights and labour standards.

Following this trajectory, the first task is to present a comprehensive picture of what the situation is like on the ground for migrant women working as domestic helpers and the social background they are in. The method applied is to study and analyse research reports, investigations and surveys carried out by research institutions, academic literature, national statistics and reports, China's country reports submitted to international treaty bodies, treaty bodies' comments on these reports directed to China, ILO thematic reports, general surveys and observations issued by the ILO Committee of Experts on the Application of Conventions and Recommendations. Although the statistics referred to in this study are secondary, they can still reveal the scale and pattern of the problem. For example, by offering the statistics of annual migrant workers in China in 2015 as 277 million<sup>35</sup> (*vis-à-vis* a population of some 16 million in the Netherlands), readers instantly get an idea of how large the group is. By presenting a table of statistics on the number of migrant workers in 2012 to 2015,<sup>36</sup> a steadily increasing trend in this group of people can be perceived. According to the fact sheet on domestic helpers in China issued by ILO, 90% of the roughly 20 million registered domestic servants in China are women, which accords with the hypothesis of the feminization of the domestic service industry. Nonetheless, such findings have their limitations too as they do not include those unregistered, silenced workers. In the case in particular of domestic helpers in China, many of them are self-employed, or are introduced to work by friends or agencies and sometimes they are not even counted in the statistics. By amalgamating these statistic and data materials, the study presents the problems to be dealt with: migrant women working as domestic helpers in China face multiple levels of social disadvantage without sufficient legal protection for their basic human rights and their working conditions.

The second main research method used is literature review, for example, literatures on feminist legal theories and an intersectionality approach. Such a process helps in the application of such theories to the concrete problem of this particular study: to perceive the problems faced by migrant women working as domestic helpers from the angle of gender power relations and from an intersectional subordination perspective. To be more specific, the study of such theories, for example, put the situation of migrant women working as domestic helpers under a gendered lens so that it can be understood that their situation is not only socio-economic based, but also gender-based. Viewed from an intersectionality approach, the dilemma faced by migrant women working as domestic helpers can be first analysed according to their social categories, such as being women, being rural migrants and being domestic helpers, and then analysed in a compound way, in which the disadvantages faced by them cannot be separately addressed.

Legal text analysis is adopted as the third research method in this study and is mainly used to understand Chinese municipal laws regarding women, Hukou laws, regulations concerning the domestic service industry, the international human rights and labour rights legal system and their legal position in China. As was explained at the beginning, there are always more documents that could be analysed. It is quite difficult to decide when to 'call it a day',<sup>37</sup> thus, the research will set a boundary topic-wise as to the limit of which documents are included in the review. Given the disciplinary embedding of this research within international legal research, the analysis of the provisions and treaty bodies' explanations focuses mainly on non-discrimination and decent working conditions selected from various UN human rights conventions and ILO conventions, mainly those ratified by China. In order to make the proposed suggestions pertinent to the raised research questions, the selection of the standards in conventions and treaties will be focused on those which are mostly likely to satisfy the needs of migrant women working as domestic helpers. As to those conventions which are highly relevant but not yet ratified by China, such as CMW and ILO No. 198 on domestic workers, this study examines them selectively because they are, at the least, of legal referential value. The scope of the potential relevant conventions found in the UN system and the ILO system to be examined is provided at the beginning of Chapter 4, and then, according to the needs of migrant women working as domestic helpers regarding equal treatment and decent working conditions, provisions on these two subjects are selected to be analysed.

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<sup>35</sup> National Bureau of Statistics of People's Republic of China, *The 2015 Investigation and Survey Report on the National Migrant Workers*, 28 April 2016, accessed on 12 February 2017, [http://www.stats.gov.cn/tjsj/zxfb/201604/t20160428\\_1349713.html](http://www.stats.gov.cn/tjsj/zxfb/201604/t20160428_1349713.html)

<sup>36</sup> See Section 2.4.

<sup>37</sup> J. D. S. Armstrong and Christopher Knott, *Where the Law Is: An Introduction to Advanced Legal Research*, American Casebook Series, fourth edition (Minneapolis: West Academic Publishing, 2012), 3.

In sum, the complexity of the questions could not usually be solved by quantitative or qualitative methods alone,<sup>38</sup> thus, a mix of both quantitative and qualitative methods is applied throughout the study to offer comparatively scientific answers. Such mixed methods help us to deepen our understanding of the problems: the fact-finding process provides the scale and patterns of the problem, whilst textual analysis reveals meanings. The adoption of different methods for different questions is how the research questions are answered in this study.

#### **1.4.2 Structure of the book**

The study's aim is to provide guiding recommendations to the Chinese government so as to improve the legal system to better safeguard the basic human rights and decent working conditions of migrant women working as domestic helpers. Hence, the study proceeds as follows. Firstly, it presents the problem by describing the status of migrant women working as domestic helpers and the relevant Chinese laws. Secondly, it introduces the perspectives to be applied to understand the problem, that is from a gender and intersectionality approach, how to understand the multiple disadvantages faced by migrant women working as domestic helpers *de facto* and *de jure*. Thirdly, it describes the conditions to be met by referring to a set of selected international human rights and labour standards tailored to the needs of migrant women working as domestic helpers. Finally, it offers suggestions to the Chinese government as to how to improve the Chinese legal system so as to better protect the basic human rights of and ensure decent working conditions for migrant women working as domestic helpers, preferably by ensuring appropriate channels for such women to access justice when their rights are violated.

In this study, Chapter 1 and Chapter 6 are, respectively, the introduction and conclusion chapters. Chapter 2 describes the dire situation of migrant women working as domestic helpers in China and the legal void in which they find themselves. Chapter 3 introduces and justifies the theories to be applied to understand the situation, namely, gender analysis and intersectionality approach. Chapter 4 draws up a series of guiding principles by analysing the international human rights conventions, international labour conventions and their treaty bodies' interpretations on the subject of non-discrimination and decent working conditions, according to the identified needs of migrant women working as domestic helpers. Chapter 5 first identifies the implementation gaps between the relevant international human rights/labour standards and Chinese domestic laws, by comparing the guiding principles with the status quo of the legal system in China. In this study, "implementation gaps" occur when states fail to pass domestic legislation, or do not establish procedures and institutions that are required to implement an international standard.<sup>39</sup> Thus, the implementation gaps present in two general situations, either there is no domestic law in the respect, or no domestic implementation mechanism in the respect.<sup>40</sup> Accordingly, the possible remedies for the situation will be to establish new laws or national institutions in the respect.<sup>41</sup> Chapter 5 comes up with suggestions as to how to improve Chinese legislation on equality and labour law so as to protect basic human rights and decent working conditions and ensure access to justice for migrant women working as domestic helpers, taking into due consideration the particular social conditions they are in.

Specifically, Chapter 1 begins with the illustrative case of Cai Minmin, who was abused for five years by her host family until she was seriously deformed, and who was a young migrant girl working as a domestic servant in Zhuhai city, Guangdong Province. It is this quickly forgotten case that raised the research questions in this study, as set out above. Hence, Chapter 1 briefly describes the situation of migrant women working as domestic helpers in China and introduces the research questions of this study, research methodologies, and the structure of the book. To find answers to these questions, Chapter 2 continues to offer an overview of the Chinese legal system concerning the protection of women's interests, Hukou laws and policies as well as laws on regulating domestic service, to enable readers to grasp the legal background in the related subjects. Chapter 2 further describes the situation of women workers against a transformative Chinese society, with the socio-cultural setting of traditional Confucianist patriarchal culture, gender equality practices against the background of socialist reform in Mao's era, and the *de facto* status of women workers in the gender-biased market economy in modern China. It then describes the situation of rural migrant workers and their poorer working

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<sup>38</sup> Abbas Tashakkori and Charles Teddlie, "Putting the Human Back in Human Research Methodology: The Researcher in Mixed Methods Research," *Journal of Mixed Methods Research* Vol. 4, No.4 (2010): 271–277, at 273.

<sup>39</sup> International Council on Human Rights Policy, *Human Rights Standards: Learning from Experience* (Switzerland: Versoix, 2006), 9.

<sup>40</sup> *Ibid.*, at 10.

<sup>41</sup> *Ibid.*

conditions in the urban areas due to their non-local Hukou status in comparison with local dwellers. Chapter 2 ends with a thorough description of the working conditions of domestic helpers and their status under the existing Chinese labour law system.

Chapter 3 displays and justifies the application of the theoretical framework of this study. It starts with a gender analysis as the first theoretical underpinning. Although the discussions and debates about gender never end in an academic setting, this study chose Joan Scott's understanding of gender, which is used as an analytical category to understand power relations between men and women.<sup>42</sup> The understanding of gender as an analytical tool of the power struggle helps us in perceiving the dire situation of migrant women working as domestic helpers to be a by-product of the gender-biased society with a complicated eco-social background. Chapter 3 then explains and uses an intersectionality approach developed by feminist theorists to analyse the intertwined and interchangeable disadvantages faced by migrant women working as domestic helpers in China.

Chapter 4 looks at the vast ocean of existing international human rights and labour rights standards for a series of guiding principles to ensure basic human rights and decent working conditions for migrant women working as domestic helpers. The first section lays out the outline of the UN normative system and ILO normative system as a collection of IHRL/ILO standards to be examined. The chapter then proceeds to introduce the ratified IHRL/ILO standards' position in China as background information. Based on the description and analysis in Chapters 2 and 3 of the situation of migrant women working as domestic helpers, Chapter 4 further categorizes their needs into three main aspects: equal treatment, decent labour conditions and appropriate channels for justice. In the light of these needs, the chapter then looks at the given collection of IHRL/ILO standards for relevant provisions and treaty bodies' interpretations. By analysing the implication of these international human rights and labour rights standards, the final section of Chapter 4 comes up with a list of guiding principles for China to fulfil its state obligations to safeguard the basic human rights, decent working conditions and access to justice of migrant women working as domestic helpers.

Chapter 5 identifies the implementation gaps between the guidelines generated in Chapter 4 and the current Chinese legal system and proposes suggestions for improvement. The gaps analysed in the first section are gaps on ensuring equality and eliminating discrimination, gaps on safeguarding labour standards, and gaps on ensuring access to justice. In the light of the identified implementation and gaps, the next section in Chapter 5 proposes suggestions for improvement: legislative suggestions to improve the Chinese domestic laws on safeguarding equality and decent working conditions for migrant women working as domestic helpers according to the guidelines developed in Chapter 4; and suggestions to improve the accessibility to justice for migrant women working as domestic helpers, with due consideration of the immediate social conditions they face. Chapter 6 concludes and summarizes the suggestions offered to the Chinese government under the provisions of international human rights and labour conventions.

## 1.5 Final Remarks

Answering these questions bears both practical and theoretical relevance. First, the study raises awareness of the intersectional disadvantage assumed by migrant women working as domestic helpers in China. The multiple facets of subordination in society is not a new phenomenon but has only been brought to the attention of the international human rights bodies in recent years.<sup>43</sup> This study uses a relatively new perspective to look at a long-existing China-specific problem and tries to offer suggestions to improve the situation; it is an experimental trial in legal academic circles and may contribute to the improvement of the Chinese legal situation in this regard. Illustrated by the example of migrant women working as domestic helpers in China, this research tries to put the theory of intersectionality into use and develop a framework of application for human rights protection.

Secondly, the study provides informative knowledge as to the situation of migrant women working as domestic helpers in China, Chinese laws and international laws in China, applicable international human rights and labour rights conventions. Thirdly, the research attempts to point to directions for improving Chinese anti-discrimination law and labour rules and urges China to better discharge its State obligation to international human rights obligations. Fourthly, the application of international human rights instruments and international

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<sup>42</sup> Joan Scott, Gender: A Useful Category of Historic Analysis, *The American Historical Review*, Vol. 91, No. 5 (1986):1053-1075, at 1069.

<sup>43</sup> See for example, UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 27 on older women and protection of their human rights*, 16 December 2010, CEDAW/C/GC/27.

labour standards as guidance to solve a concrete empirical domestic problem may enhance the role of international human rights and labour standards in China.



### 2.1 Introduction

In this chapter, the status quo *de jure* and *de facto* of women workers, migrant workers and domestic helpers in China are described. Section 2.2 provides an overview of Chinese law in terms of: its structure and hierarchies of laws in general with examples; laws on protection of women's interests; laws on regulating the Hukou system; and laws on regulating the domestic service business. Sections 2.3, 2.4 and 2.5 then introduce what conditions women workers, migrant workers and domestic helpers face in reality. By describing what the relevant laws are and how the relevant groups are treated in real life, this chapter lays the factual ground for further analysis in the following chapters: intersectional analysis of the situation of migrant women working as domestic helpers in Chapter 3, the gap identification in Chapter 4 and suggested guidelines in Chapter 5.

Section 2.2 proceeds in four stages. Firstly, "the Socialist Legal System with Chinese Characteristics" with seven legal divisions is introduced. Each tier of law contains numerous sets of codes and is illustrated by examples that are relevant to the study. Secondly, it demonstrates how Chinese laws ensure women's equal rights with men in respect of economic, social and labour aspects, while how Chinese laws pay special attention to women workers in maternity matters at the same time. Thirdly, it traces the history of the laws and policies on the Hukou system, which still affect modern Chinese society in terms of rural-urban segregation and different treatment shown towards agricultural Hukou holders vis-à-vis urban Hukou holders. Lastly, it tells how domestic service is regulated in the Chinese legal system in the commercial law division, instead of in the labour law division. This section provides a comprehensive picture of Chinese domestic laws which are of relevance to the research topic.

In Section 2.3, a three-part story of "socialist-capitalist patriarchy" faced by women workers in reality is set out. First, it describes how women workers currently still experience the traditional patriarchy practices and stereotypes in daily life, despite the numerous sets of laws aimed at women's rights protection. Second, it further demonstrates how women workers face difficulties under the formal gender equality practices derived from the socialist reform in the first few decades of the establishment of the new Chinese government since the 1950s. Lastly, given the Reform and Opening-up Policy adopted in the Deng Xiaoping era since the 1980s, <sup>1</sup>China has gradually embarked on the road to a market-oriented economy, <sup>2</sup> which has brought opportunity but also risks to women workers in the labour market, for example, gender segregation and pay gaps between female and male workers, due to historic injustices and the gender-biased market.

Section 2.4 traces how migrant workers have been rendered second-class citizens in a dual society divided by the Hukou system, the legal basis for which is introduced in Section 2.2. First, this palm-sized Hukou book can give rise to much different treatment between urban Hukou holders and agricultural Hukou holders. Second, it provides examples and statistics as to how rural migrant workers are treated in an inferior way in employment in urban areas due to their Hukou status. Third, the children of these rural migrants also face difficulties in getting education on a fair basis from local schools, and it can be impossible for them to sit College Entrance Exams at local schools because they do not have local urban Hukou.

Section 2.5 provides a general picture of the working conditions *de facto* of domestic helpers in China, compared with the *de jure* regulations in this aspect described in the earlier section. First, as an ever expanding business, domestic service is in great demand and has contributed significantly to the national economy. Second, on the basis of under-regulation in the domestic service market and the exclusion from labour law protection, domestic servants often face poor working conditions, such as performing without a contract, low payment, heavy working loads and prolonged working hours, low coverage rate of social security, risks of being abused in an isolated working environment and lack of social resources to get access to justice.

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<sup>1</sup> *Reform and Opening-up Policy*, adopted at the Third Plenary Session of the 11th Central Committee of the Communist Party of China, 22 December 1978.

<sup>2</sup> The market economy status of China is to undergo examination by the EU although this status has not yet been confirmed by the EU. The Chinese government maintains that it has gone to great lengths to move from a centrally planned economy to a market-oriented economy since the late 1970s. In telling the story of labour competition, such Reform and Opening-up Policy does play a role in shaping women's social status in contemporary China.

## 2.2 Chinese Law Overview

### 2.2.1 The Socialist Legal Structure with Chinese Characteristics

“The Socialist Legal System with Chinese Characteristics”, as it is termed by the official documents, was established at the end of August 2011, according to the White Paper concerning the Establishment of the Socialist Legal System with Chinese Characteristics.<sup>3</sup> This legal system contains 240 effective laws, 706 administrative regulations, and over 8,600 local regulations covering nearly all aspects of legal relations.<sup>4</sup> The amount and the scale of legislation is on the rise with the passing of time. In the Socialist Legal System with Chinese Characteristics, there are seven legal divisions categorized by subject matter as follows: Constitution and the related laws; Civil and Commercial Laws; Social Law; Administrative Law; Economic Law; Criminal Law; and Procedural and Non-procedural Laws.<sup>5</sup> According to the hierarchy of effect of laws, there are three tiers of all laws in the Chinese legal system: Law, Administrative Regulations and Local Regulations (see the author’s summary in the Table below). This hierarchy is to be referred to when laws are in conflict. Generally speaking, the principles used to solve conflicts of laws are that the higher grade laws take precedence over the lower grade laws, the specific laws take precedence over the general laws, and the more recently adopted laws take precedence over the older laws.<sup>6</sup>

As is illustrated in Table 2.1. below, there are three main ranks of laws and regulations, namely: (1) laws made by the National People’s Congress (NPC) and the Standing Committee of the National People’s Congress (SCNPC); (2) administrative regulations made by the State Council; and (3) local regulations made by the local People’s Congress, State Council Departments or local governments etc. In principle, the rank of the legislative body determines the ranking of the law in the hierarchy. The NPC meets for about two weeks each year at the same time as the Chinese People’s Political Consultative Conference, usually in the spring. The combined sessions are known as “The Two Meetings”. The Standing Committee of the National People’s Congress is in charge when there are no meetings. Thus, laws adopted during NPC meetings enjoy a higher legal effect than those adopted during SCNPC sessions. As can be seen from the hierarchy, the Constitution made by the NPC has the highest legal effect. Throughout the history of the People’s Republic of China since 1949, there have been four Constitutions. Of them, the 1982 Constitution, which was adopted by the Fifth National People’s Congress<sup>7</sup> and has been amended several times in, respectively, 1988, 1993, 1999 and 2004, is still effective. In the 2004 Constitutional Amendment, “the State respects and preserves human rights” has been inserted into Article 33 as an overarching principle of the Fundamental Rights and Duties of Citizens in Chapter II of the Constitution.<sup>8</sup>

Within the first tier of laws, laws that are made by the NPC and by the SCNPC have a higher legal standing than those in the second tier. For example, the Criminal Law of the People’s Republic of China<sup>9</sup> made by the NPC is one of the Basic Laws in China that has absolute authority in determining criminal cases. In the case of Cai Minmin, the abuser Ms. Wei Juan was charged with intentional assault and was sentenced to 15 years’ imprisonment at the first trial, according to this law. Examples of law made by the SCNPC are, inter alia, the Labour Law of the People’s Republic of China<sup>10</sup> and the Household Registration (Hukou) Ordinance.<sup>11</sup> The Labour Law is an overarching set of provisions that regulates labour relations, which concerns trade unions,

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<sup>3</sup> See Information Office of the State Council of the People’s Republic of China, *White Paper on the Establishment of the Socialist Legal System with Chinese Characteristics* (Beijing: Information Office of the State Council, 2011), accessed 15 February 2017, [http://www.china.org.cn/government/whitepaper/node\\_7137666.htm](http://www.china.org.cn/government/whitepaper/node_7137666.htm)

<sup>4</sup> Ibid.

<sup>5</sup> Seven legal divisions of the Chinese legal system, see *ibid.*

<sup>6</sup> See Article 86, *Legislation Law of the People’s Republic of China*, adopted at the Third Session of the Ninth National People’s Congress, by Order of the President No.31, 15 March 2000.

<sup>7</sup> *The Constitution of the People’s Republic of China*, adopted at the Fifth Session of the Fifth National People’s Congress and promulgated for implementation by the Proclamation of the National People’s Congress on 4 December 1982. It was then amended in accordance with the Amendments to the Constitution of the People’s Republic of China adopted respectively at the First Session of the Seventh National People’s Congress on 12 April 1988, the First Session of the Eighth National People’s Congress on 29 March 1993, the Second Session of the Ninth National People’s Congress on 15 March 1999 and the Second Session of the Tenth National People’s Congress on 14 March 2004.

<sup>8</sup> Ibid, Article 33.

<sup>9</sup> *Criminal Law of the People’s Republic of China*, adopted at the Second Session of the Fifth National People’s Congress on 1 July 1979, revised at the Fifth Session of the Eighth National People’s Congress on 14 March 1997, by Order of the President No.83, 14 March 1997.

<sup>10</sup> *Labour Law of the People’s Republic of China*, adopted at the Eighth Session of the Standing Committee of the Eighth National People’s Congress, by Order of the President No.28, 5 July 1994.

<sup>11</sup> *Household Registration Ordinance of the People’s Republic of China*, passed on 9 January 1958, on the 91th Session of the Standing Committee of the National People’s Congress of the People’s Republic of China, went into effect on 9 January 1958.

labour relations, working conditions, and labour dispute settlements. The Household Registration (Hukou) Ordinance, which was promulgated in 1958, is still in effect nationwide and regulates matters of Hukou registration, obtaining Hukou, Hukou transformation and Hukou termination. Because it is in the first rank of laws, unless a new law is made by the NPC that overturns its content, the Hukou Ordinance is the highest legal authority in effect when it comes to Hukou issues.

Laws and regulations made by the State Council, known collectively as administrative regulations, lie in the second tier. Two relevant sets of administrative regulations that will be further referred to in this study are the Interim Regulation on the Collection and Payment of Social Insurance Premiums<sup>12</sup> and the Regulations on Work-related Injury Insurances.<sup>13</sup> According to the Interim Regulation on the Collection and Payment of Social Insurance Premiums, social insurance premiums cover basic pensions premiums, basic medical insurance premiums and unemployment insurance premiums,<sup>14</sup> which are paid by employers/individuals to “the taxation authorities or the social insurance agencies established by the administrative department of labour and social security according to the provisions of the State Council”.<sup>15</sup> According to the Regulations on Work-related Injury Insurances, all types of enterprises and sole traders that hire workers<sup>16</sup> must participate in work-related injury insurance and pay work-related injury insurance premiums for all of the staff and workers,<sup>17</sup> so that medical treatment and economic compensation for staff and workers who suffer from work-related accidental injury or occupational disease are guaranteed.<sup>18</sup> It therefore follows that most domestic helpers, who are not hired by any enterprises or traders, are not subject to the protection of this law.

The third tier of laws contains a collection of Local Regulations, such as the following. (1) Department Regulations made by State Council Departments, one relevant example for this study is the Interim Measures for the Administration of Family Services Sector promoted by the Ministry of Commerce (MOFCOM) under the State Council.<sup>19</sup> This regulation defines what constitutes ‘family services’,<sup>20</sup> what are the responsibilities of the “family service agency”, “consumers”, “family service staff”, the supervision mechanism and legal liability. (2) Local Decrees made by the People’s Congress and its Standing Committee at the level of Province/Municipalities directly under Central Government/other large cities, such as the Beijing Employment Assistance Stipulation<sup>21</sup> promoted by the Standing Committee of the People’s Congress in Beijing. (3) Local Government Regulations made by local governments at the level of Province/Municipalities directly under the Central Government/other large cities, such as the Beijing Government Decision on the Modification of the Beijing Unemployment Insurance Stipulation<sup>22</sup> promoted by the Beijing government. (4) Autonomous Decrees made by the Standing Committee of the People’s Congress of National Autonomous Areas and (5) Special Decrees made by the Standing Committee of the People’s Congress of National Autonomous Areas.

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<sup>12</sup> *Interim Regulation on the Collection and Payment of Social Insurance Premiums*, by Order of the State Council No.259, the 13th Executive Meeting of the State Council, 14 January 1999.

<sup>13</sup> *Regulations on Work-related Injury Insurances*, promulgated by the State Council on 27 April 2003 and effective as of 1 January 2004.

<sup>14</sup> Article 2, *Interim Regulation on the Collection and Payment of Social Insurance Premiums*, 1999.

<sup>15</sup> Article 6, *Ibid.*

<sup>16</sup> According to the labour law system in China, all types of enterprises and sole traders that hire workers are collectively regarded as “employers”, as referred to by labour law, labour contract law, regulation on work-related injury etc.

<sup>17</sup> Article 2, *Regulations on Work-related Injury Insurances*, 1999.

<sup>18</sup> Article 1, *Ibid.*

<sup>19</sup> *The Interim Measures for the Administration of Family Services Sector*, adopted at the 56th ministerial meeting of the Ministry of Commerce on 7 November 2011, came into force on 1 February 2013.

<sup>20</sup> Article 2, *ibid.*

<sup>21</sup> *Beijing Employment Assistance Stipulation*, adopted at the 29<sup>th</sup> Session of the Standing Committee of the People’s Congress in Beijing, 23 December 2011.

<sup>22</sup> *Modification of the Beijing Unemployment Insurance Stipulation*, adopted at the 65th Session of the Beijing Government Executive Meetings, Beijing Municipal Government, June 5, 2007.

Table 2.1 : The hierarchy of the Three Tiers of Law

Tiers	Type	Name	Legislative Body	Examples
1	Law	Constitution	NPC	1982 Constitution
		Law	NPC	Basic Law such as: Criminal Law
			SCNPC	Laws besides Basic Law, such as: Labour Law and the Hukou Registration Ordinance
2	Administrative Regulations	Central Government Regulations	State Council	Regulations on Work-related Injury Insurances
3	Local Regulations	Local Government Regulations	The Local People's Congress (Province/Municipalities directly under the Central Government/other large cities)	Beijing Employment Assistance Stipulation
		Department Regulations	State Council Departments	Interim Measures on Domestic Service Administration
		Local Decrees	Local Governments(Province/Municipalities directly under the Central Government/other large cities)	The Beijing Government Decision on the Modification of the Beijing Unemployment Insurance Stipulation
		Autonomous Decrees	The Standing Committee of the People's Congress of National Autonomous Areas	/
		Special Decrees	The Standing Committee of the People's Congress National Autonomous Areas	/

Besides the published laws and regulations, the interpretation of such regulations by the authoritative bodies also has a legal effect. According to the Law on Legislation of the People's Republic of China, the SCNPC is empowered to interpret the laws and the applications.<sup>23</sup> Thus, the legal effect of such an interpretation made

<sup>23</sup> Article 42 states, "The power to interpret a national law shall vest in the Standing Committee of National People's Congress". *Legislation Law, 2000.*

by the SCNPC has the same force as national laws established by the NPC and the SCNPC.<sup>24</sup> In contrast, the State Council, the Central Military Committee, the Supreme People's Court, the Supreme People's Procuratorate,<sup>25</sup> the various special committees of the Standing Committee and the Standing Committee of the People's Congress of various provinces, autonomous regions and municipality directly under the central government, *may make a request* to the SCNPC for the interpretation of laws and applications. For example, when the law causes confusion in practice, these organs can ask SCNPC for legal interpretation.<sup>26</sup> These organs are also empowered to make legal interpretations on their own initiative *in the realm of their own business*, but not beyond the realm of their own business.<sup>27</sup> When the interpretations provided by these organs are at variance with each other, the SCNPC determines which interpretation is to take precedence.<sup>28</sup>

### 2.2.2 Laws on the protection of women's interests

It is provided in CEDAW that the state party must assume the responsibility to combat not only de facto but also de jure discrimination, and to eliminate direct and indirect deprivation of equal enjoyment of rights by women.<sup>29</sup> (For the position of CEDAW in China, see Section 4.3.) When it comes to the legal system on non-discrimination in China on the de jure level, Chinese law boasts many legal codes regarding the general principle of equal treatment of men and women scattered throughout the Constitution,<sup>30</sup> Labour Law<sup>31</sup> Employment Promotion Law<sup>32</sup> and so on. For example, it is enshrined in Article 48 of the Constitution that "Women in the People's Republic of China enjoy equal rights with men in all spheres of life, political, economic, cultural and social, and family life. The state protects the rights and interests of women, applies the principle of equal pay for equal work for men and women alike and trains and selects cadres from among women".<sup>33</sup> According to Articles 12 and 13 of the Labour Law, workers must not be discriminated against in employment due to their sex, and women must enjoy equal rights with men in employment; sex must not be used as a pretext for excluding women from employment during recruitment of workers, nor must the standards of recruitment be raised when it comes to women.<sup>34</sup> It is also prescribed in the Law of the People's Republic of China on Promotion of Employment that employment must not be subject to discrimination on the basis of gender and that "the State must ensure that women enjoy equal labour rights with men". "When employing units recruit workers, they must not use sex as a pretext for excluding women from employment or to raise recruitment standards for women." "When an employing unit recruits female workers, it must not stipulate in the labour contract any content which restricts female workers from getting married or bearing a child."<sup>35</sup>

Besides being treated equally de jure, women workers also enjoy "special occupational protection and are entitled to assistance and subsidies during the period of pregnancy, the period immediately after delivery, and breast-feeding", according to Article 26 of the Population and Family Planning Law of the People's Republic of

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<sup>24</sup> See Articles 42 and 47, *ibid.*

<sup>25</sup> The Supreme People's Procuratorate of the People's Republic of China is the highest government department at the national level that is responsible for both prosecution and investigation of criminal cases in the People's Republic of China. See Article 243, *Criminal Procedure Law of the People's Republic of China*, adopted at the Second Meeting of the Fifth National People's Congress on 1 July 1979; amended for the first time according to the Decision on the Amendment of the Criminal Procedure Law of the People's Republic of China at the Fourth Meeting of the Eighth National People's Congress on 17 March 1996; amended for the second time according to the Decision on the Amendment of the Criminal Procedure Law of the People's Republic of China at the Fifth Meeting of the Eleventh National People's Congress on 14 March 2012.

See more at "The Supreme People's Procuratorate of the People's Republic of China", Supreme People's Procuratorate, accessed 15 February 2017,

<http://www.spp.gov.cn/>

<sup>26</sup> See Article 43, *Legislation Law*, 2000.

<sup>27</sup> See Articles 2-5, *Resolution of the Standing Committee of the National People's Congress Providing an Improved Interpretation of the Law*, adopted at the 19th Meeting of the Standing Committee of the Fifth National People's Congress, 10 June 1981.

<sup>28</sup> See Article 1, *ibid.*

<sup>29</sup> See Articles 1 and 2 of CEDAW UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations Treaty Series, vol. 1249, p. 13.

See also, UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 16 December 2010, CEDAW/C/GC/28, para.9, 16 and 35.

<sup>30</sup> *Constitution*, 2004.

<sup>31</sup> *Labour Law*, 1995.

<sup>32</sup> *Law of the People's Republic of China on Promotion of Employment*, adopted at the 29th Meeting of the Standing Committee of the Tenth National People's Congress of the People's Republic of the China, 30 August 2007, went into effect as of 1 January 2008.

<sup>33</sup> Article 48, *Constitution*, 2004.

<sup>34</sup> Articles 12 and 13, *Labour Law*, 1995.

<sup>35</sup> Articles 3 and 27, *Law of the People's Republic of China on Promotion of Employment*, 2007.

China.<sup>36</sup> Plus, each province holds a certain level of discretion over the content of such maternity benefits for old, ill or disabled women. As Article 27 of the Law of the People's Republic of China on the Protection of Rights and Interests of Women obliges the State to "develop social insurance, social relief and medical and health services" for the sake of old, ill or disabled women.<sup>37</sup> For the special protection of women workers, there is an administrative regulation promoted by the State Council, entitled the Regulations Concerning the Labour Protection of Female Staff and Workers, that offers comprehensive protection for female staff and workers, including training, maternity benefits, 98-day maternity leave, breast-feeding breaks, free from sexual harassment, labour inspections of female workers' protection, legal liability for any violation of this protection, and so on.<sup>38</sup>

Sexual harassment had been considered as a mere moral problem instead of a legal issue before the term "sexual harassment"<sup>39</sup> was officially introduced in China in the late twentieth century. Not until 2005 was sexual harassment explicitly prohibited in the newly amended Law on the Protection of Women's Rights and Interests. During the years in between the introduction of the term and its prohibition by law, several trial cases had been filed but failed. In 2001, the first legal case claiming sexual harassment in China went to court in Xi'an and was dismissed due to lack of evidence. Later in 2003, a relevant case of sexual harassment was filed but was found by the Beijing Haidian District Court not to be proved, also due to insufficient evidence.<sup>40</sup> Even after sexual harassment was explicitly prohibited, it was only seldom that cases went to court as victims often found it hard to collect enough evidence to win a case. Informal measures are sometimes taken to achieve justice, such as revealing details on blogs to gain public attention, after which the perpetrator might be punished by his employers who would find themselves under public pressure to act. For example, Professor Yi Junqing from the Central Compilation and Translation Bureau<sup>41</sup> and Professor Wu Chunming from Xiamen University,<sup>42</sup> both used their privileged status to take advantage of their female students, finally being reported online and being dismissed by their employers. Neither case went to court but was dealt with through the use of social media.

### **2.2.3 Laws on Hukou regulation from 1949 till today**

The household registration system, known as the Hukou system, is a Chinese institution that registers household information on each family with the public service department. As a result of the requirements of the command economy in the 1950s in China, the Hukou registration system divided the whole population into agricultural Hukou holders and urban Hukou holders in order to control the population according to their Hukou status. The intention was to effectively manage the population and prevent the creation of slums near the big cities. However, with the establishment of the Hukou system and its gradual development, the "Hukou" had gradually become the basis for social stratification between the agricultural Hukou holders and the urban Hukou holders in China.

In the first two decades of the 1950s and the 1960s, a dualistic socioeconomic structure of rural-urban segregation in terms of public service was created by the rural and urban Hukou. People who lived in the urban areas had a totally different life compared with their rural counterparts. City dwellers, who were affiliated to a local factory or cooperative, enjoyed a whole set of public service system benefits including job opportunities, a social security system, education resources for children, and a supply of food and goods supported by the government. By contrast, farmers in the rural community had to work in agricultural production to support the state's industrial production. What made such social stratification static was that the change from agricultural

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<sup>36</sup> Article 26, *The Population and Family Planning Law of the People's Republic of China*, was adopted at the 25th Meeting of the Standing Committee of the Ninth National People's Congress of the People's Republic of China on 29 December 2001, was promulgated and went into effect as of 1 September 2002.

<sup>37</sup> Article 27, *Law of the People's Republic of China on the Protection of Rights and Interests of Women*, passed by the National People's Congress on 3 April 1992, amended on 28 August 2005.

<sup>38</sup> *Regulations Concerning the Labour Protection of Female Staff and Workers*, adopted by the 200<sup>th</sup> Regular Session of the State Council of People's Republic of China, went into effect on 18 April 2012.

<sup>39</sup> As to sexual harassment, see Catharine MacKinnon, *Sexual Harassment of Working Women, a case of Sex Discrimination* (New Haven: Yale University Press, 1979).

<sup>40</sup> "First Sexual Harassment Case in Beijing, First Trial Failed," *China Court*, 6 November 2003, accessed 15 February 2017, <http://old.chinacourt.org/public/detail.php?id=89247>

<sup>41</sup> "Professor and His Post-Doc Mistress: A 'Quid Pro Quo' Sexual Relationship," *Tencent News*, 19 January 2013, accessed 15 February 2017, <http://view.news.qq.com/zt2013/yjq/index.htm>

<sup>42</sup> Zhang Yizhi, "Fired by Xiamen University: Professor Takes Advantage of His Female Students" *Xinhua News*, 14 October 2014, accessed 15 February 2017,

[http://education.news.cn/2014-10/14/c\\_1112824768.htm](http://education.news.cn/2014-10/14/c_1112824768.htm)

Hukou to urban Hukou was strictly limited, and sending someone to a rural area and changing their urban Hukou status to a agricultural Hukou status was even used as punishment for misbehaviour in the 1960s.<sup>43</sup> Thus people with agricultural Hukou could not freely migrate to urban areas, as they might get locked up in the local police station or driven directly back home in accordance with the Custody and Repatriation Ordinance,<sup>44</sup> which was abolished in 2003.

The restriction has been gradually loosening up since the Reform and Opening-up Policy of recent decades. In consequence, a growing flow was witnessed of surplus personnel<sup>45</sup> from the agricultural sector to the industrial sector, seeking better opportunities in life. This growing number of people are known as migrant workers in China as they migrate from one place to another in order to work. In the story of the ‘Dual Society’, the economic policies and the Hukou system, that served as an institutional fortification of such a rural-urban dual society since the establishment of new China (1949-) are introduced in the following subsections. Modern Hukou system find its origin as a social control mechanism for the government dated back to the pre-Qin Dynasty more than 2000 years ago, but this study will only focus on the modern Hukou system after 1949. The narrative will be carried out in two time periods, one is between 1949 to 1977, when Hukou has been used as a social control tool to work for the command economy. The latter time period is after the Reform and Opening-up Policy 1978 until now, when Hukou system has been used as a social control tool for the market economy background.

Figure 2.1. Hukou policy change in different time period after 1945



### The Command Economy Policies and Hukou System (1949-1977)

Right after the establishment of the new Chinese government in 1949, private land ownership was granted to farmers who could use, sell, or rent their lands just as they wanted. However, following the launch of the First Five-Year Plan on National Economic and Social Development in 1953,<sup>46</sup> the lands originally owned by the peasants were then “collectivized” in the rural areas, whilst the factories were “nationalized” en masse in the urban areas. Then the rural areas were so arranged as to provide agricultural supplies for industrial production in the urban areas. The government purchased agricultural products at a set price, transmitted the supply into urban areas, whose population working at the local factories then purchased these agricultural products, such as rice and oil, with coupons.<sup>47</sup> At the same time, to effectively organise the human resources, i.e. the workers,

<sup>43</sup> The criticized political offenders were the ones who disagreed with the contemporary policies and were subjected to a witch-hunt and severely punished by the government during the Cultural Revolution. See Guo Shutian and Liu Chunbin, *The Imbalanced China (I), the Past, Today and the Future of Urbanization* (Hebei: Hebei People Publishing House, 1990), 22.

<sup>44</sup> Migrant workers without legal residence permits are considered illegal residents, who can be detained or repatriated to their original place, according to *Provisions for Detaining and Repatriating Urban Vagrants and Mendicants*, State Council of People’s Republic of China, 1982.

<sup>45</sup> This kind of personnel movement is known as the ‘dual economy model’, introduced by W. Arthur Lewis, the winner of the Nobel Prize for Economics in 1979. It refers to an economic model of surplus labourers moving from the “traditional” sector to the “modern” sector. See W. Arthur. Lewis, “The Dual Economy Revisited,” *The Manchester School*, Vol. 47, Issue 3 (1979): 211-229.

<sup>46</sup> *The First Five-Year Plan (1953-1957) on National Economic and Social Development*: Five-Year Plans are national economic plans adopted by the Chinese central government to lay out economic targets for development in every five-year period. *China’s 12th Five-Year Plan (2011-2015) on National Economic and Social Development*, adopted at the Fifth Plenary Session by the 17th Central Committee of the Communist Party of China (CPC), 18 October 2010. For now, there is *China’s 13th Five-Year Plan (2016-2020) on National Economic and Social Development*, adopted at the Fourth Session of the Twelfth National People’s Congress of the People’s Republic of China, 17 March 2016.

<sup>47</sup> This is known as the state monopoly for purchase and marketing of grain programme. See *Economic Command on Planned Purchasing and Planned Allocation of Agricultural Products*, Government Administration Council, 23 November 1953.

the government promulgated the Hukou registration system to gather household information and divide the population into rural and urban areas.

Gradually, such divisions gave rise to segregation because the dwellers in the urban areas were provided with adequate public services out of relatively generous urban government expenditure derived from local industrial production, whereas rural workers had to rely on manual agricultural production purchased by the government without much profit being gained by the producers. What was worse, for a long time such segregation had been strictly upheld by the Hukou policy at that time. Theoretically speaking, you were always allowed to transfer from being a worker to being a farmer, which meant that your sustenance and welfare would no longer be provided by the government. But conversely, it was difficult for a farmer to become an urban citizen.<sup>48</sup>

Such segregation between the rural residents and urban citizens can thus be understood as a by-product of the Hukou registration system, which served to control any potential rural exodus in China's command economy epoch. Between 1953 and 1957, a series of policies were issued to dissuade, prevent and restrain<sup>49</sup> the "undesirable" rural outflows to the urban areas. In 1958, the promulgation of the Hukou Registration Ordinance<sup>50</sup> symbolized a national legalization of this rural-urban population segregation. Any conversion of non-agricultural Hukou (urban Hukou) had to be reported to the local register office, whereas any conversion of agricultural Hukou (agricultural Hukou) into urban Hukou had to be approved by the relevant register office with an employment certificate from the labour department, or proof of enrolment from universities, or by a permit from the register office.<sup>51</sup> From 1958 until the 1980s, a quota system on such transformation of Hukou status was carried out all over China — "agricultural Hukou being altered to non-agricultural ones" could be no more than 1.5% of the local population each year— in order to limit the total number of people converting from agricultural Hukou status to a non-agricultural Hukou status.<sup>52</sup>

Taking a closer look at the dualist socioeconomic society that is divided by the intangible wall of Hukou, one can better understand the different life which people experienced simply due to their different Hukou status. In the urban areas, almost all factories became state-owned and were registered as "units", where the workers and cadres earned a so-called "iron rice bowl" (a stable and secure job) fully supported by the government with a high standard package of social welfare, including government funded houses, state schools, publicly funded medical care and pensions.<sup>53</sup> Both workers and cadres in the units were entitled to local non-agricultural Hukou status. However, as a result of the planned economy, these industrial units were only able to hire a certain number of local workers.<sup>54</sup> By contrast in the rural areas, farmers on the one hand were no longer entitled to private land ownership and had to work for the collective to support the industrial boom; on the other hand they were not eligible for any of the public services or welfare network as provided in the urban areas. Politically speaking, farmers were not "the ruling class" but "the alliance for the workers" according to the Constitution,<sup>55</sup> and not until 2010 did they gain an equal ratio of NPC representatives with urban citizens by law.<sup>56</sup> During the Cultural Revolution (1966-1976), being sent to the rural areas and having one's Hukou status

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<sup>48</sup> For example, strict restrictions on Hukou conversion were set up in the *Stipulation on Dealing with the Hukou Conversion*, Ministry of Public Security, 1977.

<sup>49</sup> From 1953 to 1957, many official documents were issued by the central government of China to stop undesirable rural migration into cities, at first the documents "dissuade", then it "prevent" and "restrain" such rural-urban migration. These documents are, but not limited to: *Directives on Dissuading Undesirable Rural Migration into Cities*, Government Administration Council, April 17, 1953; *Continue to Implement, the Directives on Dissuading Undesirable Rural Migration into Cities*, Government Administration Council, March 12, 1954; *Directives on Preventing Undesirable Rural Migration into Cities*, Government Administration Council, December 30, 1956; *Additional Directives on Preventing Undesirable Rural Migration into Cities*, Government Administration Council, March 2, 1957.

<sup>50</sup> See *Hukou Ordinance*, 1958.

<sup>51</sup> See Article 10, *ibid*.

<sup>52</sup> See *Stipulation on Dealing with the Hukou Conversion*, 1977.

<sup>53</sup> As to "all distributed by the government", see Guo Shutian and Liu Chunbin, *The Imbalanced China (I)*, 1990, 59.

<sup>54</sup> See *ibid*, 54.

<sup>55</sup> Article 1 states: "The People's Republic of China is a socialist state under the People's democratic dictatorship led by the working class and based on the alliance of workers and peasants". *Constitution*, 2004.

<sup>56</sup> Not until March 14, 2010 did the newly amended *Electoral Law* give rural residents equal representation 1:1 with urban citizens in Article 16(1), and the 12th NPC formed in 2013 was the first NPC elected according to this ratio. Before this, the ratio of urban to rural representatives in NPC or Local People's Congresses were 8:1 and 4:1, which means that for every 8 or 4 urban representatives who showed up in the respective congress there was only 1 from the rural areas. This hugely affected the legislation concerning rural People's rights in the law-making process. See *Electoral Law of the National People's Congress and Local People's Congresses of the People's Republic of China*, adopted at the Second Session of the Fifth National People's Congress on 1 July 1979, promulgated by Order of the Chairman No.2, 4 July 1979 and effective as of 1 January 1980; amended for the fourth time in accordance with the Decision on Amending the Electoral Law of the National People's Congress and Local People's Congresses of the People's Republic of China adopted at the 12th Meeting of the Standing Committee of the Tenth National People's Congress on 27 October 2004.

changed from urban into agricultural was even used as a punishment for the 50 million criticized political offenders.<sup>57</sup>

Figure 2.2. The three classes of citizenship founded by the Hukou system in the Mao era

### *The Market Economy Policies and the Hukou System from 1978 until now*

The steady segregation of urban and rural remained unchanged until the market economy model was introduced after the adoption of the Reform and Opening-up Policy at the Third Plenary Session of the Eleventh Central Committee of the Communist Party of China (CPC) in 1978. From then on, economic liberalization prevailed throughout China. In rural areas, a trial of de-collectivization of the agriculture sector, known as the “household contract responsibility system”, which placed the risks and opportunities on the farmers’ shoulders and made them responsible for their profits and losses, was introduced and promoted.<sup>58</sup> In urban areas, some state-owned enterprises were privatized and private businesses were encouraged and subsidized.<sup>59</sup> In the coastal areas, special economic zones were opened for foreign direct investments (FDI).<sup>60</sup>

With such an economic Reform and Opening-up Policy, foreign investors looking for cheap labour poured into the domestic market of China. In this way, these resilient, cheap and hard-working migrant workers became the major force behind local economic construction and GDP growth. Nevertheless, the local government maintained a restricted policy view towards these rural-Hukou labourers. They hesitated to offer proper labour protection for these outsiders and grudgingly allocating funds from local budgets for their accommodation, housing, social welfare, public services and other entitlements, especially in times of labour market saturation.<sup>61</sup> Migrant workers were thus viewed, in many local dwellers’ eyes, as competitors to local job-seekers or even as unstable elements in society.<sup>62</sup>

Nevertheless, with an increasing demand for labourers, many reforms have been carried out to eliminate the remains of the command economy-based Hukou system during recent decades. The low numbers of conversions from agricultural Hukou to urban Hukou have been gradually increased over time through a series of arrangements. In recent years, free mobility has gradually been promoted under the Reform and Opening-up Policy and the later adoption of a market economy. In the late 1970s, the quota for “agricultural change into non-agricultural” was set at around 1.5% of the local population each year by the Ministry of Public Security<sup>63</sup> and followed by some local government legislation. Later, in the 1984 Circular of the State Council on Settling Peasants into Township Residence,<sup>64</sup> peasants could get the status of “self-rations households” (quasi-urban Hukou) under certain circumstances. It was provided in the Circular of the State Council on Settling Peasants into Township Residence [1984] No. 141 that if a peasant who worked in the township would like to be registered as a local non-agricultural household, then he or she had to fulfil several conditions: he or she needed to have fixed residence in the local area, and a permanent contract with a local state-run institution.<sup>65</sup> In 1985, the policy of Temporary Urban Residence Permits was introduced by the Ministry of Public Security, under the requirements of which those who were over the age of 16 and wanted to stay in an urban area for

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<sup>57</sup> The criticized political offenders were the ones who disagreed with the contemporary policies and were subject to a witch-hunt and severely punished by the government during the Cultural Revolution. See Guo Shutian and Liu Chunbin, *The Imbalanced China (I)*, 1990, 22.

<sup>58</sup> See Deng Xiaoping, *Deng Xiaoping’s Literary Selections*, Vol.2 (Beijing: Peoples Publishing House, 1994), 315-316.

<sup>59</sup> Article 11 reads: “the state permits the private sector of the economy to exist and develop within the limits prescribed by law. The private sector of the economy is a complement to the socialist public economy. The state protects the lawful rights and interests of the private sector of the economy, and exercises guidance, supervision and control over the private sector of the economy.” *Constitutional Amendment*, 1988.

<sup>60</sup> Special Economic Zones along Chinese coastal areas increased to more than 140 within a decade. See Michael E. Marti. *China and the Legacy of Deng Xiaoping: From Communist Revolution to Capitalist Evolution* (Washington: Potomac Books, 2002). See also *The State Council Circular Concerning the Expansion of the Scope of Coastal Economic Open Zones*, State Council, 18 March 1988.

<sup>61</sup> Sometimes local workers were laid off and many people could not find a job in times of market saturation. The employment rate would then decrease rapidly, and it would not look good on the local administrative record. And if those migrant workers with lower demands and greater adaptability flooded into cities as comparatively “advantaged” competitors to local job-seekers, then the local unemployment situation became even worse, which does not look good on the record of local leaders.

<sup>62</sup> See Na Lan, “Is There New Hope in Labor Rights Protection for Chinese Migrant Workers?” *Asian-Pacific Law & Policy Journal*, Vol. 10, No. 2(2009):493.

<sup>63</sup> Strict restrictions on Hukou conversion were set up by the Ministry of Public Security and endorsed by the State Council in the 1970s. See for example, *Stipulation on Dealing with the Hukou Conversion*, 1977.

<sup>64</sup> *The Circular of the State Council on Settling Peasants into Township Residence*, State Council, [1984] Doc.141, went in to effect on 13 October 1984.

<sup>65</sup> See *ibid.*

more than three months were required to apply for a temporary residence permit.<sup>66</sup> Many local governments followed suit and gradually developed regulations for relaxing the strict Hukou system. For instance, since the late 1990s, under certain circumstances, infants, separated couples and senior citizens resident in rural areas have gradually been allowed to convert their household status if they have families in urban areas.<sup>67</sup>

In 2012, the No.1 Document of the Central Party Committee declared the promotion of farmers' citizenship (in Chinese: *shiminhua*<sup>68</sup>) by accelerating Hukou reform and clearing away the barriers to obtaining urban Hukou.<sup>69</sup> In 2013 the new leadership incorporated the Hukou policy reform in the Communiqué of the Third Plenary Session of the 18th Central Committee of the Communist Party of China as their inaugural resolution.<sup>70</sup> A trend of upholding the principle of promoting the free flow of workers and respecting equal rights was witnessed during the national Hukou policy reform.<sup>71</sup> Nowadays, the restrictions on getting an urban Hukou are much fewer than in the past as many local governments have come up with strategies to attract talent or potential contributions by offering urban Hukou to those who can be of benefit to urban development.<sup>72</sup> Preferential policies are open to those workers who are highly skilled<sup>73</sup> and a Residence Permit<sup>74</sup> with an attached welfare and services package has been introduced to attract more contributors to cities. In Shanghai, for example, for families with Residence Permit Type-A, their children are entitled to take college exams in Shanghai, instead of having to go back to their home place in accordance with their agricultural Hukou status. Around China, 29 provinces have been carrying out Hukou reform plans to lower the barriers to gaining local Hukou.<sup>75</sup>

#### **2.2.4 Laws on regulating the domestic service market**

Usually, there are two main channels by which Chinese domestic workers can find jobs. Mostly one would rely on the referral of a relative, a friend, a former client, or a residential community officer to find one's host family. The other main channel is through domestic service agencies. There were approximately 3,000 agencies in Beijing in 2010 and 8,000 in Shanghai in 2011;<sup>76</sup> the number is still on the rise. An agency that introduces domestic helpers to a family in need charges an "introduction fee". However, the domestic service agencies are not usually concerned with the legal issues in terms of concluding a contract, offering training, providing insurance, assuming liability or anything else. The contract, if there is one, is always concluded between the host family and the worker. Because such a "service relation" between the host family and the domestic worker is not recognized by the labour law system in China as a "labour relation", and domestic helpers are not in the strict sense "employees" of the host families, these domestic helpers are not subject to labour law protection, such as accessibility to decent working conditions, labour inspections and labour arbitration. Additionally, the host families are not responsible for working conditions or social insurance for the domestic helpers either. In practice, many families conclude a contract with the domestic helpers in private to avoid paying an introduction fee.

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<sup>66</sup> This is so provided in the *Interim Provisions on the Temporary Residents Administration in Towns and Cities*, Ministry of Public Security, 13 July 1985.

<sup>67</sup> For more details, see *Circular on Several Prominent Problems in Hukou Administration*, Ministry of Public Security, 22 July 1998.

<sup>68</sup> 'Shiminhua' is a Chinese expression used to indicate the process for an increasing number of rural residents to acquire urban Hukou.

<sup>69</sup> See *Some Suggestions on Accelerating Modern Agricultural Development and Vitalize Rural Areas*, No.1 Document of the Central Committee, co-promoted by Central Committee of the Communist Party of China and the State Council, 31 December 2012.

<sup>70</sup> *Communiqué of the Third Plenary Session of the 18th Central Committee of the Communist Party of China*, adopted at the Third Plenary Session of the 18th Central Committee of the Communist Party of China, 12 November 2013.

<sup>71</sup> See Annex 1. Evolution of policies on rural migrant workers in China, in Constance Thomas, Nelien Haspels, Tim de Meyer, Marja Paavilainen, Hongman Zhang, *Equality and Non-Discrimination at Work in China: Training Manual, Module 4: Promoting Equality at Work for Rural Migrant Workers in China* (Beijing: ILO, 2010), 101-102.

<sup>72</sup> For example, the Beijing government issued a temporary policy concerning Hukou accessibility and funding support to attract overseas talent working and staying in Beijing. See *Temporary Policy on Encouraging Overseas Talents to Work in Beijing*, Beijing Municipal Government, 27 May 2009.

<sup>73</sup> For example, high-end talents can migrate freely among Beijing, Tianjin and Hebei, and enjoy the same level of public service and social welfare as Beijing locals do, according to the *Programme for Long- and Medium-Term Talent Development in Beijing (2010-2020)*, Beijing Municipal Government, 3 March 2010.

<sup>74</sup> For example, see *Transient Measures concerning Residence Permit Administration in Shanghai*, Shanghai Municipal Government, 28 May 2013.

See also *Transient Measures concerning Residence Permit Administration in Wuhan*, Wuhan Municipal Government, 15 March 2011.

See also *Transient Measures concerning Residence Permit Administration in Shenzhen*, Shenzhen Municipal Government, 22 May 2008.

<sup>75</sup> See Li Jinlei, "29 Provinces to carry out Hukou Reform," *China News*, 29 April 2016, accessed 15 February 2017, <http://www.chinanews.com/cj/2016/04-29/7852849.shtml>

<sup>76</sup> Qunmin Chen, Xianbo Li, Ruijie Wang, "The Development of Industry of Domestic Work in Shanghai", *Shanghai Economic Research*, Vol. 6 (2011):113-118.

Only a small fraction of domestic service is provided via ‘real’ employment, in which an entity,<sup>77</sup> commonly a limited liability corporation, recruits, trains and dispatches domestic workers as its company staff. In such a situation, domestic helpers are truly affiliated to a company as an “employee”, and enjoy labour rights prescribed in labour laws and relevant social security and insurance is also provided through his or her employing company. The monthly payment for service in the home goes directly to the corporation and is then distributed to the workers after the deduction of a monthly management expenses fee, the amount of which varies from place to place. In this model, the contract of domestic service is concluded between the corporation and the host family, thus the corporation is responsible for the conclusion of the contract and any dispute settlement with the host family. The labour contract is concluded between the corporation and the domestic helpers, thus the corporation is responsible for payment, working conditions, social security, insurance etc.

In recent years, a new type of agency has evolved, called “the cloud”, which is an internet based system, which provides an online platform for families and domestic helpers to contact each other via the internet.<sup>78</sup> Families and domestic servants are free to register their authentic information through the platform. Payments are required for each concluded contract or service provided. A leading agency in this field is called “Cloud Home Service” (*yun jiazheng*), which was established in 2010 and is thriving. Registered domestic servants have exceeded 200,000 in number and are made available via the platform in the large cities like Beijing, Shanghai, Guangzhou and Shenzhen. By using the Cloud Home Service mobile phone app, it is very simple to choose a nanny for any type of home service for any length of time. The host family is responsible for paying the hiring fee, the intermediary fee (varies from 20% to 100% of the salary earned by domestic servants upon agreement) and insurance for the domestic servants, and is encouraged to transfer the money with the online app. Such an internet platform for domestic servants has greatly boosted this business by offering great convenience for the host family and some basic guaranteed rights, such as instant payment, standard contract, insurance and dispute settlement, for the domestic servants themselves. Nonetheless, the Cloud is still an internet based agency and not an employer; the labour rights it can help to guarantee for the domestic helpers are still limited.

To sum up, those domestic workers who either work through agencies, online platforms or are self-employed, which constitutes a majority of domestic servants, are not subject to labour law but civil law, contract law or some commercial administrative ordinance.<sup>79</sup> However, those much smaller numbers of domestic workers who are hired as employees in a company/institution are subject to the regulation of labour law. This study will focus on those who are excluded from the labour law system, namely those who are self-employed or those who are working via agencies. This is further explained below.

According to Article 2 of the Labour Law,<sup>80</sup> households are not considered as economic entities, so they are not “employers” de jure; consequently, domestic workers hired by private families are not considered as “employees” de jure. For the same reason, i.e. the definition within the labour law system in China, domestic workers hired by private families are not explicitly regulated by the Labour Law, Labour Contract Law of the People’s Republic of China,<sup>81</sup> the Law of the People’s Republic of China on Prevention and Control of Occupational Diseases,<sup>82</sup> or the Social Insurance Law (SIL) of the People’s Republic of China.<sup>83</sup> Hence, those rights ensured by the labour law system for employees, such as the right to collective bargaining and a collective contract, standard working hours and paid leave, payment for overtime working, the right to social

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<sup>77</sup> “Business Model for Domestic Works,” Santi Group, accessed 15 February 2017, <http://bj.cnsanti.com>

<sup>78</sup> “Find Your Domestic Helpers,” Cloud Home Service, accessed 15 February 2017, <http://www.yunjiazheng.com/>

<sup>79</sup> As is explained in Section 2.2, Chinese labour law has a system of norms that is relatively independent from the civil law system.

<sup>80</sup> It reads, “This Law applies to enterprises, individually-owned economic organizations (hereinafter referred to as the employer) and labourers who form a labour relationship with them within the boundary of the People’s Republic of China.” Article 2, Labour Law, 1994.

<sup>81</sup> Labour Contract Law, 2007.

<sup>82</sup> Article 2 states, “The occupational diseases mentioned in this Law refer to the diseases contracted by the workers of enterprises, institutions and household economic organizations (hereinafter all are referred to as the employer) due to their exposure in the course of work to dusts, radioactive substances and other toxic and harmful substances, etc.” This indirectly excludes informal workers’ rights from being protected under the social insurance on industrial injuries scheme partly funded by the government, which means domestic workers have to buy commercial insurance for themselves. Law of the People’s Republic of China on Prevention and Control of Occupational Diseases, adopted at the 24th Meeting of the Standing Committee of Ninth National People’s Republic of China on 27 October 2001, went into effect as of 1 May 2002.

<sup>83</sup> The Social Insurance Law of the People’s Republic of China, adopted by the Chinese government on 28 October 2010, effective from 1 July 2011. This is the first Chinese national law that encompasses pensions, basic medical insurance, unemployment insurance, work-related injury insurance, and maternity insurance for labourers.

insurance for industrial injuries, sickness, unemployment and pregnancy, as provided for in these laws,<sup>84</sup> do not apply to privately hired domestic workers.

However, with increasing attention being attached to the importance of the domestic service industry, it is increasingly necessary to promote laws in this regard to regulate the market and to guarantee rights of relevant parties. Thus, the General Office of the State Council issued a guiding policy in 2010 to support domestic service by establishing a public information platform, financially supporting domestic service enterprises, providing access to social insurance, and expanding dispute settlement organs.<sup>85</sup> In 2012, the Ministry of Commerce<sup>86</sup> issued an Interim Measure on Regulating Domestic Service Business, which defines the domestic service business, promotes modernization of domestic service agencies, supports the online platform of domestic service, and provides guidelines for a service contract, duties, rights and liabilities of all relevant parties, a domestic service industrial association and dispute settlement mechanisms.<sup>87</sup> The fact that the domestic service business is not regulated by the labour law system but by the commercial regulation system means that it is an area subject to commercial competition instead of labour law protection. Additionally, the focus of the Ministry of Commerce is on the regulation of the business activities of domestic service agencies and companies, instead of on how domestic helpers are treated, let alone those domestic servants who are not affiliated to any agencies or companies. Thus, despite these commercial regulations, domestic servants remain legally invisible in terms of labour rights protection.

## 2.3 Women's position in a transformative China

### Introduction

According to the theories developed by Iris Young and Maria Mies, women endure a “dual system” of “capitalist patriarchy” in the social oppression which they experience.<sup>88</sup> For women in China, such a situation is aggravated into a “triple system” of “socialist-capitalist patriarchy” as the three ideologies contained within the term are closely intertwined with each other, forming a key part of the real life experiences of Chinese women workers. This section reveals the de facto situation of women under the three roughly divided historic time periods: pre-1949, 1949-1978, and 1978 to the present. During these three time periods, different cultural traditions and ideologies played a role in affecting the life and position in society of women workers, despite what the law had prescribed for protecting women's interests. The pre-1949 patriarchal story revealed an androcentric cultural tradition of thousands of years in which women were supplementary, dependent and dispensable; thus their social contribution was perceived as being both trivial and invisible. After the establishment of the new Chinese government in 1949, socialist ideology was widely promoted around the country, telling a story about the aspiration for women's emancipation as labourers after Marxism ideology thrived in China as the national ideology. After the reform and opening-up policy was promoted as a national policy following the Third Plenary Session of the 11th Communist Party of China Central Committee in 1978, a market-oriented economy depicted the working opportunities as well as risks for women workers against the context of gender-biased competition in the labour market. Section 2.2.3 explains the de facto situation of women workers under this “triple system” in contemporary China, where all three social elements contribute to the current status of women workers.

### 2.3.1 Women's position in the pre-1949 era

The “male supremacy over female” teaching was believed to have been derived from the *I Ching*,<sup>89</sup> which states that “the Heaven governs the Earth, just as Ch'ien rules K'un”, and that “it is so determined that men

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<sup>84</sup> These previously mentioned rights are the main components in *Labour Law*.

<sup>85</sup> See *Guiding Policy on Developing Domestic Service Industry*, General Office of the State Council, [2010] Doc.43, 26 September 2010.

<sup>86</sup> Note that domestic service is mostly under the regulation of the Ministry of Commerce.

<sup>87</sup> See *Interim Measures for the Administration of Family Services Sector*, issued on 18 December 2012, Ministry of Commerce, [2012] Doc. 11, went into effect on 1 February 2013.

<sup>88</sup> Maria Mies in her 1998 thesis claimed that a “capitalist-patriarchy” is “an intrinsically interconnected system in which the gender division of labour and exploitation of women” are “never-ending world-wide process of capital accumulation”. See Maria Mies, *Patriarchy and Accumulation on a World Scale: Women in the International Division of Labour* (New York: Palgrave Macmillan, 1998), 38.

<sup>89</sup> *I Ching* (*Zhouyi*) also known as the *Classic of Changes*, is one of the oldest of the Chinese classic texts dated back to the Western Zhou period (1000-750 BC).

follow Tao of Ch'ien and women Tao of K'un".<sup>90</sup> Accordingly, men are supposed to fulfil their role to be firm, creative and relentless, whereas women are supposed to be flexible, receptive and tolerant (see table at the end of this Section). Later, the teaching of Confucius reaffirmed that everyone in society must keep to their position, including the Monarch, officials, fathers and sons, and must perform according to their own role and social expectations.<sup>91</sup> In this way, the social order is maintained and harmonized, and interpersonal ethics are established and sustained.

Although the modern interpretation of *I Ching* and *The Analects of Confucius* can be more adaptive to up-to-date ideas,<sup>92</sup> practices under gender stereotyping still prevail, in the private family sector, in the public labour market and in the political structure around China. For example, even to the most modern Chinese people, in a household the man is expected to be the "breadwinner" and the woman is supposed to carry out the household chores. Up to the present day, Chinese males are supposed to offer a house for marriage and to be registered as "head of the household" in practice,<sup>93</sup> whereas Chinese women are often discouraged from being too ambitious in their careers. For example, a slang expression such as "left-over women" attaches a stigma to women who are still single at an advanced age, whereas the expression "dragon ladies" is applied to women who are career-oriented. In Chinese culture, "good" women are those who take care of the family, do household chores and run family errands, which are all unpaid family responsibilities. Thus, domestic work, as the extension of women's family role, is often undervalued in society and no one sees domestic work as a desirable career to pursue.

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<sup>90</sup> "The Tao of Ch'ien and K'un determines the Heaven to be respectable and the Earth to be receptive, and men follow the Tao of Ch'ien and women K'un." See "Hsi Tzu," *I Ching*.

<sup>91</sup> Yen Yüan Passage, the duke Jing, of Qi, asked Confucius about how to govern. Confucius replied, "There is government, when the prince is prince, and the minister is minister; when the father is father, and the son is son." Confucius is extolling the etiquette in Zhou Dynasty (Zhou Li) when everyone knows his or her own social position and acts accordingly. See "Yen Yüan," *The Analects of Confucius*.

<sup>92</sup> Chinese ancient classics have been opened up to interpretations by many schools of teaching throughout time; the modern interpretation of ancient Chinese philosophy also continues to adapt with modern ideas. For example, Confucianism was used to justify the concept of human rights, see William Theodore De Bary, *Confucianism and Human Rights* (Columbia: Columbia University Press, 1998).

<sup>93</sup> According to statistics, the percentage of real estate ownership under the name of women, including single and married, is 20.1% and the corresponding percentage of men is 73.5%. Moreover, the percentages of bank account ownership and automobile ownership of women are generally less than for men. See All China Women's Federation and the National Bureau of Statistics, "Third Survey on the Status of Chinese Women," *Collection of Women's Studies*, Issue 6 (2011).

Table 2.2. An example of corresponding relationships in Chinese ancient philosophy of dualism and dialectic:<sup>94</sup>

Philosophical elements	Dualist index	
	Ch'ien	K'un
	Heaven	Earth
	Yang	Yin
Representative characteristics	Masculine	Feminine
	Firm	Flexible
	Male	Female
	Creative	Receptive
	Relentless	Tolerant

### 2.3.2 Women's position during the socialist reform era

During the Mao Era (1949-1976), women's liberation has been a priority on the reform agenda, which is a huge step forward moving from the traditional feudal ideology of women's subjugation to women's liberation. To put this ideal into practice, the very first step for the government was to encourage women into the labour market.<sup>95</sup> At the initial stage of the era, almost each and every peasant got land ownership, and equal work with equal pay among male and female workers became mandatory, with government subsidies.<sup>96</sup> The farmers, including female ones, were motivated to engage in agricultural work, with a resulting boost in agricultural production. In Hui'an County, for example, nearly 76 % of the women entered into the agricultural sector in 1956,<sup>97</sup> which was officially called "women's liberation from tradition".<sup>98</sup> Although such an increased number of women workers in the rural areas might have been the result of mere economic necessity, it was nevertheless a first step towards women integrating themselves into society. Before this reform, Chinese women were not encouraged to step out of their rooms but rather to stay at home for their husbands and children.<sup>99</sup>

Nonetheless, despite being an essential part of "socialist reform", the process of "women's liberation" is full of twists and turns against the strong torrent of long-held patriarchal culture. For example, the 1950 Marriage Law advocated freedom of marriage, promoted monogamy and gender equality, abolished forced or arranged marriages and prohibited bigamy and concubinage.<sup>100</sup> Yet, in practice, some of the ancient practices of marriage, such as parent-arranged marriages, little-girl-brides, and polygamy still prevailed in society, especially in the rural areas. The will to strive for women's liberation faced great difficulties in practice, especially when women had long been regarded as lesser social beings, or even personal chattels of their husband in the deep-rooted patriarchal culture.

Furthermore, in an unexpected turn, the emphasis on formal gender equality, as a result, exerted great pressure on working women, who were asked to imitate their male counterparts. They did heavy lifting "just like a man",<sup>101</sup> declared themselves to be "iron ladies" who "loved guns instead of roses"<sup>102</sup> and "held up half

<sup>94</sup> Note that the ancient Chinese dialectic philosophy does not only place emphasis on the separation of two polar opposites, but also advocates the importance of a harmonious co-presence of the two, such as Yin-Yang Balance, and Firm-Flexible Mix.

<sup>95</sup> For example, it was established in *The Land Reform Law of People's Republic of China*, adopted at the Eighth Meeting of the Committee of the Central Government, 30 June 1950, that farmers are entitled to full land ownership. However, such a full entitlement of land ownership did not last long and was replaced late in 1953 by the farmland cooperative system.

<sup>96</sup> Mao Zedong, *Selected Works of Mao Zedong*, Vol. 5 (Beijing: People's Publishing House, 1977) 246-247.

<sup>97</sup> See "Great Reform, Glorious Victory: Social Reform of Hui'an County's Implementation of Marriage Law," *Fujian Daily*, December 18, 1952.

<sup>98</sup> Women's Federation in Hui'an County, *Log of Women's Federation in Hui'an County* (1993): 25-26.

<sup>99</sup> Chinese folk teaching asks women to: assist their husbands and educate their children, and not to step out of the room or the house.

<sup>100</sup> Articles 1 and 2, *The Marriage Law of People's Republic of China*, adopted at the Seventh Meeting of the Committee of the Central Government, 13 April 1950.

<sup>101</sup> See Huang Lie, *Gender Equality and Legal Reform: A Collection of Papers in the International Symposium on Gender Equality and Legal Reform* (Beijing: China Social Sciences Press, 2009), 39.

the sky”, “women can do everything, and everything well enough”.<sup>103</sup> Rural women were also forced to do long-lasting heavy jobs, which caused many illnesses and physical problems for women.<sup>104</sup> This might have had to do with the economic necessity at that time, but was also attributed to the then propaganda of socialist gender equality, or “gender-blind” Marxism,<sup>105</sup> which presumed women to be just like men while ignoring their particular needs.<sup>106</sup> A great number of women even committed suicide or were murdered during that time, arguably due to the huge cultural conflicts between the deep-seated ancient patriarchal tradition and women’s liberation in the new era, or possibly, the enormous psychological pressure brought about by the standards set according to those of male workers.<sup>107</sup>

The previously mentioned extreme “egalitarian” approach of gender equality was finally modified after the adoption of the Opening-Up and Reform Policy issued at the Third Plenary Session of the 11th Communist Party of China Central Committee in 1978. Market economy, private ownership and small businesses, were gradually recognized and encouraged by the authorities.<sup>108</sup> Even the original strict restrictions placed on mobility from rural to urban areas were loosened to satisfy the great demands for cheap labour in the overwhelming urbanization process. This inevitably increased chances for women workers to gain more independence in economic terms. Such an economic reform even facilitated women’s participation in elected assemblies and political institutions.<sup>109</sup> Nonetheless, the socialist approach of formal gender equality often saw gender equality in a solely quantitative way, thus a quota system was introduced to ensure sufficient women’s participation, which often resulted in the women’s role becoming mere window-dressing, or in the questioning of a woman’s capability when she was included simply as a result of a quota.<sup>110</sup> Furthermore, endorsed competition in the labour market does not necessarily work for the benefit of women workers given the gender-biased way of selection and the past accumulated gender injustice. More problems in ensuring de facto gender equality in the labour market appear alongside such a transformation to a liberal market.

### 2.3.3 Women’s position in the post-opening-up era

The development of China is “wading across the stream by feeling the way”, which means a cautious trial-and-error strategy without any previous case as guidance at hand to achieve the socialist goal. After a series of reforms to the land ownership system<sup>111</sup> and a macro-economic control strategy, the central government finally decided during the Third Plenary Session of the 11th Communist Party of China Central Committee in 1978 to embark on the Reform and Opening-up Policy.<sup>112</sup> The main reformative idea was to carry out a massive

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<sup>102</sup> See Li Ao, *Legal Protection of Gender Equality* (Beijing: China Social Sciences Press, 2009), 61-62.

<sup>103</sup> See Liu Weifang, “The Great Leap Forward of Women Movement, From Beginning to End,” *Journal of China Women’s University*, Vol.5 (2008).

<sup>104</sup> It is reported that in Fengyang County, from 1959 to 1960, because of heavy labour and shortages of food, 8,237 women suffered from amenorrhoea, and 6,932 suffered from hysteroptosis. Fengyang is a county in Henan province, which suffered a great loss of life during the nationwide Great Famine. See Chen Zhenya, “Report on Fengyang County Issues,” *Suzhou Online*, 1 February 1961, accessed 15 February 2017,

<http://www.suzhou.gov.cn/asite/asp/bbs/showre1.asp?boardID=1&announceID=29812&Num=9991258000001&childs=3>

<sup>105</sup> See Heidi Hartman, “The Unhappy Marriage of Marxism and Feminism: Towards a More Progressive Union,” ed. Alison Jaggar and Paula Rothenburg, *Feminist Frameworks: Alternative Theoretical Accounts of the Relations between Women and Men* (New York: McGraw-Hill, 1993), 172-189.

<sup>106</sup> See Zhang Zhiyong, “Liberation in Displacement: Comments on the Rural Women’s Participation of Production Movement in North China during the Great Leap Forward,” *Jiangxi Social Sciences*, Vol.4 (2010).

<sup>107</sup> For example, see Xiao Aishu, “Suicide and Murder Cases of Women in Marriage During the Early Years of the People’s Republic of China,” *Qilu Journal*, Issue 2 (2005).

See also Li Honghe, “On Women’s Deaths concerning Marriage During the Early Years of the People’s Republic of China,” *Collection of Women’s Studies*, Issue 3 (2008).

See also Tang Shuiqing, “On Women’s Deaths During the 1950s When Marriage Law was Implemented in the Rural Areas in China,” *Social Science*, Issue 2 (2010).

<sup>108</sup> See Preface, *Constitution*, 1982.

<sup>109</sup> United Nations Research Institute for Social Development (UNRISD), *Gender Equality: Striving for Justice in an Unequal World’, Policy Report on Gender and Development: 10 Years after Beijing* (Geneva: UNRISD/UN Publications, 2005), xix.

<sup>110</sup> Zhong Manli, *A Gender Review over the Chinese Woman Cadre Selection Policy* (Beijing: Economic Press China, 2012), 158-160.

<sup>111</sup> From 1950-1953, the land ownership system was established as peasant private ownership by *The Land Reform Law of the People’s Republic of China* passed in 1950. With the adoption of the *Central Government’s Decision of Mutual Aid and Cooperation in Agricultural Production*, Central Committee of the Communist Party of China, 15 February 1953, the Radical Land Collectivization lasted until 1958. Then from 1958-1961 there was the Great Leap Forward, which was followed by the Farmland Quasi-privatization until the Opening-up Policy in the late 1970s, when the system for contracted responsibility was gradually established to boost morale for agricultural production.

<sup>112</sup> *Decision of the Central Committee of the Communist Party of China on Some Issues concerning the Establishment of the Socialist Market Economy*, adopted at the Third Plenary Session of the 14th Central Committee of the Communist Party of China (CPC), 14 November 1993.

privatization of the state-owned economy and to open up several Special Economic Zones in order to attract more private and foreign investment, expand urbanization, boost industrialization and stimulate GDP growth.<sup>113</sup> A market economy with Chinese characteristics, which combines state owned enterprises (SOEs) and a private economy, has been under construction ever since.<sup>114</sup>

In contemporary China, a different social culture and ideology form a complicated social condition for women workers. The Confucianist patriarchal practice, which maintains the social ethical order by allocating responsibility and resources according to one's social role, has contributed to the subordination of women to men in both the private and public sectors. The socialist ideology held formal gender equality as its core value, lifting women's status by making women equivalent to men without due consideration of the particular needs of women and the unequal footing on which women stand. Whereas the newly adopted market economy system that is under construction opens up more opportunities for women workers in the labour market, yet the accumulated past injustices and the male-biased meritocracy system do not work for the benefit of women workers in reality. To sum up, such a complicated social background that contains many different ideas and practices causes many concrete problems for women workers, such as unequal access to work opportunities, gender segregation in the labour market and the ensuing gender wage gap, a hostile working environment including but not limited to sexual harassment and with a glass ceiling, 'burning the candle at both ends' with workloads and family responsibilities. The following paragraphs will provide some facts and statistics on these aspects.

For various reasons, such as social gender stereotypes, heavy family responsibilities, and less access to social resources including education and training, more and more women are found in the informal sectors and part-time occupations with less payment, less social security and less occupational stability, which render them vulnerable, especially in times of economic downturn, financial crisis, redundancies and privatization. Take the unemployment rate in 2010 as an example: 3.4% of women aged between 16 and 59 were unemployed as opposed to 2.2% of men, despite a number of women who were not registered as unemployed.<sup>115</sup> Even with the same qualifications or similar educational background, men are generally preferred as candidates, they are paid more highly and offered more stable positions compared with women<sup>116</sup> by private enterprises in the labour market.<sup>117</sup> In the public service sector, male candidates are often given priority for some positions which claim "frequent business trips" or "intensive labour" in the job description to exclude female candidates.<sup>118</sup> 43.27% of the interviewed graduate students encountered employers who specifically asked for male employees, according to the Investigation Report on the Employment Discrimination of Graduate Students in Contemporary China issued in 2010.<sup>119</sup>

With an increasing number of women joining the labour market all over the world from 50.2 % to 51.7% during 1980-2008, the low payment for and insecurity of women workers still prevails.<sup>120</sup> The same situation is replicated in China. It is reported in the Global Gender Gap Report 2013 that the female-to-male ratio of estimated earned income is 0.691:1, compared with the ratio of 1:1 as total equality;<sup>121</sup> China thus faces a long haul to overcome the gender wage gap. Underneath unequal payment between male and female workers is

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<sup>113</sup> From 1978 to 2012, China's GDP growth had been steadily increasing to an average 7%-8% in comparison to the 6.7% of the pre-reform period. See Wayne M. Morrison, *China's Economic Rise: History, Trends, Challenges, and Implications for the United States* (Washington: Congressional Research Service, 2015).

See also professional projections done by IMF staff which showed a positive attitude toward China's 2013 economic growth, predicting it to be 8.2 %. See Andrew Burns, Theo Janse van Rensburg, "Global Economic Prospects, January 2013: Assuring Growth Over the Medium Term," *Global Economic Prospects* Vol. 6 (2013): 92.

<sup>114</sup> See *Communiqué of the Third Plenary Session of the 18th Central Committee of the Communist Party of China*, adopted at the Third Plenary Session of the 18th Central Committee of the Communist Party of China, 12 November 2013.

<sup>115</sup> Statistic from "The Sixth National Population Census" in National Bureau of Statistics, *The Tabulation on the 2010 Population Census of the People's Republic of China* (Beijing: China Statistic Press, 2010).

<sup>116</sup> United Nations Research Institute for Social Development (UNRISD), *Gender Equality: Striving for Justice in an Unequal World, Policy Report on Gender and Development: 10 Years after Beijing* (Geneva: UNRISD/UN Publications, 2005), 38-39.

<sup>117</sup> Pan Jintang, "the Gender Discrimination in the Labour Market for Graduate Students: Survey and Research on the Demand and Supply Condition in Employment of Beijing Female Graduate Students," ed. Meng Xianfan, *Chinese Women in a Transformational Society* (Beijing: Chinese Social Science Press, 2004), 48.

<sup>118</sup> The Constitutionalism Research Institute of China University of Political Science and Law, *The Research Report of Employment Discrimination in the National Civil Servants Recruitment* (Beijing: China University of Political Science Press, 2011).

<sup>119</sup> See Constitutionalism Research Institute in China University of Political Science and Law, "The 2010 Investigation Report on the Employment Discrimination against College Graduates in Contemporary China," ed. Cai Dingjian, *The Employment Discrimination in China, Current conditions and anti-Discrimination Strategies* (Beijing: China Social Science Press, 2011), 196-200.

<sup>120</sup> See ILO, *Women in Labour Markets: Measuring Progress and Identifying Challenges* (Geneva: International Labour Office, 2010), 3.

<sup>121</sup> See Ricardo Hausmann and Laura D. Tyson, *The Global Gender Gap Index 2013* (Geneva: World Economic Forum, 2013), 168.

horizontal and vertical occupational segregation,<sup>122</sup> that is, gender segregation among different vocations and among different levels in the hierarchy within the same vocation.

To be specific, on the one hand, women are mostly either engaged in the traditional female-dominated sectors such as service, clothing and textile industries that require simple and repetitive work instead of specialized craftsmanship or expertise, or they are working in the informal sectors,<sup>123</sup> or as part-time workers<sup>124</sup> with less guaranteed income and less security.<sup>125</sup> A survey in 2009 revealed that women occupied only 24.8% of the total number of highly-paid scientific and technical jobs.<sup>126</sup> On the other hand, women working within a vocational occupation are more often than not working at the lower end rather than doing managerial work.<sup>127</sup> The Global Gender Gap Report 2011 reports that the female-to-male ratio of being legislators, senior officials, and managers in China is 0.2:1, which is far away from the standard equality ratio of 1:1.<sup>128</sup> Apart from the payment and occupational segregation, hostile working environments including a glass ceiling and sexual harassment serve as severe impediments to women's career advancement. The development of both statute and case law in this respect is not sufficient in China, thus the access to any remedy for women victims of sexual harassment is very limited in practice. (As to sexual harassment cases in China, see more details in Chapter 5.)<sup>129</sup>

Another problem faced by female workers comes from their heavy family responsibilities, which are inextricably linked with the patriarchal culture in China. According to the statistics, although the competition for employment and workloads have been dropped onto women's shoulders, the household chores and errands undertaken by women have not been significantly reduced as they do daily household work for 143 and 102 minutes (urban and rural women respectively), whereas their male counterparts do so for 94 and 43 minutes (urban and rural men respectively).<sup>130</sup> It is also widely held that because of the heavy burden of taking care of the family and children, women are distracted at work and thus fewer women than men could make it to the top of a career structure.<sup>131</sup> Even if women finally make it to the top of their career structure, the stigma of being an inadequate wife or mother would easily be apparent to them in China's specific cultural environment.

## Conclusion

The transformative Chinese society nowadays is made up of a peculiar mixture of patriarchal practices, legacies from socialist reform, and a gender-biased market economy environment for women workers to live and work in, despite what laws may prescribe to protect women's interests. The patriarchal practices derived from Confucianism demanded that women should fulfil their expected roles of being a dutiful daughter, a subordinate wife, and a loving mother who devoted her life to the family. Women were discouraged from pursuing their own career ambitions otherwise they would be stigmatized in the community. The socialist reform following the establishment of the new Chinese government in 1949 brought revolutionary changes to the social psyche of gender relations, but not necessarily in a healthy way as it assumed that women were just like men and the policies in those times failed to take into consideration the specific needs of women. The

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<sup>122</sup> As to vertical and horizontal occupational segregation, see UN Committee on the Elimination of Discrimination against Women, *Concluding comments of the Committee on the Elimination of Discrimination against Women: China*, CEDAW/C/CHN/CO/6, 7-25 August 2006, para.22.

<sup>123</sup> See ILO, *Women in Labour Markets: Measuring Progress and Identifying Challenges* (Geneva: International Labour Office, 2010), 43-50.

<sup>124</sup> United Nations Research Institute for Social Development (UNRISD), *Gender Equality: Striving for Justice in an Unequal World, Policy Report on Gender and Development: 10 Years after Beijing* (Geneva: UNRISD/UN Publications, 2005), 70.

<sup>125</sup> Wang Guoyin, "On the Sexual Discrimination of Graduate Students' Employment," *Journal of Huaihai Institute of Technology*, Vol. 9, Issue 22 (2011):36.

<sup>126</sup> See UN Committee on the Elimination of Discrimination against Women, *Consideration of Reports Submitted by China, Combined Seventh and Eighth Periodic Report*, CEDAW/C/CHN/7-8, 17 January 2013, para.152.

<sup>127</sup> Bai Jing, Du Liantao, "On the Employment Sexual Discrimination of Graduate Students," *Journal of Jixi University*, Vol. 12, Issue 2 (2012):12-13.

<sup>128</sup> 1 = total equality, 0 = absolute inequality, so a ratio of 0.2 means far away from equality. See Ricardo Hausmann and Laura D. Tyson, *The Global Gender Gap Report 2011* (Geneva: World Economic Forum, 2011), 142.

<sup>129</sup> See The Third Survey on the Status of Chinese Women, organized jointly by the All China Women's Federation and the National Bureau of Statistics, stated on December, 2010 and get published on the Collection of Women's Studies, Issue 6, Nov. 2011. See Central Compilation and Translation Bureau, accessed 15 February 2017, [http://www.cctb.net/llyj/llyj/llwz/201301/t20130121\\_37060.htm#](http://www.cctb.net/llyj/llyj/llwz/201301/t20130121_37060.htm#)

<sup>130</sup> See All China Women's Federation and the National Bureau of Statistics, "Third Survey on the Status of Chinese Women," *Collection of Women's Studies*, Issue 6 (2011).

<sup>131</sup> 72.7% of people interviewed thought that women undertook more housework, which was considered by 67.5% of people interviewed as the main reason contributing to a lack of women amongst the leadership. See Ibid.

Reform and Opening-up Policy introduced market economy reforms to China, putting the emphasis on economic growth and monetary success in society. The market economy has opened the door for women to gain access to the labour market, but at the same time has opened a Pandora's box because past injustices and the patriarchal background put challenges in the way of women trying to get equal opportunities in payment and promotion in the labour market, which in turn hinders the realization of de facto gender equality in society.

## 2.4 Hukou-based dilemma in a “dual society”

### Introduction

What magic does the palm-size —Hukou book<sup>132</sup> do? You may wonder. As has already been mentioned in Section 2.2 on the Hukou-related laws and policies, urban Hukou opens a door to opportunities for a better job and all sorts of entitlements which a citizen has in the urban area. Without an urban Hukou, life in the urban areas can be difficult: comparatively low salaries, inferior working conditions, inaccessibility of publicly supported social welfare plans and children of migrant workers facing difficulties in getting schooling, etc. A local urban Hukou, by contrast, is a residence permit which comes with a package of local government supported public services and welfare in city areas. This permit opens up the holder's way to job opportunities, career development, social insurances, public services and other multifaceted social life necessities required for a normal and decent life for an urban citizen.

For a migrant worker who holds only an agricultural Hukou, many limitations are set on them concerning searching for a decent job and getting sufficient social welfare, especially in the metropolitan cities such as Beijing, Shanghai and Guangzhou where local residence is considered a rare resource due to the rights, if not privileges, which it provides. As explained in Section 2.2, the Hukou system has produced an unprecedented segregation of urban and rural communities, an “Urban-Rural Dual Structure” in the form of huge differences in income, living standards, social welfare, public infrastructure and the like. This resulted in China being characterized as “one country, two societies”.<sup>133</sup>

Although the restriction placed on labour mobility by the Hukou system has been gradually relaxed *de jure* in the context of the opening-up and reform policy, yet unequal treatment and exploitation of rural migrant workers under the Hukou system has not been entirely abolished *de facto*, which has contributed to the deeply rooted prejudice held against farmers.<sup>134</sup> This section will further describe just how migrant workers struggle in the urban areas in real life, despite many laws and policies which explicitly prohibit different treatment.

In the context of the research, (rural) ‘migrant workers’ refers to workers who migrate from one place to another in China. In this study, special attention is paid to those with agricultural Hukou who migrate into big cities for work without a local urban Hukou. As is shown in the table below, there were around 277 million migrant workers in China in 2015,<sup>135</sup> and this number has been constantly on the rise in recent years against the background of rapid urbanization in China.<sup>136</sup> Migrant workers make up almost 35% of the work force in China, according to the data provided by the World Bank.<sup>137</sup> Amongst these migrant workers, 56.5% are people younger than 40 years old, at the age when they are at their most productive.<sup>138</sup> Despite the significant numbers of migrant workers and their great contribution to economic growth, there are still a huge number of

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<sup>132</sup> The Hukou book is held by the owner and is a 14cms x 10cms sized book containing information on the members of the household.

<sup>133</sup> Martin King Whyte, *One Country, Two Societies: Rural-Urban Inequality in Contemporary China* (New York: Harvard University Press, 2010).

<sup>134</sup> Constance Thomas, Nelien Haspels, Tim de Meyer, Marja Paavilainen, Hongman Zhang, *Equality and Non-Discrimination at Work in China: Training Manual, Module 4: Promoting Equality at Work for Rural Migrant Workers in China* (Beijing: ILO, 2010), 25.

<sup>135</sup> National Bureau of Statistics of People's Republic of China, *The 2015 Investigation and Survey Report on the National Migrant Workers*, 28 April 2016, accessed on 12 February 2017, [http://www.stats.gov.cn/tjsj/zxfb/201604/t20160428\\_1349713.html](http://www.stats.gov.cn/tjsj/zxfb/201604/t20160428_1349713.html)

<sup>136</sup> See Pan Jiahua and Wei Houkai ed, *Blue Book of Cities in China: Annual Report on Urban Development in China No.5*, first edition (Beijing: Social Science Academic Press, 2012).

<sup>137</sup> See “Labour Force,” World Bank, accessed 15 February 2017,

<http://data.worldbank.org/indicator/SL.TLF.TOTL.IN/countries>

What is worth mentioning here is that the total labour force figures in China given by the World Bank included the employed and the unemployed and even the armed forces but did not include workers in the informal sector.

<sup>138</sup> *Ibid.*

people living and working in the cities without a local Hukou.<sup>139</sup> These people without local Hukou still experience worse treatment de facto in many aspects of lives compared with workers with local Hukou.

Table 2.3. The number of migrant workers during 2012 to 2015 in China<sup>140</sup>

Year	2012	2013	2014	2015
Total	262,610,000	268,940,000	273,950,000	277,470,000
1. Migrant workers who go to another province	163,360,000	166,100,000	168,210,000	168,840,000
(1) Migrant workers who migrate alone, leaving their families behind	129,610,000	130,850,000	132,430,000	-
(2) Migrant workers who migrate together with their family	33,750,000	35,250,000	35,780,000	-
2. Migrant workers in their local province	99,250,000	102,840,000	105,740,000	108,630,000

Without local Hukou, migrant workers face de facto inferior treatment in the fields of employment, social security, health care and education.<sup>141</sup> Such disadvantages and lack of equal opportunities based on one's household registration status can be considered to be discrimination based on social origin,<sup>142</sup> meaning that an individual's membership of a class, socio-occupational category or caste determines his or her occupational future, either because he or she is denied access to certain jobs or activities, or is assigned only certain jobs.<sup>143</sup> Poor working conditions, including excessive working hours and lack of sufficient rest breaks, are especially acute for rural migrant workers in the city areas.<sup>144</sup> On top of that, the locally supported social security, including basic old age pensions, basic medical care and the minimum living standard scheme (*di bao*) are not equally accessible to workers from the rural areas.<sup>145</sup> What is more, migrant workers do not have equal access to subsidised medical care in comparison with their urban counterparts, and pay proportionately more for medical insurance and medical costs.<sup>146</sup> Additionally, the children of rural-to-urban migrant workers face particular difficulties in connection with attending local schools for education and sitting the National College Entrance Examination at local schools.<sup>147</sup>

Whilst job hunting, migrant workers face overt discrimination based on their Hukou status: 47.91% of college graduates were asked for a local Hukou when seeking jobs;<sup>148</sup> or they would have faced unreasonable

<sup>139</sup> See Kam Wing Chan, "The Household Registration System and Migrant Labour in China: Notes on a Debate," *Population and Development Review*, Vol.36, Issue 2 (2010), 360.

<sup>140</sup> Summarized by the author according to the following reports:

National Bureau of Statistics of People's Republic of China, *The 2015 Investigation and Survey Report on the National Migrant Workers*, 28 April 2016, accessed on 12 February 2017, [http://www.stats.gov.cn/tjsj/zxfb/201604/t20160428\\_1349713.html](http://www.stats.gov.cn/tjsj/zxfb/201604/t20160428_1349713.html)

National Bureau of Statistics of People's Republic of China, *The 2014 Investigation and Survey Report on the National Migrant Workers*, 29 April 2015, accessed on 12 February 2017, [http://www.stats.gov.cn/tjsj/zxfb/201504/t20150429\\_797821.html](http://www.stats.gov.cn/tjsj/zxfb/201504/t20150429_797821.html)

National Bureau of Statistics of People's Republic of China, *The 2013 Investigation and Survey Report on the National Migrant Workers*, 12 May 2014, accessed on 12 February 2017, [http://www.stats.gov.cn/tjsj/zxfb/201405/t20140512\\_551585.html](http://www.stats.gov.cn/tjsj/zxfb/201405/t20140512_551585.html)

National Bureau of Statistics of People's Republic of China, *The 2012 Investigation and Survey Report on the National Migrant Workers*, 27 May 2013, accessed on 12 February 2017, [http://www.stats.gov.cn/tjsj/zxfb/201305/t20130527\\_12978.html](http://www.stats.gov.cn/tjsj/zxfb/201305/t20130527_12978.html)

<sup>141</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *Concluding observations on the second periodic report of China, including Hong Kong, China, and Macao, China*, 13 June 2014, E/C.12/CHN/CO/2, para.15.

<sup>142</sup> ILO CEACR, *Direct Request to China, on Discrimination (Employment and Occupation) Convention, 1958 (No. 111)*, adopted 2012, published 102<sup>nd</sup> ILC session, 2013, paras. 1 and 7.

<sup>143</sup> Discrimination based on social origin, *ibid.*

<sup>144</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *Concluding observations: People's Republic of China, including Hong Kong and Macao*, 13 May 2005, E/C.12/1/Add.107, para.24.

<sup>145</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *Concluding observations on the second periodic report of China, including Hong Kong, China, and Macao, China*, 13 June 2014, E/C.12/CHN/CO/2, para.24.

<sup>146</sup> *Ibid.*, para.33.

<sup>147</sup> *Ibid.*, para.35.

<sup>148</sup> See Constitutionalism Research Institute in China University of Political Science and Law, "The 2010 Investigation Report on the Employment Discrimination against College Graduates in Contemporary China," ed. Cai Dingjian, *The Employment Discrimination in China, Current conditions and anti-Discrimination Strategies* (Beijing: China Social Science Press, 2011), 196-200.

demands from employers such as being charged a deposit, or having their identity documents retained as a guarantee.<sup>149</sup> Additionally, horizontal and vertical segregation<sup>150</sup> both produce a low income market for them. Horizontally, they are often forced into a heavy labour, physically demanding sector or into informal sectors with low income and low stability, and are offered labour dispatch work<sup>151</sup> or temporary contracts again for low skilled or labour intensive jobs, high risk or physically demanding occupations shunned by urban dwellers.<sup>152</sup> Vertically, they are mostly excluded from management or skilled work.<sup>153</sup> In a 2012 survey in Nanjing, 83% of the new generation of migrant workers earned no more than 2500 RMB (roughly 340 euros) per month,<sup>154</sup> which is about 58.8% of an urban citizen's monthly salary.<sup>155</sup> Most migrant workers earn around the local minimum wage standards.<sup>156</sup>

After finding a job, they are easily exploited by employers by being made to work long hours with high physical demands,<sup>157</sup> often without pay for working overtime;<sup>158</sup> many even experience default in payment of their salary.<sup>159</sup> For example, it has been roughly estimated in Wuhan that in payment default cases, 90% involve construction workers, who are predominantly migrant workers from rural areas.<sup>160</sup> Many tragedies happened when they failed to get the payment after years of sweat and effort: some aired their complaints and resorted to legal aid but in vain, some committed suicide,<sup>161</sup> some committed homicide.<sup>162</sup> Seeking a remedy can be quite difficult for these workers because 62% of them had not even signed a contract beforehand, whereas the lengthy process of a court decision that would last for at least one or two years often deterred many migrant workers.<sup>163</sup>

Without local urban Hukou, migrant workers are often ineligible for urban welfare assistance such as housing subsidies, social insurance plans, injury insurance plans or pension plans. According to an anonymous survey carried out in 2011 in seven cities across China, less than 10% of migrant workers have participated in

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<sup>149</sup> See Zhang Yonghong, "Politics of Local Governance: A Systemic Perspective, Using the Implementation of Policies on the Protection of Rural Migrant Workers as an Example," *Journal of Sun Yat-sen University*, Social Science Edition, Vol. 49, Issue 1 (2009).

<sup>150</sup> See Cai Fang and Wang Dewen, "Impacts of Internal Migration on Economic Growth and Urban Development in China," eds. Josh DeWind and Jennifer Holdaway, *Migration and Development Within and Across Borders: Research and Policy Perspectives on Internal and International Migration* (Geneva: International Organization for Migration, 2008), 265.

<sup>151</sup> Labour dispatch work is a particular form of working under the Dispatch Labour System in China. It requires workers to sign a contract with labour dispatch agencies, but not the end-users themselves. Both agencies and end-users shirk responsibility on labour security or labour injuries.

<sup>152</sup> Some scholars summed up the job ascribed to migrant workers as the 3-D job: dangerous, dirty and demeaning. See Kam Wing Chan, "The Household Registration System and Migrant Labour in China: Notes on a Debate," *Population and Development Review*, Vol.36, Issue 2 (2010), 359.

<sup>153</sup> For example, in a comparative study of Beijing and Zhuhai, the percentage of migrant workers as high-ranking cadres and professional managers was respectively 8.19% and 5.52%, whereas the percentage of local counterparts was respectively 27.65% and 24.8%. See Zhang Huafeng, "An Economic Analysis of Residence Requirements and Employment Discrimination," ed. Li Weiwei and Lisa Stearns, *Employment Discrimination: International Standards and National Practice* (Beijing: Law Press, 2006), 506.

<sup>154</sup> Nanjing Chinese Academy of Social Sciences and Nanjing on the Investigation of Social Integration, *New Generation of Migrant Workers in Nanjing Enterprises*, All-China Federation of Trade Unions, 15 February 2012, accessed 15 February 2017, <http://www.acftu.org/template/10001/file.jsp?cid=601&aid=85194>

<sup>155</sup> Institute for Urban and Environment Studies of the Chinese Academy of Social Sciences (CASS), *The Blue Book of Cities in China: Annual Report on Urban Development of China No.6* (Beijing: Social Sciences Academic Press, 2013).

<sup>156</sup> Zhang Huafeng, "An Economic Analysis of Residence Requirements and Employment Discrimination," ed. Li Weiwei and Lisa Stearns, *Employment Discrimination: International Standards and National Practice* (Beijing: Law Press, 2006), 508.

<sup>157</sup> See Jiang Wenran, "Prosperity at the Expense of Equality: Migrant Workers Are Falling Behind in Urban China's Rise," eds. Errol P Mendes and Sakunthala Srighanthan, *Confronting Discrimination and Inequality in China: Chinese and Canadian Perspectives* (Ottawa: University of Ottawa Press, 2009), 28-29.

<sup>158</sup> According to Article 36, *Labour Law*, the standard working time is 8 hours a day, 44 hours a week; overtime payment is calculated separately. For example, according to Article 44, normal overtime payment should not be less than 150% of basic payment, weekend overtime, no less than 200% of the basic payment, and national holiday overtime, 300% of the basic payment.

<sup>159</sup> Beijing Zhicheng Public Interest, "Research Report on Migrant Workers' Payment Default," *Migrant Workers' Legal Aid*, 19 January 2012, accessed 15 February 2017, <http://www.zgnmg.org/t/nmggz/1476.html>

<sup>160</sup> See Hu Xinqiao, "90% Migrant Workers Payment Disputes concern Construction Program," *Legal Daily*, 5 February 2013, accessed 15 February 2017, <http://house.people.com.cn/n/2013/0205/c164220-20440146.html>

<sup>161</sup> Liu Dejun failed to get back the salary (3,200 yuan RMB) owned by his employer, committed suicide by drinking highly toxic pesticide and died on 29 January 2011. See Zhang Tao, "Rural Migrant Workers Committed Suicide" *Xinhua News*, 30 January 2011, accessed 15 February 2017, [http://news.xinhuanet.com/society/2011-01/30/c\\_121042061.htm](http://news.xinhuanet.com/society/2011-01/30/c_121042061.htm)

<sup>162</sup> Wang Binyu failed to get back his salary, took his revenge by stabbing five people in a row and was sentenced to death on October 18, 2005. Case Code: Ningxia High Court, Criminal Court, Final Judgment, No.97.

<sup>163</sup> 62% of migrant workers had not signed a labour contract with their employing unit. National Bureau of Statistics of People's Republic of China, *The 2015 Investigation and Survey Report on the National Migrant Workers*, 28 April 2016, accessed on 12 February 2017, [http://www.stats.gov.cn/tjsj/zxfb/201604/t20160428\\_1349713.html](http://www.stats.gov.cn/tjsj/zxfb/201604/t20160428_1349713.html)

employment-based social insurance plans.<sup>164</sup> This is partly because local employers usually do not hire workers without local Hukou so, as a result, most migrant workers do not have an employer to share the burden of paying social insurance premiums for them. What makes the situation worse is that the institutional set-up does not allow social security benefits to accumulate if the insured person migrates to another city, meaning that all the benefits that can be enjoyed in City A will be swept away if the insured settles down in City B. In reality, so many migrant workers move from one city to another that migration itself becomes a major barrier for them in getting access to local social welfare plans.<sup>165</sup> Individual factors, such as personal preferences, level of education, (lack of) knowledge of welfare programmes, might also contribute to the low social insurance coverage of migrant workers.<sup>166</sup>

Although the Cooperative Rural Medical Insurance scheme<sup>167</sup> has a wide coverage in villages, it does not cover the medical expenses incurred in the cities where most migrant workers live, thus many of them are vulnerable in the case of any work injuries<sup>168</sup> or occupational diseases. For example, pneumoconiosis<sup>169</sup> represents 90.2% of all reported occupational diseases and is the most prevailing occupational hazard in China. Among pneumoconiosis patients, 55.9% are not covered by retirement insurance, 45.6% have no injury insurance, 86% do not join trade unions for various reasons, 37.8% receive no compensation and some were even fired after they had been diagnosed.<sup>170</sup> Without local Hukou-supported medical care services, the risks and costs which migrant workers experience are much higher than those of local dwellers.

Another major problem faced by these workers is access to public education for their sons and daughters. Before 2010, in some major cities, sponsorship fees or temporary tuition surcharges had to be paid for the schooling of “migrant children” without local Hukou whereas state primary education for local children is free of charge. Once such a charge had been explicitly prohibited by the Ministry of Education,<sup>171</sup> some schools would, in consequence, directly deny access to any migrant children. Consequently, some privately funded schools, specifically for children of migrant workers, were set up in some cities or urban outlying areas. But without public financial support,<sup>172</sup> most of these schools were poorly constructed with insecure teaching resources; some were even closed down by the local government for not meeting educational standards.<sup>173</sup> Without local Hukou, these migrant children would have to go back to their places of origin to sit the National College Entrance Examination (Gaokao). Large metropolitan centres like Beijing, Shanghai and Guangzhou still keep a required link between sitting for exams and local Hukou, and are hesitant to offer openings to migrant children.<sup>174</sup> Those children who do not migrate with their parents but are taken care of by their relatives in the rural areas, are known as “left-behind children”,<sup>175</sup> making up 51.8%<sup>176</sup> of migrant families and causing great

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<sup>164</sup> Xu Qingwen, Guan Xinping, Yao Fangfang, “Welfare Program Participation Among Rural-To-Urban Migrant Workers in China,” *International Journal of Social Welfare* (2011): 20.

<sup>165</sup> Andrew Watson, “Social security for China’s migrant workers: providing for old age,” *Journal of Current Chinese Affairs*, Vol. 38 (2009): 85-115.

<sup>166</sup> Jianping Yao and Byung-Cheol Kim, “Social Insurance Participation of Rural Migrant Workers Based on Gender Dimension: Evidence from Four Chinese Cities,” *Asian Social Work and Policy Review* Vol.9 (2015): 57-69, at 58.

<sup>167</sup> A collective fund for medical insurance for rural-Hukou holders in China.

<sup>168</sup> Liu Shuhong, “Only 22% Of Rural Migrant Workers Are Covered by Work Injury Insurance,” *Legal Daily*, 15 August 2009, accessed 15 February 2017, [http://www.legaldaily.com.cn/0801/2009-08/15/content\\_1138656.htm](http://www.legaldaily.com.cn/0801/2009-08/15/content_1138656.htm)

<sup>169</sup> Pneumoconiosis is an occupational lung disease and a restrictive lung disease caused by the inhalation of dust, often in mines and from agriculture.

<sup>170</sup> See Beijing Yilian Labour Legal Aid and Research Institute, “Investigation on Occupational Hazards: Over 0.2 Billion People Suffer from Occupational Hazards Without Compensation” *Beijing Health Inspection*, 2 March 2011, accessed 15 February 2017, <http://www.bjhi.gov.cn/newsCenter.do?dispatch=newsDetail&newsId=8a8a8bc32e7085c7012e74e814350010&catalogId=2c9082902c526407012c526736600002>

<sup>171</sup> Extra fees charged to non-local students in primary schools were prohibited by *Decision on Amend and Abolish some Regulations*, Ministry of Education, by Order of the Ministry of Education No.30, 13 December 2010.

<sup>172</sup> See “School on the Roof” revealed simple-structured schools for children of migrant workers: Because of limited space for activities, Linzhi school in Wuhan has to arrange outdoor activities for these kids on the roof of the teaching building, 58 kids had to have class in a room of 20 square meters. See Yang Ning, “Schools on the Roof,” *People News*, 22 November 2011, accessed 15 February 2017, <http://edu.people.com.cn/GB/16336843.html>

<sup>173</sup> In August 2011, 24 schools for migrant workers’ children in Beijing were closed down, more than 14 thousand migrant children facing drop out. See Zhangling, “24 Schools for Migrant Workers’ Children in Beijing Are Closed Down,” *Sina News*, 17 August 2011, accessed 15 February 2017, <http://edu.sina.com.cn/zxx/2011-08-17/1016309905.shtml>

<sup>174</sup> See “Sitting in College Entrance Examination in Shanghai? You Need a Shanghai Hukou First,” *Ifeng News*, 30 December 2012, accessed 15 February 2017, [http://news.ifeng.com/mainland/detail\\_2012\\_12/30/20671337\\_0.shtml](http://news.ifeng.com/mainland/detail_2012_12/30/20671337_0.shtml)

<sup>175</sup> See Yuwen Wu, “The Abuse of China’s ‘Left-Behind’ Children,” *BBC News*, 12 August 2013, accessed 15 February 2017, <http://www.bbc.co.uk/news/world-asia-china-23628090>

social concern.<sup>177</sup> Left-behind children are children of migrants left with relatives in the rural areas, facing economic, mental, educational and physical problems. According to the Fifth National Census, there were at least 20 million left-behind children who could not live with their parents because one or both of them had migrated into cities for work.

## Conclusion

Predictably, the Hukou system has affected and will still affect equal access to public social resources for rural migrant workers with agricultural Hukou in the context of the socialist market economy context. The inferior conditions which they face in terms of employment opportunities, working conditions, payment and promotion, access to social security, access to public services and so on, seriously hinder their enjoyment of basic human rights and labour rights. Such inequality even affects their children's equal access to education simply because of their agricultural Hukou status. It is acknowledged by the new generation of leadership that an urgent reform of the Hukou system nationwide has to be carried out for a more inclusive society, and for upholding an individual's liberty and dignity. Still, there is a long way to go before all these disadvantages are abolished de jure and de facto for rural migrant workers throughout China.

## 2.5 Domestic helpers' working conditions

Given the rapid aging of the population, the expected baby boom after the end of the One Child Policy and women's growing participation in the labour market, domestic service, predictably, is increasingly in demand especially in the above average income areas.<sup>178</sup> Surveys of 1,600 households in Shenyang, Qingdao, Changsha and Chengdu concluded that over 40% of households need domestic service,<sup>179</sup> another report shows that amounts to 14 million domestic servants are in need nationwide.<sup>180</sup> Domestic service is not only much needed, but also has contributed significantly to the national gross domestic product (GDP). It has been calculated that there are 500,000 formal home service agencies with a total annual income of 160 billion RMB in China.<sup>181</sup>

Despite its great potential and contribution to society, however, domestic service remains an unattractive career track to follow given that performing such service is considered to be low status work, poorly paid, with constant working overtime without compensation, in poor working conditions, with high occupational insecurity and usually without social insurance.<sup>182</sup> In Shanghai, for example, domestic helpers as a whole in this area earn 20% less than non-domestic helpers with the same personal characteristics.<sup>183</sup> What is more, as was mentioned in Section 2.2, the Chinese national labour law system does not recognize those domestic servants who work for a private family as "employees"; consequently, the labour rights normally enjoyed by employees are withheld from domestic helpers. What is worse, labour inspections are not applicable to privately hired domestic servants and labour arbitration is not available to them either. In the labour market, privately hired domestic helpers make up the majority, only a small fraction of them sign a labour contract with registered domestic service companies, in which situation domestic helpers' labour rights are in a relatively better situation than those of most other domestic helpers. Generally speaking, it is no wonder that this group of people is so legally invisible and culturally devalued, as domestic servants are almost always composed of under privileged people in society. There are 15 to 20 million people working as domestic workers in China,

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See also "China's 'Left-Over Children'," *China Daily*, 6 July 2006, accessed 15 February 2017, [http://www.chinadaily.com.cn/china/2006-07/06/content\\_635143.htm](http://www.chinadaily.com.cn/china/2006-07/06/content_635143.htm)

<sup>176</sup> Institute for Urban and Environment Studies of the Chinese Academy of Social Sciences (CASS), *The Blue Book of Cities in China: Annual Report on Urban Development of China No.6* (Beijing: Social Sciences Academic Press, 2013).

<sup>177</sup> UN Country Team China, "Advancing Social Development in China: Contribution to The 11th Five-Year Plan," *Occasional Paper*, Vol. 1 (2005): 16.

<sup>178</sup> ILO, *Domestic Work Policy Brief No. 4: Global and Regional Estimates on Domestic Workers* (Geneva: International Labour Organization, 2011), 5.

<sup>179</sup> "Prospect of Domestic Service Industry and Governmental Support," China Home Service Association (CHSA), 13 April 2012, accessed 15 February 2017,

<http://www.chsa.com.cn/xhjs2/hydt/2012/04/13/9852.html>

<sup>180</sup> May Wong, "Domestic Workers and Rights in China," *Solidarity*, April 2008, accessed 11 February 2017,

<http://solidarity-us.org/site/node/1394>

<sup>181</sup> "Prospect of Domestic Service Industry and Governmental Support," China Home Service Association (CHSA), 13 April 2012, accessed 15 February 2017, <http://www.chsa.com.cn/xhjs2/hydt/2012/04/13/9852.html>

<sup>182</sup> Dong Xiaoyuan, Feng Jin and Yu Yangyang, "Relative Pay of Domestic Elder care Workers in Shanghai, China," *Feminist Economics*, Vol.23 (2017): 2.

<sup>183</sup> *Ibid*, 3.

amongst whom 15 million are laid-off workers, migrant workers or college school students,<sup>184</sup> and 90% are female, excluding unreported juvenile females.<sup>185</sup> Usually, doing domestic service requires few qualification requirements, thus many migrants with lower education levels or fewer skills, such as migrant girls who have dropped out of school to earn a living in the urban areas, consider it to be an easy choice. Yet such an easy choice may contain a high risk of abusive working conditions including restrictions of movement, undefined working hours, insufficient rest periods, default on payment, lack of social security, psychological and physical abuse, and degrading living conditions.<sup>186</sup>

Currently, as a result of insufficient legal regulation, the domestic service market is filled with small, weak, short-lived, unsubsidized domestic service agencies, which are neither healthy for the survival of the agencies themselves nor beneficial for ensuring decent working conditions for domestic servants. In practice, host families tend to conclude private contracts with domestic servants, circumventing the agencies or companies to avoid paying “introduction fees”,<sup>187</sup> which results in high risks for domestic servants. In most cases, domestic service is performed without any contract at all. For instance, more than 50% of domestic workers in Guangzhou and Chengdu are working without a contract.<sup>188</sup> Working without a contract means that working conditions, such as the maximum working hours per day, the frequency of daily or monthly breaks, the standard of performance evaluation, and dispute settlement channels, are not specified.

Moreover, domestic workers, especially live-in workers, are required to be on stand-by for work. 35% of domestic workers are working over 10 hours a day in Guangzhou and Beijing, 70% of them are working more than 10 hours a day in Nanjing.<sup>189</sup> 28% of them work over the weekend in Chengdu and Guangzhou, usually without overtime pay.<sup>190</sup> During the busy season, such as during the Chinese New Year, when a thorough clean is required by tradition, domestic helpers’ working conditions may become even worse because some of them have to work around the clock. Additionally, prolonged and irregular working hours, exposure to cleaning chemicals, constant isolation from any form of social life and limitation of privacy can harm domestic helpers’ physical and mental health. Most of them have suffered from occupational hazards such as skin irritation, back injuries, muscle strain, joint pain or stiffness, high blood pressure, chronic fatigue syndrome, mental stress and the like.<sup>191</sup> A 2010 medical report listed 10 depression-prone jobs, and home/child-care work came at the top of the list.<sup>192</sup>

Despite being exposed to such high risk of occupational hazards, more than 60% of domestic helpers still do not have membership of any social insurance scheme, including maternity insurance.<sup>193</sup> Such a situation may be attributed to many reasons. First, the social insurance system in China usually comes as a package that contains pension, medical insurance, unemployment insurance, work-related injury insurance, maternity insurance, and housing funds, the premiums for which are usually paid by three parties, namely, the government, the employers and the employees through the salary system. However, as explained before, most domestic servants are not affiliated to any company and they are not regarded as “employees” in the Chinese labour law system, thus there is no such salary system through which to pay the social insurance premium. If domestic servants want to have a social insurance package, then they have to pay the premium as an individual, meaning that the premium they have to pay is the amount that would otherwise have been paid by three parties. Given the high occupational mobility of this job and the non-transferability of the insurance, if the payment of a social insurance premium is then not continued, or if the premium payer migrates to another city, then the benefits derived from the premium are no longer accessible. For women domestic servants, it is also

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<sup>184</sup>“Prospect of Domestic Service Industry and Governmental Support,” China Home Service Association (CHSA), 13 April 2012, accessed 15 February 2017, 9999<http://www.chsa.com.cn/xhjs2/hydt/2012/04/13/9852.html>

<sup>185</sup> ILO, *Fact Sheet: Domestic Workers in China*, 2009, 2.

<sup>186</sup> UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), *General Comment No. 1 on Migrant Domestic Workers*, 23 February 2011, CMW/C/GC/1, para.13.

<sup>187</sup> “Urge Domestic Service Regulation Ordinance,” *People News*, 3 February 2015, accessed 15 February 2017, <http://acwf.people.com.cn/n/2015/0203/c99060-26500998.html>

<sup>188</sup> ILO, *Fact Sheet: Domestic Workers in China*, 2009, 2.

<sup>189</sup> “There lacks legal protection for domestic helpers, whose working condition worth attention,” *China News*, 12 January 2010, accessed 15 February 2017,

<http://www.chinanews.com/gn/news/2010/01-12/2067331.shtml>

<sup>190</sup> ILO, *Fact Sheet: Domestic Workers in China*, 2009, 3.

<sup>191</sup> “Housemaids are facing occupational hazard after undue fatigue in Shanghai,” *People News*, 9 March 2009, accessed 15 February 2017,

<http://sh.people.com.cn/GB/138654/8926669.html>

<sup>192</sup> See Halah Touryalai, “10 Jobs with High Depression Rates,” *Forbes News*, 12 October 2010, accessed 15 February 2017,

<http://www.forbes.com/sites/halahouryalai/2010/12/10/10-jobs-with-high-depression-rates/>

<sup>193</sup> ILO, *Fact Sheet: Domestic Workers in China*, 2009, 2.

important to get access to maternity insurance, which is usually funded through the formal employment system.

Further, where a private household is the work place, no labour inspection is permitted and this increases the risks of being physically or mentally abused. In the meantime, the semi-family relationship and the difficulty of gathering evidence reduce the accessibility to remedies when such abuses occur. Taking the case cited at the beginning of this thesis as an example, Cai Minmin, a young girl from a rural area, went to Zhuhai city for work.<sup>194</sup> She was employed as a housemaid by Ms. Wei, who violently abused Minmin continually for five years with all kinds of tools, like hammers, scissors, vases, chopsticks, and clothes hangers. This case underlines the importance of labour inspections in places of domestic service and the need to improve the remedy system for this group of people who are in a vulnerable position. Meanwhile, when domestic helpers' human rights or labour rights are violated, the chances of them getting access to justice are limited as going to court is often too expensive and too lengthy for a domestic helper and, in most cases, labour arbitration is not available to privately hired domestic helpers.

### **Conclusion**

In this chapter, working conditions in the domestic service business have been described. As the demand for domestic workers increases and the value of domestic service is increasingly recognized, more awareness is raised about the protection of their labour rights, especially for those domestic servants who are self-employed and agency based because they are often excluded from the labour law system in China. Their labour rights, such as the right to freedom of association, collective bargaining, work-related social insurances and benefits, accessibility to labour dispute settlement mechanisms, are not clearly articulated by law. As a matter of fact, the working conditions de facto are, if not poor, unsatisfactory for domestic helpers to remain as humans with dignity. Many domestic services are provided without a contract, which makes the working conditions unclear and the access to justice difficult in cases of violation of rights or disputes. In most cases, they also have to work long hours without overtime pay, and to work during the weekends without extra pay, etc. Their isolated working environment increases their vulnerability in cases of abuse, sexual harassment or violence. When their rights are violated, they have a limited chance to obtain a remedy. This invisible and excluded group of workers are in need of formal recognition by labour law, their rights to decent working conditions need to be articulated, and their access to justice calls for more institutional security.

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<sup>194</sup> See Shu Jing, "Zhuhai Home Maid Abuse Case: female employer sentenced to 12 years' imprisonment by Guangdong Provincial Higher People's court," *Xinhua News*, 19 August 2007, accessed 15 February 2017, [http://gd.xinhuanet.com/newscenter/2007-08/19/content\\_10898959.htm](http://gd.xinhuanet.com/newscenter/2007-08/19/content_10898959.htm)

### 3.1 Introduction

A theory is a set of organized beliefs or concepts that helps us to understand certain phenomenon, or to answer certain questions. A good theory is a parsimonious map that guides us to the destiny of better understanding. This chapter sets out the theoretical underpinnings and their implications for this study: a gender analysis and an intersectionality approach to look at the status quo of migrant women working as domestic helpers and the relevant laws. Although “gender” as an evolving concept has never been defined in a unanimous way, the study still tries to use gender as an analysis tool to look at the power struggle between men and women in society. It has to be said, however, that with the modern development of gender theories, gender is no longer an analysis tool simply to perceive the power struggle between men and women, but goes beyond that.<sup>1</sup> Nonetheless, this study looks at a particular group of people who are marginalized in the labour market largely because they are women and they are performing a job that is considered to be an extension of women’s role in the family and hence their work is, to a large extent, undervalued. Their gender and the specificity of their occupation greatly attributes to their subordinate position in society. It is not that the author does not embrace new developments in the theories of gender studies, rather, it is because this particular study specifically focuses on migrant women working as domestic helpers that the gender analysis adopted by this study is, inevitably, mostly referring to women. Section 3.2.

Intersectionality, as a complementary lens through which to examine the multiple disadvantages experienced by migrant women working as domestic helpers in China, is explained and elaborated in this chapter. Derived from feminists’ endeavors to challenge the existing gendered society, intersectionality as an analytical perspective has been developed through years of intellectual commitment. Just as its name suggests, intersectionality describes a situation where social oppression happens intersectionally based on different social categories, such as gender, social class, race, nationality etc. Given the situation of migrant women working as domestic helpers, they may face overlapping forms of problems based on their gender, their social origin and their particular occupation. Thus, intersectionality is an appropriate tool to help us understand the concrete situation and what problems beset this group of people, so that this study can offer appropriate suggestions in this regard in the field of legal-based social engineering. In Sections 3.3 and 3.4. the concepts of intersectionality and applied intersectionality in the analysis of the status quo of migrant women working as domestic helpers are introduced.

### 3.2 Gender analysis and its implication in the study

Gender does not only refer to the social construction of the social category based on biological sex,<sup>2</sup> but in a broader sense, as Joan Scott put it, it is “a useful category of historical analysis” to look at power relations in society.<sup>3</sup> However, the discussions about gender and gender-derived problems never end in society. Before gender was theorized as a category for analysis, the traditional ways to perceive the power balance between men and women were purely based on biological traits: women are biologically different from men, so they have different natures and abilities. Accordingly, many people believed that women were born to be wives and mothers, to please and to breed, while men were born to be citizens.<sup>4</sup> In China, such myths were endorsed by the interpretation of Confucius’s teaching, which emphasizes the “Three Rules and the Five Virtues” in order to keep a harmonious society where people know their position and act accordingly in the private and public sectors.<sup>5</sup> In addition, according to the traditional teaching of the “Three Obedience and the Four Virtues of Morality” of women, women are expected to act as respectful daughters, subordinate wives, and loving mothers during their lives. The Four Virtues of being a woman expect a woman to act properly and pay

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<sup>1</sup> For example, Anne Fausto-Sterling’s well-known studies raise doubts over the standard binary model of understanding gender. Her work claims that there are many sexes including male, female, herms, merms, and ferms. See Anne Fausto-Sterling, “The Five Sexes”, *The Sciences* (1993):1-5; see also Anne Fausto-Sterling, “The Five Sexes, Revisited”, *The Sciences* (2000):19-23.

<sup>2</sup> “Concepts and Definitions: Gender”, United Nations Entity for Gender Equality and Empowerment of Women, accessed 23 January 2017, <http://www.un.org/womenwatch/osagi/conceptsanddefinitions.htm>

<sup>3</sup> Joan Scott, Gender: A Useful Category of Historic Analysis, *The American Historical Review*, Vol. 91, No. 5 (1986):1053-1075, at 1069.

<sup>4</sup> See Jean-Jacques Rousseau, “Sophy, or Women,” in *Emile*, trans., Barbara Foxley (New York: E.P. Dutton, 1921), 322.

<sup>5</sup> “The Three Rules” are that “the emperor rules the people, the father rules the sons, and the husband rules the wives”. “The Five Virtues” are “benevolence, righteousness, propriety, wisdom and fidelity”. See Dong Zhongshu, *Chun Qiu Fan Lu*, a book completed in Han Dynasty (202BC-220AD). The book is a compilation of teachings from Confucius and Mencius.

attention to her morality, her manner, her language and her family-maintaining skills.<sup>6</sup> Such teachings have created the social stereotypes and expectations for women that shackle their development according to their individual free will.

The discourse of “biological determination” receives constant challenges because a claim of inherent differences between men and women arising from nature solidifies sexual differences, deepens social stereotypes and perpetuates the existing sex dominance of men over women. However, counter discourses deny that the differences between the two sexes are caused by their biological differences. They hold that if women ever appear to be “incapable of reason”, it is not because of a natural disability, but due to “faulty upbringing”,<sup>7</sup> or social construction.<sup>8</sup> Women can be as independent and rational as men are, were they to get the same level of education and social resources that they rightly deserve;<sup>9</sup> only social perceptions make women appear as lesser human beings. To endorse this understanding of men and women, a book was published in 1968 entitled *Sex and Gender*, in which the author, the psychiatrist Robert Stoller, identified environmental imprints as one of the essential elements besides biological traits and sex assignment that form one’s gender social category.<sup>10</sup> This idea of gender, a socially constructed perception of men and women, was later imported to China, where there is not a specific word for gender, as there is not in many other languages. There is no word in Chinese to present the concept of gender. Chinese uses *xingbie* to represent sex, and *shehui* (social) *xingbie* (sex) to represent gender, a compound Chinese phrase was created by adding “social” in front of “sex” to make it denote “gender”, namely, *shehui xingbie*.

At the international level, gender has been widely used as a social counterpart concept vis-à-vis biological sex. For instance, the World Health Organization (WHO) defines “sex” as “the biological and physiological characteristics that define men and women”, whereas “gender” is “the socially constructed roles, behaviors, activities, and attributes that a given society considers appropriate for men and women”.<sup>11</sup> In a similar vein, General Recommendation No. 28 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) refers to “sex” as “biological differences between men and women”, whereas “gender” refers to “socially constructed identities, attributes and roles for women and men and society’s social and cultural meaning for these biological differences resulting in hierarchical relationships between women and men and in the distribution of power and rights favouring men and disadvantaging women”.<sup>12</sup>

As was pointed out at the beginning of this Section, the word ‘gender’ is more than just a synonym for women,<sup>13</sup> or for a mere social construction of biological sex. Gender is used in this study as a category of analysis, a way to perceive social power relations between men and women.<sup>14</sup> In this study especially, gender helps us to better understand women’s position vis-à-vis men in society throughout history, the implication of the activities they perform in a concrete time-and-space context, the distribution of power in society, and its reflection on each individual’s social category.<sup>15</sup> Analysis through the lens of gender to understand the power relations between men and women is a prerequisite of any meaningful social engineering towards a society of gender justice. In such a society, the sharing of responsibilities, the allocation of resources and any code of conduct are no longer simply based on one’s biological sex or gender, or any other arbitrarily defined social categories, but are based on more objective grounds. The understanding of authentic gender equality guides us as we attempt to propose appropriate legislative suggestions to achieve this goal.

Gender analysis is also widely applied in various fields of study such as law and sociology, to reflect the existing gender imbalance in society. Such an application of gender in different fields of study equips the researchers with a different pair of lenses through which to see the problems. For example, when gender as an analytical category was applied in the field of legal study, it gave rise to Feminist Legal Theory (hereinafter FLT). FLT,

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<sup>6</sup> “Three Obedience” and “Four Virtues of Women’s Morality” find their origins from *Commandments for Women*, compiled in Han Dynasty (202BC-220AD), is a book offering guidance to women’s behaviour in society.

<sup>7</sup> See Valerie Bryson, *Feminist Political Theory: An Introduction*, second edition (New York: Palgrave Macmillan, 2003), 9.

<sup>8</sup> See for example, John Stuart Mill, *The Subjection of Women*, first published in 1869 (London: Virago, 1983), 38.

<sup>9</sup> See Mary Wollstonecraft, “A Vindication of the Rights of Woman,” ed. Deidre Shauna Lynch, *A Vindication of the Rights of Woman*, third edition, first published in 1792 (New York: W. W. Norton & Company, 2009), 3-1.

<sup>10</sup> Robert Stoller, *Sex and Gender: On the Development of Masculinity and Femininity* (New York: Science House, 1968).

<sup>11</sup> “What Do We Mean by ‘Sex’ and ‘Gender’?”, World Health Organization, accessed 23 January 2017,

<http://apps.who.int/gender/whatisgender/en/>

<sup>12</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 16 December 2010, CEDAW/C/GC/28, p2.

<sup>13</sup> Joan Scott, Gender: A Useful Category of Historic Analysis, *The American Historical Review*, Vol. 91, No. 5 (1986): 1053-1075, at 1056.

<sup>14</sup> *Ibid*, 1066.

<sup>15</sup> *Ibid*, 1069.

despite the variety of its teachings, generally analyses the relationship between law and gender and puts forward legal reform based on the experiences of women.<sup>16</sup> It airs critiques to the existing laws from a gender analysis by “asking the other questions”, such as: “How do laws define and respond to the differences between men and women, if there are any?”<sup>17</sup> “Are women’s interests and needs well-represented in laws?” “How to make laws that take due consideration of women’s needs and interests without furthering their subjugation?” “How to offer equal treatment to all without ignoring the specific needs of certain social groups?” Many feminist legal theorists have contributed their wisdom in deconstructing the gender bias in the existing legal system and have even come up with coping strategies to tackle such bias. What this study has learned from FLT is that this study would also propose legislative suggestions based on the experience of women, to be specific, the experience of migrant women working as domestic helpers in China.

However, there are numerous understandings and proposals derived from various feminist legal researchers, and this study will compare some of the theories and learn from their wisdom. A fundamental question raised in endless debates is about the differences between men and women. Only once this question has been answered can there be further discussion for feminist legal researchers on how to tackle such differences, if there are any, by law. Such differences, if there are any, are the very basis of whether and how laws should treat women differently from, or identically with men. That said, if there are intrinsic differences between men and women, then how should law define such differences and how should law treat such differences in a fair way without further subjugating women? Conversely, if there are no intrinsic differences between men and women, then how can laws remedy any past injustices caused by a socially constructed differentiation between men and women? Is there a certain situation when women should be treated differently by law from men, for example when women are pregnant? And to what extent does such different treatment, if so legislated for, further harm women’s interests as a result? These are also all relevant questions to be answered for the sake of this specific study, which aims to propose appropriate legal suggestions for the benefit of migrant women working as domestic helpers in China.

Feminist legal theorists have been debating such questions and have been applying their wisdom to finding answers. Catharine Mackinnon regards men and women’s biological sex to be a continuum rather than bipolarity. “It is the society that makes sex to be bipolar,” she maintains.<sup>18</sup> Frances Olsen believes that the sexualization and the hierarchization of men and women exist at the same time, so they should be tackled simultaneously.<sup>19</sup> This means that the actual differences between men and women co-exist with the socially constructed differences between men and women, so such actual differences and constructed differences ought to be addressed at the same time. Martha Minow also raised her concern that the acknowledgement of such differences would have a controversial effect, because to enhance the difference might accentuate dominance, whereas to ignore the difference would not help to accommodate needs that derived from historic injustice.<sup>20</sup> The debate over the question of differences between men and women has already resulted in different strategies being used in legislation, as it is very difficult to arrive at one common method to deal with such differences. Whether to stress the differences and come up with different treatment or whether to assimilate the differences and come up with identical treatment still remains a hotly debated topic in the field.

Based on the discussion of sex differences, further questions were raised such as: what is the benchmark for gender equality? Should women pursue the values that are upheld in a male-biased society? Different theorists come up with different approaches to address gender equality in law, and these are summarized by Christine Littleton as the symmetrical approach and the asymmetrical approach.<sup>21</sup> The symmetrical approach rejects the existence of sex differences and proposes either that women should assimilate themselves into the male standards, or that both women and men should walk towards each other in an androgynous fashion, which is known as the androgyny model.<sup>22</sup> The asymmetrical approach acknowledges sex differences and does not intend to wipe out such differences, but instead it further developed several models to deal with differences.

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<sup>16</sup> Katharine Bartlett and Rosanne Kennedy eds., *Feminist Legal Theory: Readings in Law and Gender, New Perspectives On Law, Culture, And Society* (New York: Westview Press, 1991), 1.

<sup>17</sup> *Ibid.*, 5.

<sup>18</sup> Catharine Mackinnon, “Difference and Dominance, On Sex Discrimination,” eds. Katharine Bartlett and Rosanne Kennedy, *Feminist Legal Theory: Readings in Law and Gender, New Perspectives On Law, Culture, And Society* (New York: Westview Press, 1991), 82.

<sup>19</sup> Katharine Bartlett and Rosanne Kennedy eds., *Feminist Legal Theory: Readings in Law and Gender, New Perspectives On Law, Culture, And Society* (New York: Westview Press, 1991), 50.

<sup>20</sup> Martha Minow, *Making all the Difference: Inclusion, Exclusion and American Law* (New York: Cornell University Press, 1990), 21.

<sup>21</sup> Christine A. Littleton, “Reconstructing Sexual Equality,” eds. Katharine Bartlett and Rosanne Kennedy, *Feminist Legal Theory: Readings in Law and Gender, New Perspectives On Law, Culture, And Society* (New York: Westview Press, 1991), 28.

<sup>22</sup> *Ibid.*

The first model in the asymmetrical approach is the special rights model endorsed by Elizabeth Wolgast, who suggests that the differences between male and female are irreversible, and that women during maternity and breastfeeding require special treatment.<sup>23</sup> The second asymmetrical model is the accommodation model that reconciles the androgyny model and the special requirements model. Sylvia Law and Herma Kay recommended this model, i.e. to treat men and women equally in general, except during women's reproduction period.<sup>24</sup> The third model is an acceptance model, which means to accept what is differentiated in society based on gender, but to take measures to eliminate any negative influence based on such differences. Taking gender segregation in the work place as an example, the acceptance model intends not to address the segregation itself, but to take measures to make sure that the entitlements and treatments are the same, even in the face of such segregation.<sup>25</sup> The proponents of all models provide their own examples as to how to address gender equality from a legal perspective, and this study will borrow from this wisdom and incorporate it in Chapter 5 when putting forward legislative suggestions.

Feminist legal theory also questions women's limited representation in law. It questions the gender-biased legal system that appears to be equal but fails to take enough account of women's interests and needs. Feminist legal theorists ask, are women (well) represented in the laws? Do these laws listen to women's voices? For the sake of this study, when we see women predominately occupying the domestic service business, when we see domestic helpers are generally paid much less than men undertaking work of similar value, and even being excluded from labour protection, feminist legal theories and their questions help us to reflect on the situation these migrant women workers are in. Do they voluntarily choose to become house workers? Are these women's choices made in a vacuum or in a gender-biased society? Viewed from a gender analysis, these seemingly voluntary occupational choices are made in a concrete social condition shaped by historic opportunities and in an institutional environment with imbalanced gender power relations. If such facts are not recognized by the legislators and the adjudicators, then the existing gender inequality will be maintained, and the victims will even take the blame for it themselves.<sup>26</sup> It is also not helpful for the legislators and the adjudicators to presume that women naturally prefer less challenging work, because such preference has nothing directly related to one's gender, but has a lot to do with the circumstances: it is human to show little ambition when one is in a career with blocked-off opportunities.<sup>27</sup> Thus, it is suggested by some of the feminist legal theorists that the legislators and the adjudicators should offer hope and aspiration to women workers by leading structural reforms in the labour market.<sup>28</sup>

By looking into the basis of the existing legal system, FLT further analysed this gender-biased mechanism and its tendency to affirm the status quo of gender inequality. It raised such questions as: 'Do the laws overtly exclude or indirectly discriminate against women?' 'How do these laws affect gender based accessibility to resources and assumption of responsibility?' 'How do laws reflect and perpetuate gender stereotypes?' Taking contract law doctrine as an example, the bipolar division of public and private, manifestation and intent, can put a stranglehold on our way of thinking in dealing with daily life.<sup>29</sup> In particular, in the case of economic compensation required by a woman when an intimate relationship ends, a bipolar way of looking at this is that either the woman has nobly provided her home service out of love and admiration which requires no payment, or she is just commoditized as having traded her body with economic support from the male partner.<sup>30</sup> Such analysis of the existing law makes us rethink the fairness of contract and law, whether duress and unconscionability work behind the seemingly "consented-to" contract. Overall, with a gender lens, FLT deconstructs the laws by asking a different question, using a different voice, searching for answers, and above all, seeking changes.<sup>31</sup>

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<sup>23</sup> Elizabeth Wolgast, *Equality and the Rights of Women* (New York: Cornell University Press, 1980), 122.

<sup>24</sup> See Sylvia A. Law, "Rethinking Sex and the Constitution," *University of Pennsylvania Law Review* 132, No. 5 (1984): 955-1040.

<sup>25</sup> Christine A. Littleton, "Reconstructing Sexual Equality," eds. Katharine Bartlett and Rosanne Kennedy, *Feminist Legal Theory: Readings in Law and Gender, New Perspectives On Law, Culture, And Society* (New York: Westview Press, 1991), 47.

<sup>26</sup> Vicki Schultz, "Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation on the Job in Title VII Cases Raising the Lack of Interest Argument," *Harvard Law Review*, Vol. 103, No. 8 (1990): 1749-1843, at 1758.

<sup>27</sup> For example, in the 1986 case *EEOC v. Sears, Roebuck & Co.*, the Supreme Court found that sex segregation in the sales business is women's own choice. But the problem of such jurisprudence is that it blames societal injustice on women themselves for making bad choices. See *ibid*, 1759.

<sup>28</sup> *Ibid*, 1842.

<sup>29</sup> Clare Dalton, "An Essay in the Deconstruction of Contract Doctrine," *The Yale Law Journal*, Vol. 94, No. 5 (1985):997-1114, at 1038.

<sup>30</sup> *Ibid*.

<sup>31</sup> Hilary Charlesworth, Christine Chinkin and Shelley Wright, "Feminist Approaches to International Law," *The American Journal of International Law* Vol. 85, No. 4 (1991): 613-645, at 614-615.

However, a golden mean has to be found when using a gender analysis or FLT in the research for social engineering. We have to avoid a “victimization rhetoric”,<sup>32</sup> which over-emphasises women’s vulnerability and helplessness, as this rhetoric is likely to cause a counter-effect. In Chapter 5 on proposing legislative suggestions, this study will recommend that the laws in China must not essentialize women as a victimized group in the society but should treat women equally with men. As Kapur rightly pointed out, an overemphasis on “women’s vulnerability” might produce “over generalization about women”, which could reinforce the stereotypes of gendered experience while underestimating the different experience of women in different social and cultural backgrounds.<sup>33</sup> A further implication of essentializing women as a homogeneous, victimized group is that it could invite a protectionist response from legislators and adjudicators,<sup>34</sup> resulting in a perpetuation of women’s subordination. Hence this study would apply a balanced way to use gender as an analytical tool, meaning that it sees gender as a social category of power imbalance, without regarding gender as a legitimate source of different treatment. This balanced application of gender study is further used in Chapter 5 when proposing legislative recommendations.

In sum, a gender approach is applied in this study as an analytical tool to reflect the status quo of women workers in China. A gender analysis is further applied to review the existing provisions concerning non-discrimination and decent working conditions in the international human rights/labour law framework in order to come up with a list of criteria for gap identification and gap filling in Chapter 4. A gender approach is also used in Chapter 5 to propose suggestions that take into account the experience of women for the improvement of the conditions of migrant women working as domestic helpers in China.

Firstly, in the description of the status quo of migrant women working as domestic helpers, the study used, in Chapter 2, a gender analysis to identify the mixed story of Chinese women in the patriarchal practice, in the socialist formal equality reform and in the gender-biased market economy. From a gender analysis, Chapter 2 looked into the following situations: how the patriarchal practices contributed to the static role played by women in the family arena as well as the public sector; how socialist reform in China had promoted women’s emancipation but only ensured formal equality by law; how the recently-adopted market economy reform has encouraged women into the labour market, whilst they still face unequal opportunities and inferior treatment in the fierce market competition. A gender analysis helps us to see through to the additional disadvantages faced by migrant workers caused by both gender and their Hukou status. It further equips us with a lens to probe into the typical manifestations of gender segregation in the labour market – in this case in particular, a predominant percentage of women working as domestic helpers in China. A gender analysis helps us to analyse how women domestic helpers are more susceptible in the face of a hostile working environment such as verbal and physical abuse, sexual harassment etc. than their male counterparts.

Secondly, the study will look via the gender lens into the selected set of international human rights/labour standards regarding the elimination of discrimination and the promotion of equality and work-related rights that can be applied to protect women, migrant workers and domestic helpers. For example, according to the ICESCR General Comment No. 20, direct and indirect discrimination needs to be clarified.<sup>35</sup> When reviewed in a gender analysis, the exclusion of domestic servants – -who are predominantly women – -as formal labourers, may well be qualified as indirect discrimination based on gender. Thus, after review through a gender analysis, the guiding principle in this regard can be specified in a recommendation for the Chinese legislative body that indirect discrimination based on gender or other social categories must be explicitly prohibited by domestic law. In Chapter 5, some of the principles selected in Chapter 4 will be reviewed from a gender analysis in order to come up with suggestions concerning social engineering in the legal field.

Thirdly, the study intends to propose workable suggestions to fill the gaps between the guiding principles arising from international standards and the Chinese legislation, concerning eliminating discrimination and ensuring decent working conditions for the benefit of migrant women working as domestic helpers. For example, it is proposed by the study that authentic gender equality should be understood in a way so that “the interests, needs and priorities of both women and men are taken into consideration to ensure the diversity of different groups of women and men”.<sup>36</sup> For another example, gender analysis helps the study to propose the

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<sup>32</sup> Ratna Kapur, “The Tragedy of Victimization Rhetoric: Resurrecting the Native Subject in International/Postcolonial Feminist Legal Politics,” *Harvard Human Rights Law Journal*, Vol. 15 (2002):1.

<sup>33</sup> *Ibid.*, 5-7.

<sup>34</sup> *Ibid.*

<sup>35</sup> See UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (Article 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20, para.27.

<sup>36</sup> “Concepts and Definitions: Gender”, United Nations Entity for Gender Equality and Empowerment of Women, accessed 23 January 2017,

principles of guaranteeing equal access to labour protection, such as freedom of association, social security, and decent working conditions for people working in the female-dominated sector, such as domestic helpers. Only when the laws take women's needs and situation seriously, would the laws become a social institution that upholds gender justice.

### **Conclusion**

This section described gender as a useful category in analysing power relations between men and women in society. This section traced the pre-gender understanding of men and women, illustrated the development of gender theories and displayed the application of gender analysis in this study. A gender analysis will be applied in combination with intersectionality in the understanding of the overlapping problems faced by migrant women working as domestic helpers in China. A gender analysis will also be applied in Chapter 4 to review the current international human rights/labour law framework so as to develop a set of gender-sensitive guiding principles to be drawn up for the benefit of migrant women working as domestic helpers. Finally, in Chapter 5, gender analysis will be used, together with an intersectionality approach, to help develop gender-sensitive recommendations for the Chinese legal system for the benefit of migrant women workers as domestic helpers.

### **3.3 Intersectionality approach and its implication in the study**

#### **3.3.1 Intersectionality: what is it?**

In the second half of the 20th century, the wakening of black feminists led to a series of discussions on the social oppression of black females based on their sex and colour. Bell Hooks in her 1982 work, *Ain't I a woman?*<sup>37</sup> tells her story of being unfairly treated as a black woman. She bluntly accused the dual oppressive system based on one's gender and colour by stating "all Women are white, all Blacks are men",<sup>38</sup> referring to the marginalized position of black women, namely being invisible in the discourse. Later, from 1983, discussions on "triple oppression" suffered by working class black women were had by Nira Yuval-Davis and Floya Anthias.<sup>39</sup> These academic efforts called for more attention to be paid to under-privileged women such as black women, working class women, lesbian women as opposed to white women, upper-class women, and heterosexual women who represented the mainstream within female society. Such efforts posed doubts about homogeneity amongst women, causing debates amongst feminist theorists as well.

It seems that the situation of interwoven subordination was not considered to be a proper concept until "intersectionality" was first coined by Kimberle Crenshaw in 1989. In her paper, *Demarginalizing the Intersection of Race and Sex*, she proposed the "compoundedness" of discrimination against African American women in society, by stating that either sex additionally disadvantaged African American women, or being African American additionally disadvantaged women.<sup>40</sup> She expressed her concerns that the absence of discussion over the racial elements in gender discourse might reinforce the exclusion of African American women.<sup>41</sup> Even more, the perpetuation of such overlapping subjection might ensue when the "white-dominated feminists" still placed focus on patriarchy, sexuality and ideology.<sup>42</sup> Intersectionality started a revolution within the feminist constituency by calling for attention beyond patriarchy and sexuality, and also beyond social stratification and other categories.

Since intersectionality made a contribution to the feminist analytical framework, diversified theories have been developed on the basis of the fundamental notion of intersectionality. If we understand the essence of it, then we can refer to the three basic theoretical notions of intersectionality, as enunciated by Lorena Sosa:<sup>43</sup> (1)

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<http://www.un.org/womenwatch/osagi/conceptsanddefinitions.htm>

<sup>37</sup> See Bell Hooks, *Ain't I a Woman, Black Women and Feminism*, third edition (London: Pluto Press, 1990).

<sup>38</sup> See Gloria T. Hull, Patricia Bell Scott and Barbara Smith, *All the Women Are White, All the Blacks Are Men, but Some of Us Are Brave: Black Women's Studies* (New York: Feminist Press, 1982).

<sup>39</sup> Rita Dhamoon, "Considerations in Mainstreaming Intersectionality as an Analytic Approach," (paper presented at the annual meeting of the Western Political Science Association, Manchester Hyatt, San Diego, California, 20 March, 2008):19.

<sup>40</sup> Kimberle Crenshaw, "Demarginalizing the Intersection of Race and Sex," eds. Katharine Bartlett and Rosanne Kennedy, *Feminist Legal Theory: Readings in Law and Gender, New Perspectives On Law, Culture, And Society* (New York: Westview Press, 1991), 57-80, at 64.

<sup>41</sup> Ibid, 67

<sup>42</sup> Ibid. 67.

<sup>43</sup> See Lorena Sosa, *At The Centre, Or The Margins? A Review of Intersectionality in the Human Rights on Violence Against Women* (the Netherlands: Ridder Print, 2015), 68-70.

individuals/groups are affected by overlapping forms of disadvantage at one and the same time; (2) the interacting categories of distinction do not necessarily work in a hierarchical way; (3) these different axes do not simply work in an “additive” way. In sum, intersectionality sees multiple axes of differentiation that are caused by gender, and other economic, political, cultural, physical, subjective and experiential aspects, emphasizing that different dimensions of social life cannot be separated out into discrete and pure strands.<sup>44</sup>

With decades of efforts devoted to the advancement of theories and discussions revolving around intersectionality, such a concept has been brought to the attention of the international community as well. For instance, the 1995 Beijing Declaration for the Fourth World Conference on Women recognized that there are multiple barriers placed in front of women and girls and their empowerment “because of their race, age, language, ethnicity, culture, religion or disability and so on”. In General Recommendations No. 18,<sup>45</sup> No. 26,<sup>46</sup> and No. 27<sup>47</sup> address disabled women, migrant women workers and older women respectively, issued by the UN Committee on the Elimination of Discrimination against Women, such a perspective of “overlapping forms of oppression” was fully recognized and adopted by the treaty body. General Recommendation No. 25 dealing with gender related dimensions of racial discrimination issued by the Committee on the Elimination of Racial Discrimination (CERD) also noted that sometimes racial discrimination might “disproportionately affects women than men”.<sup>48</sup> An increasing recognition of intersectionality in the social equality discourse and an accumulative effort to institutionalize it into the justice system was witnessed. Indeed, viewed from an intersectionality approach, if a legal system is determined to promote substantive equality and to eliminate all forms of discrimination but fails to take account of such compounded subordination, it will be unable to provide sufficient protection and remedy for those people who have experienced multiple injustices in society. For the purpose of this study, whose subject of research is exactly the most vulnerable group in the society, the introduction and application of intersectionality as an analytical perspective is not only helpful but also essential to the case.

Since every theory has its own definition of intersectionality, with large or small variations, how is intersectionality defined in this study? For this study, intersectionality is defined as a feminist perspective to understand complicated social power dynamics. It sees gender, together with other social categories such as social origin, race, nationality, ethnicity, sexual orientation and so on as the basis of social power diversion. With intersectionality as a lens, we see different groups of minorities facing multiple levels of social oppression due to various configurations of social categories, in varying degrees of intensity.<sup>49</sup> In comparison to the traditional way of perceiving power relations in society that is singly based on either gender or race alone, intersectionality equips the analysts with a fresh pair of eyes to observe the complexity of inequality that cannot be understood in a mutually inclusive manner. Seen from an intersectionality approach, it is not difficult to see that people in real life do not experience neatly compartmentalized forms of disadvantage, but multiple systems of oppression interacting with each other simultaneously.<sup>50</sup> Take rural migrant women workers in China as an example, their urban female counterparts, being urban dwellers and well-educated, face quite different situations in life in terms of education, work opportunities, promotion prospects, social welfare, even educational resources for their offspring, in the same social context. While both urban women and rural women may face disadvantages arising from gender, yet the disadvantages faced by a rural migrant woman are compounded based on different axes of social categories, namely, their gender and their social origin — in this case, their agricultural Hukou status.

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<sup>44</sup> Avtar Brah and Ann Phoenix, “Ain’t I a Woman? Revisiting Intersectionality,” *Journal of International Women’s Studies*, Vol.5 (2004):75-86, at 76.

<sup>45</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendations No. 18*, adopted at the Tenth Session, 1991, A/46/38.

<sup>46</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 26 on women migrant workers*, 5 December 2008, CEDAW/C/2009/WP.1/R.

<sup>47</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 27 on older women and protection of their human rights*, 16 December 2010, CEDAW/C/GC/27.

<sup>48</sup> UN Committee on the Elimination of Racial Discrimination (CERD), *General Recommendation No.25 on gender-related dimensions of racial discrimination*, 20 March, 2000, p.1.

<sup>49</sup> George Ritzer and Jeff Stepnisky, *Contemporary Sociological Theory and Its Classical Roots: The Basics*, second edition (London: McGraw Hill Education, 2007), 204.

<sup>50</sup> Johanna Bond, “International Intersectionality: A Theoretical and Pragmatic Exploration of Women’s International Human Rights Violations,” *Emory Law Journal*, Vol. 52, No. 71 (2003): 71-186, at 76.

### 3.3.2 Intersectionality: why is it?

Admittedly, intersectionality does not necessarily lead us to the ultimate truth. Many gender theorists even regard intersectionality as a “decentring” of the “normative subject of feminism”.<sup>51</sup> They expressed their concerns that the introduction of ethnicity, race, and other axes of social categories would be likely to lessen the social relevance of gender.<sup>52</sup> To some of them, instead of stressing the commonality of women, intersectionality focuses too much on the differences amongst women, which is likely to create an unnecessary schism between, for example, black feminists and white feminists. Such schism might, in turn, repudiate the presumption of the homogeneity of women. Some feminists even claim that intersectionality is a “useless tool” because it does not add value to gender analysis. Randi Gressgard suggested that intersectionality is “a redundant complication of things”, because she thinks that when it is possible to expound by using a fundamental model (for example, gender), it simply does not help to solve the crisis of presentation by being more “difference-sensitive”.<sup>53</sup> Sandra Harding believed that this intersectionality has no scientific methodological content whatsoever in that it only adds a category of “women” in any lesser social category and stirs them together to make a “superficially new approach”.<sup>54</sup>

It must be admitted that, to some extent, they have made their point. But as far as this study is concerned, instead of sabotaging the feminist constituency, intersectionality can actually be utilized in a way that enhances the dialogue within the feminist community, and to bridge understanding amongst feminists coming from different social backgrounds with various axes of difference. After all, to adopt an intersectionality analysis does not always have to result in the repudiation of the common ground shared by gender theories, because an intersectionality approach also helps us to realize that women are more susceptible to disadvantages caused by other social categories than men are. Rather, intersectionality adds a complementary lens to a gender analysis: it can enhance the credibility of a gender approach with its epistemology. In the context of this study in particular, to analyse the problems faced by migrant women working as domestic helpers, it is simply not enough to view their problems only from a gender analysis, but what is also worth analysing are the compounded disadvantages caused by other social axes such as social origin and occupation.

What is more, intersectionality is by no means a redundant theory because it addresses a fundamental question within feminist theories: the differences amongst women.<sup>55</sup> Intersectionality helps to underline the shortsightedness, if not blindness, of gender analysis concerning the complexity and multiplicity of other forms of oppression based on race, class, ethnicity, disability and so on. It is undeniably important for women around the world to form a “strategic alliance” based on their common gender, yet it is no less significant for women to recognize that a large group of people in this alliance are extra vulnerable due to the complicated social categories in which they find themselves. After all, to acknowledge the differences among women can help us to understand the different problems faced by women under different social contexts, and thus to offer appropriate protection or remedies accordingly. Section 3.4 therefore provides an intersectional analysis of the particular situation of migrant women working as domestic helpers and this shows how intersectionality can deepen our understanding of these People’s particular problems. This is the factual basis on which the follow-up legislative suggestions are proposed.

Whilst some feminists defend gender as a normative platform for all feminist discussion by firmly retaining gender as the primary category<sup>56</sup> even if intersectionality is involved in the relevant analysis, there are voices from the black feminists who repudiate an inner hierarchical relationship among gender, class, and race,<sup>57</sup> because gender does not exist prior to these categories.<sup>58</sup> My response is that whether or not gender should be

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<sup>51</sup> Avtar Brah and Ann Phoenix, “Ain’t I a Woman? Revisiting Intersectionality,” *Journal of International Women’s Studies*, Vol.5 (2004):75-86, at 78.

<sup>52</sup> Gudrun-Axeli Knapp, “Race, Class, Gender: Reclaiming Baggage in The Fast Travelling Theories,” *European Journal of Women’s Studies*, Vol.12 (2005): 249-265, 256.

<sup>53</sup> Randi Gressgard, “Mind the Gap: Intersectionality, Complexity and ‘the Event’,” *Theory and Science*, Vol.10 (2008): 5.

<sup>54</sup> “The additive approaches to race issues could no more be contained within the terrains one might have envisioned for them at the start than could the ‘add women and stir’ approaches to gender issues.” See Sandra Harding, *Whose Science? Whose Knowledge?* (New York: Cornell University Press, 1991), 212.

<sup>55</sup> Avtar Brah and Ann Phoenix, “Ain’t I a Woman? Revisiting Intersectionality,” *Journal of International Women’s Studies*, Vol.5 (2004):75-86, at 71-76.

<sup>56</sup> Maria Carbin and Sara Edenheim, “The Intersectional Turn in Feminist Theory: A Dream of a Common Language?” *European Journal of Women’s Studies*, Vol. 20 (2013): 233-248, at 246.

<sup>57</sup> *Ibid*, 244.

<sup>58</sup> Wendy Brown, “The Impossibility of Women Studies,” ed. Wendy Brown, *Edgework: Critical Essays on Knowledge and Politics* (Princeton: Princeton University Press, 2005), 123-124.

taken as a primary category for analysis depends on individual cases. Gender is an indispensable category in the analysis of power relations, but not necessarily the primary one on all occasions. This is because some other status might hold a predominant position in certain circumstances or, in most cases, the situation is only aggravated by an amalgam of different axes. For example, if when a migrant woman is denied a job opportunity as a domestic servant because she does not have a local Hukou, another migrant candidate, this time a male, is also denied such a chance, then the major effective category in this situation is her agricultural Hukou status (or social origin). However, her gender will make the situation worse than that of her male counterpart because her gender will present more difficulties in getting another job opportunity in a different business.

To sum up, I consider intersectionality and gender to be mutually complementary. As a Chinese scholar who is born and bred in the yin-yang philosophy, I am inclined to believe that a gender analysis and an intersectionality approach mutually reinforce each other instead of sabotaging each other. I intend to argue that intersectionality is a sound tool for analysis because it adopts a specificity-sensitive perspective, while at the same time it makes up for the shortfalls of prioritizing or even absolutizing gender as the one and only category for analysis of power relations. As is pointed out by Kathy Davis, intersectionality is a successful feminist theory based on several aspects: firstly, it serves as a bridge between those feminists who maintain gender as the primary category of analysis and those who emphasize a complicated mechanism of different social categories in social power relations.<sup>59</sup> Secondly, it leaves endless openings for further interpretation and creates new possibilities. Thirdly, it retains the gender analysis, yet stays open-minded about it. It is all-inclusive, yet still leaves room for new interventions. Finally, it deconstructs the men-women binary oppositions without necessarily undermining the common ground of gender discourse.<sup>60</sup> In sum, intersectionality fits the strategy of resonating with women's shared experience, without losing touch with their diversity, as Deborah Rhode says.<sup>61</sup> It offers an innovative perspective to conceptualize the model of social category as being more than just unitary and static; rather, it is multi-faceted and dynamic as well.<sup>62</sup> Section 3.4 further elaborates how gender and intersectionality are to be applied in the study.

### 3.4 Gender and intersectionality analysis as applied in this study

In this section, gender analysis and an intersectionality approach are used in a complementary way: firstly, to analyse the status quo of migrant women working as domestic helpers in China; secondly, to review the IHRL/ILO conventions and Chinese laws; and thirdly, to be incorporated in the legislative suggestions. However, before jumping into the analysis, it is necessary to know that there are different approaches to applying intersectionality, commonly known as the additive approach and the constructive approach. The additive approach is to interpret intersectionality as an additive process, so that relevant social categories can be reduced to each essentialized category, such as "blackness", "womanhood", "working class" and so on. The constructive approach is to expound intersectionality as a constitutive process, sometimes known as "transversal politics",<sup>63</sup> which views a multilayered social category compounded of different axes of oppression as irreducible, inseparable and entangled. As Philomena Essed states, racism and genderisms are "mutually interwoven formations of race, ethnicity and gender".<sup>64</sup>

In this research, the constructive approach of intersectionality will be used as an analysis tool to examine the working conditions of migrant women working as domestic helpers in China. This constructive approach of intersectionality deals not only separately with each axis of social category – gender, social status and occupation – but also considers how these social categories overlap and interconnect with each other. To be specific, a migrant woman working as a domestic helper does not only face the possible disadvantage of being a woman, or holding a agricultural Hukou, or working as a domestic servant, but also the disadvantage based

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<sup>59</sup> See for example Kathy Davis, "Intersectionality as A Buzzword: A Sociology of Science Perspective On What Makes a Feminist Theory Successful," *Feminist Theory*, Vol. 9 (2008): 65-85.

<sup>60</sup> *Ibid.*, 70-71.

<sup>61</sup> Deborah Rhode, "Feminist Critical Theories," 42 *Stanford Law Review* (1990): 617-638, at 626.

<sup>62</sup> Johanna Bond, "International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations," *Emory Law Journal*, Vol. 52, No. 71 (2003): 71-186, at 101-137.

<sup>63</sup> Transversal politics is a democratic practice of alliances across boundaries of difference. See Nira Yuva-Davis, *Gender and Nation* (London: Sage Publication, 1997).

<sup>64</sup> Philomena Essed, "Towards a Methodology to Identify Converging Forms of Everyday Discrimination," (United Nations, conference contribution, 2001): 1.

on these elements in an entangled way. The intersectionality applied in the status quo analysis will explore how the three relevant social categories contribute to the aggravation of the disadvantage.

### **3.4.1 Double minority: problems based on gender and social origin**<sup>65</sup>

In China, women made up 33.6% of the migrant population in 2015, and this percentage continues to increase year after year.<sup>66</sup> The trend of increasing female participation in the urban labour market is attributed to women's growing self-autonomy, which also gives rise to emerging problems for these migrant women workers. They experience frequent changes between traditional cultures and modern trends, which contributes to the complexity of their social category.<sup>67</sup> Furthermore, they are inclined to face barriers based on both their gender and their social origin – in this case, their agricultural Hukou status. Such unequal treatment according to one's Hukou status in China may also serve as an example of discrimination on the basis of socio-economic status,<sup>68</sup> depending on from which perspective you perceive this phenomenon. A woman migrant seeking opportunities in the urban areas may have limited job options and have to cope with multiple forms of discrimination on the grounds of both social status and sex.<sup>69</sup> It is very difficult to trace which social category has contributed to the compounded form of disadvantage experienced by migrant women working as domestic helpers as the categories are inextricably intertwined with each other.

In the market-economic context, women migrant workers are likely to be steered into the service business, an informal sector comprising such employment as hourly-paid hospital care providers, nannies, home maids,<sup>70</sup> amongst which domestic service is known as "migrant-only occupation".<sup>71</sup> Such employees are poorly paid, work without security, are susceptible to fraud and deception, and face a hostile working environment which includes violence and sexual harassment.<sup>72</sup> Most of these workers are neither organized nor represented by any trade union nor can they afford legal advisors, thus they have very little ability to negotiate which often minimizes their participation in the conclusion of any labour contract and reduces their welfare rights in the workplace. Individual factors, such as the level of education, the level of awareness of personal rights, and a knowledge of the welfare system may also limit their accessibility to social welfare. Gender segregation in the labour market puts women at a greater disadvantage in comparison with their male counterparts, especially when the rural migrant status is compounded with being a woman. Even some emerging forms of exploitation arise in a gendered way.<sup>73</sup>

Despite many cities across China having carried out different legal models of enhancing the accessibility of social insurance to rural migrants, viewed from a gender analysis these models fail to take into account gender differences as no maternity insurance is included in any of these models.<sup>74</sup> According to a 2006 investigation, only 6.7% of migrant women workers are covered by the maternity care fund and only 14.4% of them received fully paid maternity leave.<sup>75</sup> When they are in pregnancy, they are easily dismissed by employers.<sup>76</sup> So when

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<sup>65</sup> Discrimination based on social origin, means an individual's membership of a class, socio-occupational category or caste determines his or her occupational future, either because he or she is denied access to certain jobs or activities, or is assigned only certain jobs. See ILO CEACR, *Direct Request to China, on Discrimination (Employment and Occupation) Convention, 1958 (No. 111)*, adopted 2012, published 102<sup>nd</sup> ILC session, 2013.

<sup>66</sup> National Bureau of Statistics of People's Republic of China, *The 2015 Investigation and Survey Report on the National Migrant Workers*, 28 April 2016, accessed on 12 February 2017, [http://www.stats.gov.cn/tjsj/zxfb/201604/t20160428\\_1349713.html](http://www.stats.gov.cn/tjsj/zxfb/201604/t20160428_1349713.html)

<sup>67</sup> Weidong Li, Shuzhuo Li and Marcus W Feldman, "Gender Differences in Anomie Among China's Rural Migrant Workers in The Context of Gender Imbalance and Population Migration," *Chinese Journal of Sociology*, Vol. 1, No. 4 (2015): 605-624, at 606.

<sup>68</sup> See International Labour Organization, *Equality and Non-discrimination at work in China Training Package, Equality and Non-discrimination at work in China: Handbook* (Beijing: ILO, 2010), 20.

<sup>69</sup> See for example, International Labour Organization, "Fiftieth Anniversary of the Discrimination (Employment and Occupation) Convention, 1958 (No.111)", in *Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A)* (Geneva: ILO, 2009).

<sup>70</sup> Jianping Yao and Byung-Cheol Kim, "Social Insurance Participation of Rural Migrant Workers Based on Gender Dimension: Evidence from Four Chinese Cities," *Asian Social Work and Policy Review*, Vol.9 (2015): 57-69, at 67.

<sup>71</sup> Fei Guo and Robyn Iredale, "The Impact of Hukou Status on Migrants' Employment: Findings from the 1997 Beijing Migrant Census," *International Migration Review*, Vol. 38, Issue 2 (2006).

<sup>72</sup> Chen Lanyan, "Gendered Reality of Migrant Workers in Globalizing China," ed. Errol P Mendes and Sakunthala Srighanthan, *Confronting Discrimination and Inequality in China: Chinese and Canadian Perspectives* (Ottawa: University of Ottawa Press, 2009), 205.

<sup>73</sup> Margaret Satterthwaite, "Crossing Borders, Claiming Rights: Using Human Rights Law to Empower Women Migrant Workers," *Yale Human Rights and Development Journal*, Vol. 8, Issue 1 (2005): 9.

<sup>74</sup> Jianping Yao and Byung-Cheol Kim, "Social Insurance Participation of Rural Migrant Workers Based on Gender Dimension: Evidence from Four Chinese Cities," *Asian Social Work and Policy Review*, Vol.9 (2015): 57-69, at 60.

<sup>75</sup> See "National Coordination Group for Safeguarding the Rights of Women and Children: Investigative Report 2006," in UNDP China, *China Human Development Report 2007/2008: Basic Public Services for 1.3 Billion People* (Beijing: UNDP China, 2008).

they are pregnant, many migrant women have to go back to their places of origin, give birth there, take a period of rest and then return to cities for work. What is worse, only 31.1% of migrant women workers are covered by pension plans, whereas 73.3% of their urban female counterparts are so covered.<sup>77</sup> The participation rate of take-up of pension and injury insurance by women migrant workers was 50% of the total number of such workers,<sup>78</sup> and this figure may even leave out of the statistics those who work in the informal sector. In short, this group of people is extra vulnerable in the face of exploitation, not only because they are marginalized in the local labour market because they are migrant workers but also because they are women. Apart from the oppression of migrant workers based on their social status, it is noticeable that women migrant workers encounter compounded forms of discrimination due to their Hukou status and their gender: the feminization of the service business, the segregation in the informal sector and the exclusion from social welfare plans all contribute to worsen their situation. Despite the great efforts made to reform the Hukou system in various cities and regions, there still is much room for improvement on eliminating discrimination de jure and de facto.<sup>79</sup> To tackle mixed Hukou and gender discrimination, legislation has to take into consideration a gender mainstreaming approach, as well as an intersectionality approach.

### **3.4.2 Overlapping social categories and interwoven oppression**

In this section, an intersectionality approach is applied to analyse how multiple forms of social oppression are caused by the overlapping and interconnected social categories accepted by migrant women working as domestic helpers in China. To begin with, being women, migrants and domestic servants are illustrated in the first subsection in a pie chart to show how the social categories overlap and cause disproportionate effects in the form of social barriers. In the second subsection, it is demonstrated in the pie chart that being women, migrants and domestic servants places such women in a transformative relationship. Thus these social categories and the derived disadvantages are inseparably interconnected with each other.

#### ***The overlapping social categories***

As is demonstrated in Figure 3.1., migrant women working as domestic helpers find themselves in the small intersectional triangle on the left. The disadvantages based on these social categories, however, do not just cover the area of the small triangle, but cover the whole area of the three circles on the right. This gives rise to numerous forms and permutations of disadvantage. When gender-based social exclusion overlaps with Hukou-based social exclusion, then a migrant woman suffers from overlapping forms of inequality because she is a migrant and a woman. Hence, the difficulties she faces might be, on the one hand, a limited choice of jobs because of an overwhelming preference for male candidates in the labour market; on the other hand, the denial of access to local social welfare plans because local governments do not have big enough budgets to support people without local Hukou. Again, when a woman domestic helper suffers from domestic violence or sexual abuse carried out by her host family without sufficient access to any form of remedy, it may well be as the consequence of being a woman at the same time as working in a relatively isolated working environment. There are many more possibilities given the complexity of the combination of these social categories. For most of the time, the boundaries of social category-based discrimination are unclear. This shows that a person who falls into multiple disadvantageous social categories may face a greater total disadvantage than just a sum of the disadvantages caused by each single social category.

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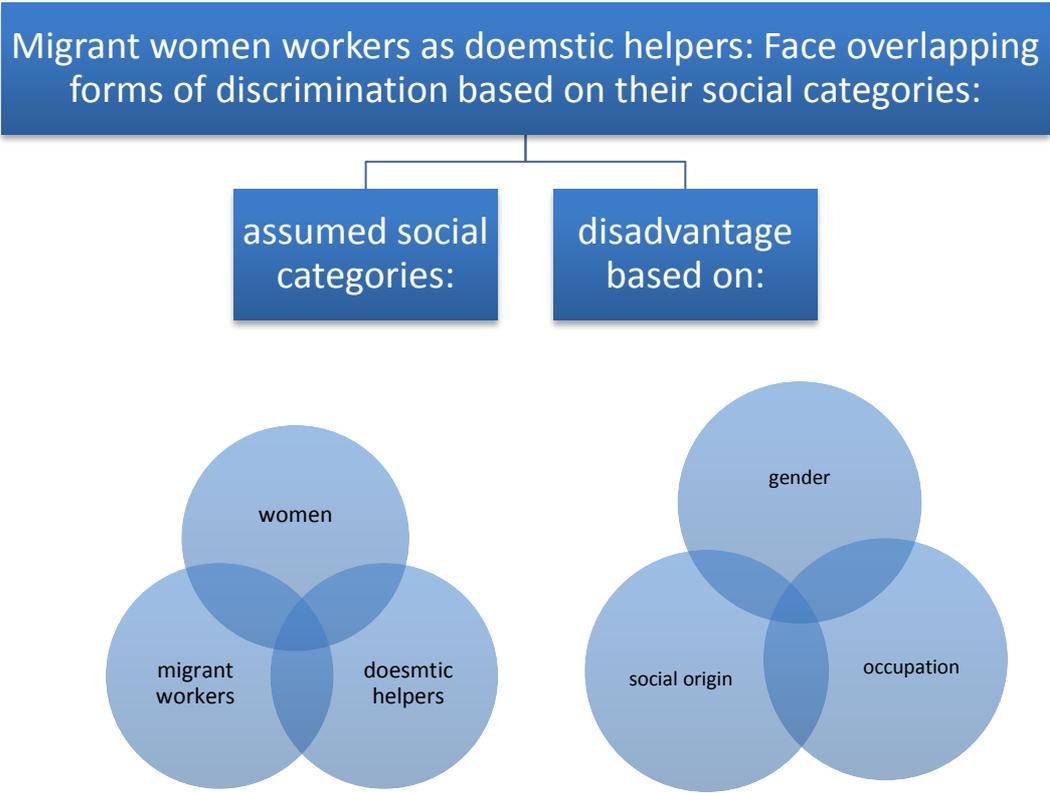
<sup>76</sup> See Women Workers Committee and All-China Federation of Trade Union (ACFTU), Weihai Branch, *The Investigation Report on the Realization of Migrant Women Workers' Rights and Interests* (Weihai: ACFTU, 2011).

<sup>77</sup> All China Women's Federation and the National Bureau of Statistics, "Third Survey on the Status of Chinese Women," *Collection of Women's Studies*, Issue 6 (2011).

<sup>78</sup> "National Coordination Group for Safeguarding the Rights of Women and Children: Investigative Report 2006," in UNDP China, *China Human Development Report 2007/2008: Basic Public Services for 1.3 Billion People* (Beijing: UNDP China, 2008).

<sup>79</sup> Yuwen Li, "An analysis of Employment Discrimination", Yuwen Li and Jenny Goldschmidt *Taking Employment Discrimination Seriously: Chinese and European Perspectives* (the Netherlands: Martinus Nijhoff Publishers, 2009), 31.

Figure 3.1. Overlapping social categories and ensued overlapping disadvantages



***The interconnected social categories***

Migrant women working as domestic helpers being a marginalized group in the legal system and an invisible group in society, is by no means just a coincidence. When viewed through the lens of intersectionality, it is not difficult to detect that there seem to be some intrinsic liaisons amongst the social categories of being women, being migrants and being domestic helpers. Such interlocking links between women and migrant workers, between migrant workers and domestic servants, and between female and domestic servants, reveal the institutional oppression that calls for a sophisticated solution. Intersectionality is not simply a way to address helpers “hyphenations among specific existence”<sup>80</sup> such as women, social origin and occupation. Rather, it helps to demonstrate the transformative liaisons among the three social categories.

<sup>80</sup> Elizabeth Grosz, *Becoming Undone, Darwinian Reflections on Life, Politics, and Art* (Durham: Duke University Press, 2011), 82.

Pie Chart 3.1. The interconnected social categories:



Applying the lens of intersectionality, we can see that for migrant women working as domestic helpers, their gender, social origin and occupation interact with each other in an intrinsically connected manner. Firstly, there is an increasing connection between being women and being migrants: with more and more Chinese women earning their own living and entering into the labour market, a growing number of rural women also want to find jobs in the urban areas. There has even been witnessed a trend of “feminization of migration”<sup>81</sup> around the world, including in China. Secondly, there is an obvious connection between being women and working as domestic helpers. Domestic service is predominately served by female workers, who are inclined to perform such jobs as the natural extension of women’s traditional family role, as least according to the social stereotypes. Thirdly, there is also some connection between being migrant women and working as domestic helpers. Being a migrant woman with limited social resources and limited vocational skills in the urban areas, one is easily excluded from well-paid stable jobs, having to work instead in the informal sectors with low pay and poor stability. One obvious option for such women is to work as domestic helpers.<sup>82</sup> In short, women and migrant workers both belong to the under-class in society, so they are often pushed into informal, poor quality jobs. However, it is hard to tell whether they are forced to choose the low-paid service-based job, or whether it is those employers who deliberately seek them out to do those jobs. The multiple disadvantages they face are further explained below.

### **3.4.3 Concrete problems derived from the intersectional social categories**

According to the status quo of migrant women working as domestic helpers in China as described in Chapter 2, in combination with the situation revealed by intersectionality analysis, they are and are likely to be exposed to multiple levels of social oppression, as a result of their intersectional disadvantaged social categories namely, their gender, their Hukou status, and their occupation. This is particularly true in the metropolitan cities such as Beijing, Shanghai and Guangzhou where the Hukou policy is undergoing only slow reform. The households in these urban areas are still in great need of domestic helpers to share the burden of family chores, yet the safe and secure working conditions of domestic helpers are not assured either de facto or de jure. Using gender analysis and intersectionality theory as a lens for identifying problems faced by domestic helpers, this section analyses their concrete needs according to the inferior conditions they face.

First and foremost, according to the description of Chapter 2, migrant women workers as domestic helpers’ situation can be summarized as follows.

- (1) The gender- and Hukou-segregated labour market causes a wage gap and unequal payment for women domestic helpers who are at the same time agricultural Hukou holders.
- (2) The fact that domestic helpers are usually excluded in formal labour law as a result of their informal employment working style bars them from freely joining local trade unions.
- (3) There can be all sorts of exploitation in terms of payment default, excessive working hours and an unfavourable working environment due to their reduced bargaining position.
- (4) Private houses as work places, compounded with agricultural Hukou status and being a woman, may give rise to social exclusion, exploitative working hours, physical abuse, and even sexual harassment or assault.

<sup>81</sup> “Feminization of migration,” see more at United Nations Economic and Social Council, Commission on Population and Development, *Feminization of Migration, Remittances, Migrants’ Rights, Brain Drain Among Issues, As Population Commission Concludes Debate* (New York: UN, 2006).

<sup>82</sup> “Informal Economy as an ILO Subject,” ILO, accessed 18 February 2017, <http://www.ilo.org/global/topics/employment-promotion/informal-economy/lang--en/index.htm>

(5) Private houses as work places are, at the same time, a very tricky area for law to regulate.

(6) There is a lack of standards for ensuring a safe working environment and for controlling occupational hazards in the housework field.

(7) Being domestic helpers, as well as non-local Hukou holders, their intersectional situation makes it very difficult for migrant domestic helpers to get access to government supported social benefits and social security.

(8) Access to remedies is often very difficult and costly for migrant women working as domestic helpers, who may not even be aware of the possibility of defending their legitimate rights.

Based on these summarized situation, their conditions are categorized and their needs are derived accordingly in the following section.

### **Discrimination in the labour market**

Migrant women working as domestic helpers face multiple levels of labour market discrimination due to their overlapping disadvantageous social categories. First and foremost, the domestic service industry is predominantly occupied by women working as nannies, house cleaners, cooks, childcare or elder care providers, which are stereotypically considered as the extension of women's family roles. Such a feminization of the domestic service market is a showcase of the gender segregation of the labour market and the gender wage gap where women are allocated to the lower rungs of the social ladder. Just as the ILO report shows, working in the informal economy, "being female" and "paid little" are inextricably interlocked.<sup>83</sup> Indeed, domestic work is by no means regarded as a choice career in China, because it usually involves dirty and heavy work with prolonged working hours, poor payment<sup>84</sup> and a lack of social security. Doing domestic service jobs is, more often than not, a combination of being in the underclass and, at the same time, a woman. What is more, girls from the rural families tend to have fewer opportunities for higher education, which results in their limited choices of jobs, when they migrate into urban areas for work.

Secondly, as a holder of agricultural Hukou, a woman working in an urban area can face various degrees of restrictions and limitations in terms of labour market discrimination. Take the metropolitan cities for example, the local Hukou in Beijing, Shanghai and Guangzhou are still not completely open to agricultural Hukou holders. Thus, migrant workers have to go through various administrative procedures to get a job, and many workers without local Hukou are denied certain jobs. Additionally, without local Hukou, they are not entitled to the public services that local governments provide for the local urban Hukou holders, such as government-supported social security coverage, and free access to local schools for their children. Furthermore, wage-based discrimination occurs to migrant workers including less payment than rural dwellers, denial of payment, confiscation of personal documents, etc.

Thus, the concrete needs of migrant women workers, viewed from a gender and an intersectional perspective are:

- Equal access to local/urban labour market with local domestic helpers.
- Remuneration system that guarantees equal pay for work of equal value.
- A job evaluation system free from gender bias and Hukou discrimination, but based on objective indicators, such as skills involved, stand-by hours, local economic development level, etc.
- Equal treatment in public services, such as accessibility to publicly provided occupational training and educational programmes, accessibility by their children to local schools and college examinations, equal access to local social security schemes, on the same footing as local urban workers.
- Introduction of an effective labour inspection system to detect labour market discrimination against migrant women working as domestic helpers, such as no contracts, payment default, deposit fraud, confiscation of personal documents confiscation, etc.

### **Exclusion from local trade unions**

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<sup>83</sup> Marilyn Carr and Martha Alter Chen, *Globalization and the Informal Economy: How Global Trade and Investment Impact on the Working Poor* (Geneva: ILO, 2001), 3.

<sup>84</sup> Payments for domestic helpers are usually lower than for most of the other jobs on the labour market. See ILO, *ILO Domestic Work Policy Brief No.1, Remuneration in Domestic Work* (Geneva: ILO, 2011), 2.

Due to the fact that an individual domestic helper is usually hired by private families, they are not regarded as “employees” per se according to the Chinese labour law system.<sup>85</sup> Being an employee is a prerequisite of joining a trade union, so if a domestic helper is hired by a private family, then they are not qualified to join a trade union, either. The exclusion from trade union membership significantly impairs the bargaining power of domestic helpers, making them vulnerable in the face of arbitrary exploitation, infringement of labour rights, and even physical or verbal abuse. The situation may be worse if the host family happens to restrict their domestic helpers from becoming engaged in the larger community. Even if they were able to join local trade unions, whether their voice would be heard in a male- local-dominated association is still questionable. Accordingly, the needs of migrant women workers in this particular field can be summarized as follows:

- Being legally acknowledged as formal workers in the labour law system and being able to enjoy all the decent working conditions prescribed by the labour law system, just like normal workers.
- Freedom to join or form any forms of labour association or freedom to form their own trade union.
- To be able to join the ACFTU– the most powerful trade union nation-wide – in a specific capacity under which domestic helpers’ needs are heard and taken care of.
- A specific person or institution in the local community for domestic helpers to fall back on and through whom or which to seek help.

### **Poor working conditions**

When under-educated young girls from rural areas want to make a living in the urban areas, they often rely on acquaintances or agencies in the cities to introduce them to host families. Their dependence on their contact makes them vulnerable to exploitation. Even after they have successfully found a host family to work with, due to their reduced bargaining position and their limited awareness of possible rights, they may face all sorts of problems in terms of substandard payment, payment default, prolonged working hours, insufficient rest hours, 24-hour stand-by hours without due compensation. Other than that, women working in the informal sectors are seldom given contracts, which makes it hard for them to claim their rights in court or other judicial bodies.

Given the situation described above, the needs of migrant women workers in this area can be summed up as follows:

- Prohibition of illegal actions, such as human trafficking for domestic servants, compulsory labour by domestic servants, prostitution of domestic servants, in the domestic service labour market
- A standard written contract guaranteed by law, with specific terms on working hours, payment and the form of payment, sufficient rest hours per week and paid leave per year.<sup>86</sup>
- Decent working conditions with due consideration of their specific working characteristics.

### **Private house as the work place**

A particular aspect of performing domestic service is that the work place is somebody’s private home, where laws usually cannot interfere. This can give rise to problems for migrant women workers, who are basically at the disposal of the host family. In most cases, a live-in nanny will have to spend most of her time at the employer’s home, which may cause social isolation and dependence upon the host family.<sup>87</sup> Furthermore, in such a private working environment domestic helpers are extremely vulnerable in the face of physical and psychological abuse, such as slapping, beating, or degrading comments. Even gender-based violence such as sexual harassment or rape can happen, especially to female domestic servants. In addition, being rural migrants who do not have solid social connections in the urban areas, it is even harder for them to make their voices heard to claim their rights and for the purposes of self-empowerment. From what has been described, the needs of migrant women workers as domestic helpers are:

- Legal supervision as to their working conditions.
- Right to privacy, personal belongings, and free mobility.

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<sup>85</sup> Similar situations can be found in Kuwait, Saudi Arabia, and Singapore. See Gabriela Rodriguez Pizarro, United Nations Commission on Human Rights, Report of the Special Rapporteur, *submitted pursuant to Commission on Human Rights Resolution 2002/62*, UN Doc. E/CN.4/2003/85/Add.4, para.25.

<sup>86</sup> See Article 7 and Article 10, ILO, *Convention Concerning Decent Work for Domestic Workers*, C189, 16 June 2011.

<sup>87</sup> See ILO, *Preventing Discrimination, Exploitation and Abuse of Women Migrant Workers: An Information Guide, Booklet 4: Working and Living Abroad* (Geneva: ILO, 2003), 22.

- Freedom from harassment, abuse, violence and any forms of intrusion.
- Strict prohibition on and a punishment scheme for abuse of domestic helpers.

### **Occupational safety and health in the domestic service business**

As there are no national regulations regarding safety and health standards in the domestic service industry, the working environment in each family varies, as do the contractual terms of each of the intermediate companies. Women working in this sector are likely to be exposed to health and safety threats, including accidents such as being cut by a knife or falling, chronic occupational hazards such as skin reaction to strong detergents, or back/wrist/neck problems due to long hours of cleaning work. But most of them cannot join the work-related injury insurance plan equally provided by the state, the employers and the employees because they are not considered to be “employees”, and when domestic servants are hurt or injured, the host families are often reluctant to pay for their medical treatment or even just fire them to save any trouble. Commercial insurance is an option for host families, but the law has to make purchase of such commercial insurance a mandatory request for each contract, otherwise families and domestic helpers themselves are likely to go without insurance in exchange for higher wages. The problems of safe and healthy working conditions call for:

- Specific standards for safe and healthy working conditions for domestic workers, according to their type of work.
- A requirement enforced by law for the host family to provide a safe and healthy working environment for domestic helpers.
- Appropriate type of commercial or government-supported insurance system covering work-related injuries for domestic helpers and their host families, or compulsory commercial insurance demanded by law.

### **Limited access to social benefits and social security**

Migrant women working as domestic helpers face limited access to social security due to being migrants and being domestic helpers at the same time. Being rural migrants, they are not entitled to the government-supported social benefits set up for urban citizens, such as unemployment subsidies, low-income subsidies or personal housing funds, because they do not have local Hukou. In addition, being domestic helpers who are not recognized by the labour law system, they are not entitled to the insurance system that usually covers normal workers, which includes pension, medical insurance, work-injury insurance, unemployment insurance, maternity protection and parental insurance. Thus, the host family and the domestic helper have no other choice but to rely on commercial housekeeping insurance, which is not compulsory unlike the insurance for normal workers in the employment system. Considering the situation of limited access to social benefits and social security faced by migrant women workers as domestic helpers resulting from both their Hukou status and their occupation, they need:

- To be granted equal access to social benefits with local urban citizens.
- To be granted equal rights to labour insurance with normal employees.
- Compulsory insurance for both the host family and domestic helpers, or a government-supported insurance scheme covering injury, maternity, illness, old age, disability etc.
- Maternity insurance supported either by a commercial insurance scheme or by the government.

### **Limited choices over the access to justice**

Apart from the previously summarized problems faced by migrant women working as domestic helpers, what makes their situation worse is that when these problems happen to them, they find the journey to seek justice rather arduous. Firstly, being a migrant woman domestic worker who lacks local social resources, it is more likely that she will become so dependent on the host family that she will feel reluctant to confront them. The case of Cai Minin in the opening chapter is an extreme example of such a story: a migrant girl who was a domestic helper was brutally abused by her female employer for five years, yet did not dare to ask for help. Secondly, the relationship between the host family and the domestic helper is usually not subject to labour arbitration or labour inspection, meaning that normal labour inspections do not supervise such daily working conditions and that any labour dispute settlement mechanism cannot be applied to disputes arising from such relationships. Thirdly, for trivial disputes in a private home, getting a lawyer and going to court is disproportionately costly and time-consuming for domestic helpers. Furthermore, domestic workers do not

want their reputation to be ruined in the close community, because they might still look for another host family to work for in the neighbourhood. In addition, many of these problems are still in a grey area of regulation, so that there might well not be a sufficient legal basis for their claims anyway. Thus, when disputes occur, or when rights are violated, the legal basis for obtaining justice is very limited for them. After all, a law suit is very much the last resort for migrant domestic helpers, who lack social resources, money and time to immerse themselves in a lengthy and costly procedure to obtain justice.

Accordingly, the need to get access to justice is critical to safeguarding their legitimate rights, and such workers need:

- An accessible mechanism to obtain justice and a remedy that is affordable, convenient, speedy and impartial for domestic helpers.
- Various choices of dispute settlement mechanisms such as speedy trial courts, labour arbitration, mediation etc.
- Government-supported legal aid services provided for migrant women working as domestic helpers.

#### **3.4.4 Applied intersectionality in reflection on and reformation of law**

Intersectionality asks one of ‘the other questions’ when reviewing positive laws: “Do laws and policies take the implications of multiple disadvantage into consideration?” In this research, bearing in mind the particular group of migrant women working as domestic helpers who are intersectionally disadvantaged, the intersectionality approach is applied to review existing international human rights and labour rights Conventions and current Chinese legislation in terms of non-discrimination. Fortunately, the concept of intersectionality has already been considered by many international human rights treaty bodies, which have formally employed terms such as “multiple discrimination” “intersectional disadvantage” and so on to express their concerns over the situation of people who have suffered from discrimination on more than one ground. These observations include but are not limited to General Comment (2009) of the UN Committee on Economic, Social and Cultural Rights,<sup>88</sup> General Recommendations No. 18,<sup>89</sup> No. 26<sup>90</sup> and No. 27<sup>91</sup> of the UN Committee on the Elimination of Discrimination against Women (CEDAW) and General Recommendation No. 25 (2000) of the UN Committee on the Elimination of Racial Discrimination (CERD)<sup>92</sup>, which are further elaborated in Chapter 4. Using intersectionality as a tool for review in this research helps in the examining of current international standards and in suggesting specific guidelines to safeguard the interests and benefits of the intersectionally disadvantaged migrant women working as domestic helpers, as set out in Chapter 5.

### **3.5 Conclusion**

This chapter introduces gender analysis and the intersectionality approach as analytical tools in this study. As well as the clarification of the general function and theories of gender analysis and the intersectionality approach, this chapter, in Section 3.4, showed the specific significance and the function of these concepts and perspectives used in this research as analysis tools for a better understanding of the status quo of migrant women working as domestic helpers and their concrete needs. The understanding of their situation serves as the factual basis for the development of guidelines in Chapter 4, referring to current international human rights and labor rights Conventions in connection with the rights and interests of migrant women working as domestic helpers. The gender analysis and the intersectionality approach also serve as critical analytical tools in order to come up with feasible proposals, in Chapter 5, for social engineering with sensitivity towards gender issues and intersectional discrimination.

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<sup>88</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (Article 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20, paras. 17 and 27.

<sup>89</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendations No. 18*, adopted at the Tenth Session, 1991, A/46/38.

<sup>90</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General recommendation No. 26 on women migrant workers*, 5 December 2008, CEDAW/C/2009/WP.1/R.

<sup>91</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General recommendation No. 27 on older women and protection of their human rights*, 16 December 2010, CEDAW/C/GC/27.

<sup>92</sup> UN Committee on the Elimination of Racial Discrimination (CERD), *General Recommendation No.25 on gender-related dimensions of racial discrimination*, 20 March, 2000, p1.

This chapter begins with an elaboration of the gender approach by regarding gender as a useful category of historic analysis of the social power balance and relevant theories in Section 3.2. It is further pointed out in Section 3.2. that in the pursuit of gender justice in society, the gender approach to legal studies – Female Legal Theory – as an analysis perspective is pivotal because it alters the original male-predominant perspective by “asking the other questions”, it raises awareness of gender inequality, and it helps to mainstream gender consciousness in policy-making, legislation and judicial decisions. Finally, this chapter leaves an opening in the gender approach in which to slot in intersectionality analysis, which is alert to the intermeshed effects of disadvantage, for further application to the fact-finding, legal analysis and suggestions of legal change for the sake of migrant women working as domestic helpers in China.

Intersectionality, elaborated in Section 3.3 is used as a complementary lens to look beyond mere gender differences to other biological, social and cultural categories like disability, sexuality, ethnicity, social origin and so on. Despite the criticism which intersectionality has received from essentialist feminists and post-structuralists, the author regards intersectionality as a necessary part of a yin/yang balance to compensate for any shortcomings of pure womanhood-based analysis. Section 3.3 further argues that intersectionality itself is a good balance between a specificity-sensitive approach and a generalist angle, between opening up to new possibilities and relying on the ontology of gender theory, and between the deconstruction of social categories and the common platform for gender discourse. Finally, Section 3.3 displays legal support from international human rights legal documents where the recognition of intersectionality is shown by the illustrating of several relevant examples and methodologies of applying intersectionality.

By combining gender and intersectionality as analytical tools, this chapter goes beyond the dualism of femininity and masculinity within gender theories by recognizing the complexity of personal social categories and the relevant social construction. That is, the intersectionality of gender and other categories of differences including race, ethnicity, sexuality, disability and so on, make up the complicated basis of social power distribution.

Section 3.4. elaborates how gender and intersectionality are applied in this research. Firstly, gender and intersectionality are applied in the understanding of the status quo of migrant women working as domestic helpers in China, due to their overlapping social categories and their interconnected social categories of being women, migrant workers and domestic helpers. Secondly, gender and intersectionality are applied to describe the concrete problems faced by migrant women working as domestic helpers resulting from the intersectional social categories. Thirdly, gender and intersectionality are also applied in the development of criteria to guarantee the benefits and interests of migrant women working as domestic helpers, referring to the existing international human rights and labour rights Conventions.

In conclusion, this chapter lays out the fundamental framework for this research, namely, the gender analysis and intersectionality approach, which has the function of penetrating the three parts – demonstration of the problem, searching for guidelines, and improvement of the situation – of the study. Furthermore, it innovatively reconciles the discord between gender approach and intersectionality approach by bringing them into cooperation for real-life problem-solving: for the improvement of the status of migrant women working as domestic helpers in China. Although I would not dare to claim that the combination of gender and intersectionality is *the* perfect perspective to analyse all the social injustice and gender inequality issues, I feel sufficiently confident to say that this combination of both approaches is an appropriate way to analyse the status quo of migrant women working as domestic helpers, to raise consciousness and to get sufficient legal protection for their working conditions and equality.

### 4.1 Introduction

In the previous chapters, background information on Chinese laws was given and the status quo of migrant workers, women workers and domestic helpers in China were respectively analysed (see Chapter 2). Based on the theoretical underpinning of this study – gender analysis and intersectionality approach – a pair of lens was created to perceive the situation of migrant women working as domestic helpers and the intersectional problems they face (see Chapter 3). Following on from that, this chapter looks in the vast ocean of international human rights treaties and international labour conventions, especially those which are ratified by China, searching for the most relevant provisions and treaty bodies’ interpretations for migrant women working as domestic helpers. From these provisions and interpretations, a list of guidelines is generated to suggest ways of improving existing Chinese domestic laws concerning the interests of migrant women working as domestic helpers. Using these guidelines, Chapter 5 identifies the implementation gaps in the Chinese laws and proposes legislative suggestions for improvement.

This study uses “IHRL/ILO standards” in the sub-title to refer to a collection of both (1) explicit provisions provided in the text of the UN human rights treaties and international labour conventions; and (2) treaty bodies’ interpretations, such as general comments, general recommendations, concluding observations used in the IHRL treaty bodies system, and also Direct Requests and observations used by the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR).<sup>1</sup> Since the object and purpose of this chapter is, from these IHRL/ILO standards, to generate a set of guidelines that can be used to guide the improvement of Chinese domestic laws for the benefit of migrant women working as domestic helpers, the study prioritizes the standards that are most relevant to the concrete needs of this group of people. At the same time, the study also pays first and foremost attention to those conventions that are ratified by China, because the ratified conventions generate state obligations binding on China. Based on the analysis of these selected standards according to the needs of migrant women working as domestic helpers, a set of implications are drawn up as the guidelines for legislative improvement, which serve as the basis of Chapter 5 that identifies the gaps in legislation and proposes suggestions for improvement.

Hence, Chapter 4 proceeds as follows. Section 4.2 maps the existing international human rights treaties and labour conventions in the UN and ILO normative system as the realm to be explored in the following sections. Section 4.3 provides the background information on how international human rights treaties and labour standards conventions are incorporated in the Chinese legal system. Section 4.4 categorizes the needs of migrant women working as domestic helpers into mainly three types: to be treated equally with other workers; to be ensured decent working conditions; and to be ensured affordable access to justice. Next, according to the categorized needs of migrant women working as domestic helpers to be treated equally with other workers in China, section 4.5 scans the existing international human rights treaties and labour conventions, searching for provisions and treaty bodies’ interpretations that guarantee non-discrimination and promote equality. Then, according to the needs of migrant women working as domestic helpers to be guaranteed decent working conditions, section 4.6 scans the existing international human rights treaties and labour conventions, searching for provisions and treaty bodies’ interpretations that safeguard decent working conditions.

In more detail, section 4.2 is introductory in nature, providing some general information about the UN human rights normative system and the international labour law system, from which the standards are chosen to be analysed in the later sections. The reason why the study only focuses on the UN human rights normative system and the ILO normative system, rather than the European and Inter-American human rights normative systems, is because the UN and ILO systems are not only most relevant to the subject of this study, but are more legally binding on China than those district-based human rights normative systems, on the subject of human rights and decent working conditions.

Hence, the international legal documents in the UN human rights normative system which are examined are both conventions and the treaty bodies’ interpretations of certain provisions. In the UN system, the relevant provisions in the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Convention to Eliminate All Forms of Discrimination Against Women (CEDAW) are examined because both have been ratified by China and their subject matters are highly relevant to the topic of this study. Treaty bodies’ General Comments and country-specific observations made by the ICESCR Committee and the CEDAW Committee will

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<sup>1</sup> Jean-Michel Servais, *International Labour Law* (the Netherlands: Kluwer Law International, 2011), 147.

be examined as well to further understand the implication of the provisions. In the ILO system, several core ILO conventions, such as ILO Conventions Nos. 87 and 98 on freedom of association and collective bargaining, are studied because China as an ILO member state has to abide by these core conventions regardless of the ratification status. Additionally, ILO Conventions Nos. 100 and 111 on equal remuneration and non-discrimination in the labour market will be examined as they have both been ratified by China. The General Survey, Direct Request and Observation to China issued by the Committee of Experts on the Application of Conventions and Recommendations (CEACR) will be referred to so as to further understand the implication of the provisions. At the same time, the study pays first and foremost attention to those conventions that have been ratified by China rather than to those which have not been ratified by China, because the ratified conventions generate state obligations whilst the unratified ones do not. This does not mean that the study ignores the unratified International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW), which is considered to be “a cornerstone of the human rights-based approach to regulating labour immigration”.<sup>2</sup> In addition, ILO Convention No. 189 on decent working conditions for domestic helpers,<sup>3</sup> though not ratified by China, is still of significant relevance to the subject.

Section 4.3 describes the position of international law, especially the position of international human rights law and international labour law in the Chinese legal system. A great number of ratified international treaties have been incorporated into domestic laws, whilst there are also those international treaties and international customary laws that are given a more superior position than domestic law in explicit legal terms. After accession to numerous human rights treaties and labour conventions, China has made great efforts in terms of promoting legislation and policies for the protection of human rights of Chinese citizens, especially for “the vulnerable” (Chinese: *ruoshi qunti*). This section provides principles, examples, and academic discussion on how international treaties are incorporated in Chinese domestic legislation, which all serve as background knowledge in this respect.

Section 4.4 categorizes the needs of migrant women working as domestic helpers into three major types, namely: to be treated equally with other workers; to be ensured decent working conditions; and to be ensured affordable access to justice. On the basis of these categorized needs, the study studies the map of the existing IHRL/ILO normative system to find relevant standards, as explained above, both explicit provisions from the conventions and the pertinent interpretations made by treaty bodies. According to these standards, sections 4.5 and 4.6 generate implications as the guiding principles for the improvement of Chinese domestic laws for the benefit of migrant women working as domestic helpers, under the subjects of non-discrimination and decent working conditions respectively.

Section 4.5 looks in particular into the selected provisions and interpretations to see what is required of the state obligation to eliminate discrimination, how direct and indirect discrimination is defined in these international standards, what are the guiding principles on non-discrimination to be fulfilled from a gender analysis, and what are the demands to be met from an intersectional perspective. Section 4.6 focuses on the standards safeguarding decent working conditions tailored to the needs of migrant women working as domestic helpers, which includes the freedom of association, accessibility to social security and specific decent working conditions for migrant workers and domestic workers given the nature of their work. It has to be stressed here that the entitlement to labour rights is also intrinsically related to equality and non-discrimination: every labour right protected is concerned with protecting people against exclusion and inequalities. With these generated guiding principles, Chapter 5 further identifies the gaps between these guidelines and the current domestic laws, with the aim of coming up with suggestions to fill the gaps.

## **4.2 Mapping the IHRL and ILO Normative Systems on Safeguarding Human Rights**

### **Introduction**

Before any specific international legal standards are analysed, we first need to have an overview as to what international legal documents/provisions on international human rights standards and international labour standards will be referred to in this study. Thus, this section offers a map of international legal standards selected from the UN human rights normative system (IHRL) and the ILO normative system. Section 4.2.2 introduces the UN normative system on safeguarding human rights and the relevant legal documents. Section

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<sup>2</sup> Martin Ruhs, *The Price of Rights: Regulating International Labor Migration* (Princeton: Princeton University Press, 2014), 1.

<sup>3</sup> ILO, *Convention Concerning Decent Work for Domestic Workers*, C189, 16 June 2011.

4.2.3 introduces the ILO normative system on the core labour standards and other ILO labour standards on ensuring decent working conditions such as remuneration, hours of work, social security etc. Section 4.2. in general, offers a general picture of the UN normative system and ILO normative system on safeguarding human rights and decent working conditions, from which the provisions to be analysed in sections 4.5 and 4.6 are chosen.

#### **4.2.1 UN normative system on safeguarding human rights**

The United Nations, with its 193 member states,<sup>4</sup> is by far the most universal and influential international organization that works on, among other commitments, promoting respect for human rights. Any state, including China, which is a member of the UN, is automatically obliged to uphold the provisions set out in the Charter of the United Nations, whose Article 1 and Article 55 both oblige states party to the UN to respect “human rights and fundamental freedoms for all without distinction as to race, sex, language or religion”.<sup>5</sup> The Charter of the United Nations further pledges, in Article 56, that “all members take joint or separate action” to fulfil the purpose of respecting and upholding human rights and fundamental freedoms without distinction.<sup>6</sup> Under the constitution of the UN, the Economic and Social Council (ECOSOC) was established as a principal UN organ to promote human rights.<sup>7</sup> For decades, on the basis of the Charter of the United Nations, thematic and country-specific mechanisms, special rapporteurs on human rights topics, and relevant working groups have been established to safeguard human rights around the world.<sup>8</sup> Additionally, UN bodies such as United Nations General Assembly (UNGA)<sup>9</sup>, ECOSOC,<sup>10</sup> the Human Rights Council (HRC) and the Human Rights Council Advisory Committee,<sup>11</sup> the United Nations High Commissioner for Human Rights (UNHCHR),<sup>12</sup> the Commission on the Status of Women, the Commission for Social Development and others, are all devoted to the promotion and observance of human rights in all aspects of peoples’ lives.

The universality of human rights are presumed to be inalienable fundamental rights: a person is entitled simply because he or she is a human being.<sup>13</sup> Such an aspiration has been elaborated on by a series of international legal documents and practices. The very progressive document that set the trend was the Universal Declaration of Human Rights (UDHR) adopted in 1948 by the United Nations General Assembly (UNGA). This document is not only representative of ‘western’ values of human rights, but also has ‘eastern’ elements in it, such as the Confucian concept of “conscience”<sup>14</sup> that was incorporated by one of the Chinese drafters, Mr. Pengchun Chang.<sup>15</sup> With Articles 1 to 21, the UDHR embraces the civil and political rights that are promoted by the northern powers, but also recognizes those economic social and cultural rights that are widely accepted by the southern countries.<sup>16</sup> Being a resolution adopted by the UNGA, the UDHR is unlike a treaty, which means it does not create legal obligations on states, yet the aspirations set in the UDHR have been gradually implemented via later UN conventions, and even through regional human rights treaties.<sup>17</sup> Given the scope of this study, I will further introduce the human rights conventions within the UN normative setting, and leave out the regional set-ups.

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<sup>4</sup> “Member States,” United Nations, accessed 25 January 2017, <http://www.un.org/en/member-states/index.html>

<sup>5</sup> Articles 1 and 55, United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

<sup>6</sup> Article 55 and 56, *ibid.*

<sup>7</sup> Article 62 and 68, *ibid.*

<sup>8</sup> Manfred Nowak, *Introduction to the International Human Rights Regime* (the Netherlands: Koninklijke Brill, 2004), 74.

<sup>9</sup> Article 13 of Charter of the United Nations prescribes UNGA’s function to “assist the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion”. United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

<sup>10</sup> Article 62 of Charter of the United Nations states that ECOSOC may “make recommendations for the purpose of promoting respect for and observance of human rights and fundamental freedoms for all”, *ibid.*

<sup>11</sup> UN General Assembly, *Human Rights Council: resolution / adopted by the General Assembly*, 3 April 2006, A/RES/60/251.

<sup>12</sup> UN General Assembly, *High Commissioner for the promotion and protection of all human rights: resolution / adopted by the General Assembly*, 20 December 1993, A/RES/48/141.

<sup>13</sup> María Magdalena and Sepúlveda Carmona et al., *Human Rights Reference Handbook*, fourth edition (Reykjavik: The Icelandic Human Rights Centre, 2009), 3.

<sup>14</sup> See Article 1, “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.” UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

<sup>15</sup> “UDHR Draft Committee,” United Nations, accessed 23 January 2017, <http://research.un.org/en/undhr/draftingcommittee>

<sup>16</sup> Manfred Nowak, *Introduction to the International Human Rights Regime* (the Netherlands: Koninklijke Brill, 2004), 76.

<sup>17</sup> Rhona Smith and Christien Van Den Anker eds., *The Essentials of Human Rights* (London: Hodder Arnold, 2005), 351.

The UDHR gave rise to the two most fundamental international human rights conventions, namely, International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR). ICCPR has recognized that the rights prescribed therein are the rights derived from the inherent dignity of the human person, such as the right of self-determination (Article 1), the right to life (Article 6), the right to liberty and security of the person (Article 9), the right to be treated with humanity and with respect (Articles 7 and 10), the right to liberty of movement (Article 12), the right to be treated equally before the courts and tribunals (Article 14), the right to freedom of thought, conscience and religion (Article 18), the right of peaceful assembly and freedom of association (Articles 21 and 22), and the equal enjoyment of rights prescribed without distinction (Articles 25-27) and so on.<sup>18</sup> ICESCR has more focus on the right to work and favourable working conditions (Articles 6-7), the right to form and join trade unions (Article 8), the right of everyone to social security and social insurance (Article 9) and the right to education (Article 13) and so on.<sup>19</sup> Indeed, the importance of work is acknowledged as a means of personal development, a source of fulfilment and a channel to make contributions to the society.<sup>20</sup> Later, in the 1993 Vienna Declaration and Programme of Action, the separately categorized human rights are regarded as actually “indivisible, interdependent and interrelated”.<sup>21</sup>

Within the UN human rights normative system, more fundamental human rights treaties and attached optional protocols have come into being during recent decades.<sup>22</sup> Some of these treaties have been adopted to combat the most deeply rooted discrimination against specific groups in society and to promote human dignity for all people. For instance, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) obliges parties to eradicate discrimination on the basis of race, not to sponsor or defend racism, and to prohibit racial discrimination within their jurisdictions.<sup>23</sup> The United Nations Convention on the Rights of the Child (UNCRC) was adopted to make sure that all children can enjoy sufficient rights and benefits without distinction.<sup>24</sup> The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) establishes rights for migrant workers and their families throughout the entire migration process, regardless of their document status or their country of origin.<sup>25</sup> To achieve gender equality and to eliminate discrimination against women, the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) was adopted to recognize women’s equal rights with men in all aspects of life.<sup>26</sup> All of these conventions have their own independent expert committee to examine the implementation of the treaty and to offer professional interpretations of the provisions.<sup>27</sup>

This study will select, among these documents, the following treaties and their treaty bodies’ interpretations to analyse in further detail. (1) The International Covenant on Economic, Social and Cultural Rights (ICESCR) because it has provisions most relevant to work-related rights and at the same time is legally binding on China. The General Comments and the Concluding Observation to China made by the Committee on Economic, Social and Cultural Rights (CESCR) will be referred to as well. (2) The 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) because it has relevant provisions to women workers and at the same time is legally binding on China. The General Recommendations and Concluding Observation to China made by CEDAW committee will be referred to as well. Apart from these two ratified conventions, this study will also examine the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) and the treaty bodies’ opinions. Although this convention is not legally binding on China it contains a systemic set of standards applicable to migrant workers given their migration status in a different country, which can be used as legislative examples.

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<sup>18</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations Treaty Series, vol. 999, p. 171.

<sup>19</sup> UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations Treaty Series, vol. 993, p. 3.

<sup>20</sup> Titia Loenen, “Universality of Human Rights and Gender Bias in the Right to Work”, the Netherlands: *SIM Special 21*, 445.

<sup>21</sup> Point 5, UN General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23.

<sup>22</sup> “List of Human Rights Treaties and Optional Protocols,” OHCHR, accessed 23 January 2017,

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>

<sup>23</sup> Articles 1-5, UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations Treaty Series, vol. 660, p. 195.

<sup>24</sup> UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations Treaty Series, vol. 1577, p. 3.

<sup>25</sup> Rhona Smith and Christien Van Den Anker eds., *The Essentials of Human Rights* (London: Hodder Arnold, 2005), 259.

<sup>26</sup> Article 2, UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations Treaty Series, vol. 1249, p. 13.

<sup>27</sup> Manfred Nowak, *Introduction to the International Human Rights Regime* (the Netherlands: Koninklijke Brill, 2004), 94.

#### 4.2.2 ILO normative system on protecting labour rights

Founded in 1919 under Part XIII of the Treaty of Versailles after the First World War, the International Labour Organization (ILO) has been quite influential on the standard-setting and implementation of work-related rights for almost a century.<sup>28</sup> As one of the most active special agencies attached to the United Nations, ILO has developed numerous standards that are either directly related to safeguarding human rights or to ensuring decent working conditions. These are promulgated through the ILO standard sources such as ILO Declarations, ILO Constitution, ILO Recommendations and ILO Conventions, whose provisions have been largely incorporated in many UN human rights conventions and regional treaties.

The ILO normative system is established through a particular way of representation. Prescribed in the Constitution of the International Labour Organization, “the principle of tripartism” of representatives from government, workers and employers in both organization and consultation is widely applied in the formation of ILO documents and various organizational activities.<sup>29</sup> Above all, almost all major institutions including the Governing Body, regional meetings, the Labour Advisory Board (LAB) within ILO are composed of representatives from government, workers and employers. In debates and consultations for the adoption of new conventions and recommendations during the International Labour Conference (ILC), a tripartite discussion is introduced to guarantee the greatest degree possible of democracy and compatibility amongst different interested parties, namely, those from government, workers and employers. Many ILO core conventions have been ratified by approximately two-thirds of the member states,<sup>30</sup> which can be seen as a notable achievement of this tripartite mechanism.

Amongst the numerous detailed standards set out in the ILO legal documents, four of them are considered to be cornerstones of the international labour standards. The four core ILO principles set up by the eight fundamental conventions within the ILO normative system are identified by the ILO’s Governing Body as: (1) freedom of association and the effective recognition of the right to collective bargaining; (2) the elimination of all forms of forced or compulsory labour; (3) the effective abolition of child labour; and (4) the elimination of discrimination in respect of employment and occupation.<sup>31</sup> The 1998 ILO Declaration on Fundamental Principles and Rights at Work obliges the member states to respect and promote the eight conventions on the four fundamental labour rights because of their membership, regardless of their ratification status.<sup>32</sup>

In the context of the ILO normative system, the right to freedom of association has many associated principles. First of all, both workers and employers are entitled to “establish and join organizations of their own choosing without previous authorization”.<sup>33</sup> Secondly, when such an organization is established, it is to have the right to “draw up its own constitutions and rules, to elect their representatives in full freedom, to organize their administration and activities and to formulate their programmes” free from interference by the public authorities.<sup>34</sup> Thirdly, such organizations are to have the right to establish and join federations and confederations, and to affiliate with international organizations.<sup>35</sup> Fourthly, states are obliged to take measures appropriate to national conditions so as to encourage collective agreements via negotiations amongst such organizations.<sup>36</sup>

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<sup>28</sup> “Origins and History,” ILO, accessed 23 January 2017, <http://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm>

<sup>29</sup> Manfred Nowak, *Introduction to the International Human Rights Regime* (the Netherlands: Koninklijke Brill, 2004), 142.

<sup>30</sup> These ILO conventions are, for example, ILO Nos. 29, 87, 98, 100, 111, 138 and 182.

<sup>31</sup> These ILO Conventions have been identified as fundamental, and are at times referred to as the core labour standards:

- Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)
- Right to Organise and Collective Bargaining Convention, 1949 (No. 98)
- Forced Labour Convention, 1930 (No. 29)
- Abolition of Forced Labour Convention, 1957 (No. 105)
- Minimum Age Convention, 1973 (No. 138)
- Worst Forms of Child Labour Convention, 1999 (No. 182)
- Equal Remuneration Convention, 1951 (No. 100)
- Discrimination (Employment and Occupation) Convention, 1958 (No. 111)

See International Labour Office, *The International Labour Organization’s Fundamental Conventions* (Geneva: ILO, 2002), 8.

<sup>32</sup> ILO, *Declaration on Fundamental Principles and Rights at Work*, adopted by the International Labour Conference at its Eighty-sixth Session, Geneva, 18 June, 1998.

<sup>33</sup> See Article 2, ILO, *Freedom of Association and Protection of the Right to Organize Convention*, C87, 9 July 1948.

<sup>34</sup> See Article 3, *Ibid.*

<sup>35</sup> See Article 5, *Ibid.*

<sup>36</sup> See Article 4, ILO, *Right to Organize and Collective Bargaining Convention*, C98, 1 July 1949.

In the same context, the ILO principle to eliminate discrimination and promote equality in the employment arena has several elements too. Firstly, it defines discrimination in the working place as any “exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation”.<sup>37</sup> Secondly, several situations are not deemed to be discrimination according to the provisions in ILO Convention No. 111. For example, selection based on the inherent requirements of a particular job,<sup>38</sup> or activities justifiably suspected to be prejudicial to national security,<sup>39</sup> or special measures of protection or assistance provided by other ILO conventions and recommendations<sup>40</sup> are usually not regarded as discriminatory actions. Thirdly, states are obliged to adopt all appropriate means to promote the principle of equal remuneration for men and women workers for work of equal value.<sup>41</sup>

The core ILO standards also require the abolition of forced labour and the elimination of “the worst forms of child labour”.<sup>42</sup> Forced labour is defined as any “work or service exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”.<sup>43</sup> States are obliged to “take effective measures to secure the immediate and complete abolition of forced or compulsory labour”,<sup>44</sup> especially the worst forms of child labour,<sup>45</sup> including but not limited to all forms of slavery practices towards children, the recruitment of children in armed conflict, the use of children for prostitution or pornographic products or other illicit activities, and any other conduct that may impede the health, safety or morals of children.<sup>46</sup>

Apart from the above-mentioned four core principles, the ILO normative systems have established numerous standards to guarantee workers the right to decent working conditions, social security and social insurance, occupational safety and health. It also has standards to oblige states to ensure employment promotion, labour inspection and vocational training for the development of workers. To protect specific categories of workers, such as women workers, migrant workers, seafarers, fishermen, dockworkers and domestic helpers, ILO has adopted a series of conventions tailored to the needs of the specific categories of workers according to the nature of their work.<sup>47</sup>

In this legal framework, firstly, working conditions are essential to paid work and employment relationships.<sup>48</sup> Generally speaking, working conditions cover a broad collection of standards, including those regarding remuneration, hours of working time, rest periods, and restrictions on night work. First, remuneration is “payable in virtue of a written or unwritten contract of employment by an employer to an employed person for work done or to be done or for services rendered or to be rendered ... in terms of money”.<sup>49</sup> Relevant ILO standards prescribe such remuneration can only be paid in legal tender,<sup>50</sup> and directly to the worker concerned.<sup>51</sup> The worker enjoys freedom of disposal of the wages free from outside interference.<sup>52</sup> Any arbitrary deduction from wages must be restricted by national law and if there is any law-endorsed deduction, the worker must be fully informed of such situation.<sup>53</sup>

Second, “hours of work” is also a subject of the ILO normative system concerning working conditions. The very first ILO convention limited the hours of work in industrial undertakings to 8 hours in the day and 48 hours in

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<sup>37</sup> See Article 1, ILO, *Convention concerning Discrimination in Respect of Employment and Occupation*, C111, 25 June 1958.

<sup>38</sup> See Article 1(2), *Ibid.*

<sup>39</sup> See Article 4, *Ibid.*

<sup>40</sup> See Article 5, *Ibid.*

<sup>41</sup> See Article 2, ILO, *Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value*, C100, 29 June 1951.

<sup>42</sup> “The Worst Forms of Child Labour”, ILO, accessed 23 January 2017, <http://ilo.org/ipecc/Campaignandadvocacy/Youthinaction/C182-Youth-orientated/worstforms/lang--en/index.htm>

<sup>43</sup> See Article 2, ILO, *Forced Labour Convention*, C29, 28 June 1930.

<sup>44</sup> See Article 2, ILO, *Abolition of Forced Labour Convention*, C105, 25 June 1957.

<sup>45</sup> See Article 6, ILO, *Worst Forms of Child Labour Convention*, C182, 17 June 1999.

<sup>46</sup> See Article 3, *Ibid.*

<sup>47</sup> “Subjects of Concern in the ILO Normative System,” ILO, accessed 23 January 2017

<http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12030:0::NO::>

<sup>48</sup> “Working Conditions as One of the Major Subject of Concern,” ILO, accessed 23 January 2017,

<http://www.ilo.org/global/topics/working-conditions/lang--en/index.htm>

<sup>49</sup> See Article 1, ILO, *Convention concerning the Protection of Wages*, C095, 24 September 1952.

<sup>50</sup> See Article 3, *Ibid.* Legal tender is a medium of payment recognized by a legal system to be valid for meeting a financial obligation. In this case, it means that payment must be paid via legally recognized money.

<sup>51</sup> See Article 5, *Ibid.*

<sup>52</sup> See Article 6, *Ibid.*

<sup>53</sup> See Article 8, *Ibid.*

the week.<sup>54</sup> Later on, ILO No. 47 was adopted to reduce the hours of work to 40 hours a week without jeopardizing the standard of living for the workers.<sup>55</sup> Third, rest periods, closely related to the hours of work, are also incorporated in many ILO normative documents. ILO Convention No.14 has prescribed that “the whole of staff employed in any industrial undertaking ... shall enjoy in every period of 7 days a period of rest comprising at least 24 consecutive hours”.<sup>56</sup> In a similar vein, ILO Convention No. 106 also entitles persons working in the commerce and office arena to an uninterrupted weekly rest period comprising not less than 24 hours in the course of each period of 7 days.<sup>57</sup> Fourth, there are also ILO normative documents that lay out standards for workers doing night work, such as the right for workers doing night work to “undergo health assessment without charge and to receive advice on how to reduce or avoid health problems”, and the obligation to equip the working place with “suitable first-aid facilities” etc.<sup>58</sup>

Besides working conditions, social security is another pillar of ILO standards that covers comprehensive sets of requirements in order to act as a buffer against social crises in the era of a global economy. Thus, ILO has adopted a series of conventions and recommendations to guide states in their provision of adequate social security for their citizens, such as general conventions like C102 Convention concerning Minimum Standards of Social Security, C118 Convention concerning Equality of Treatment of Nationals and Non-Nationals in Social Security, C157 Convention concerning the Establishment of an International System for the Maintenance of Rights in Social Security, as well as specific conventions concerning medical care, sickness benefit, unemployment benefit, old-age benefit, employment injury benefit, family benefit, maternity benefit, invalidity benefit, and survivor’s benefit.<sup>59</sup> To allow the universal coverage of social security to be reached gradually, the ILO instruments in this regard have combined flexibility<sup>60</sup> with the obligation of an annual report by offering a wide range of options of social security types (listed above) for the state to choose from. Out of the nine types of social security, a state must comply with at least three of them, including at least one of unemployment, employment injury, invalidity and survivor’s benefit.<sup>61</sup> Further details of the standards in this regard will be elaborated in Sections 4.5. and 4.6.

Given the numerous standards within the ILO instruments system, there are several levels of mechanism to guarantee compliance from states. First, a state assumes an obligation to “bring the ratified conventions to its domestic authoritative bodies for effective implementation and enactment of legislation”,<sup>62</sup> and to “make an annual report to the International Labour Office on the measures which it has taken to give effect to the provisions of Conventions to which it is a party”.<sup>63</sup> As for recommendations, as well as bringing the Recommendation before the said competent authority, members must report to the Director-General of the International Labour Office when requested by the ILO Governing Body on “the position of the law and practice in their country” in regard to the relevant matters.<sup>64</sup>

Second, complaints may be launched against a state by an ILO member state or Governing Body,<sup>65</sup> or in special procedures for representations by employers’ and workers’ organizations to the CEACR chosen by the Governing Body.<sup>66</sup> Additionally, complaints regarding freedom of association even against those countries which have not ratified the Conventions on freedom of association (ILO Nos. 87 and 98) can be filed by governments, employers’ and workers’ organizations to the Fact-Finding and Conciliation Commission on

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<sup>54</sup> See ILO, *Convention Limiting the Hours of Work in Industrial Undertakings to Eight in the Day and Forty-eight in the Week*, C001, 13 Jun 1921.

<sup>55</sup> See Article 1, ILO, *Convention concerning the Reduction of Hours of Work to Forty a Week*, C047, 23 Jun 1957.

<sup>56</sup> See Article 2, ILO, *Convention concerning the Application of the Weekly Rest in Industrial Undertakings*, C014, 19 June 1923.

<sup>57</sup> See Article 6, ILO, *Convention concerning Weekly Rest in Commerce and Offices*, C106, 4 March 1959.

<sup>58</sup> See Articles 4 and 5, ILO, *Convention concerning Night Work*, C171, 4 January 1995.

<sup>59</sup> “International Labour Standards on Social security,” ILO, accessed 23 January 2017,

<http://ilo.org/global/standards/subjects-covered-by-international-labour-standards/social-security/lang--en/index.htm>

<sup>60</sup> ILO Constitution specifically allows modification for local conditions, see Article19(3), ILO, *Constitution of the International Labour Organization (ILO)*, 1 April 1919.

<sup>61</sup> See Article 2, ILO, *Convention concerning Minimum Standards of Social Security*, 27 April 1955.

<sup>62</sup> Article 19(5), ILO, *Constitution of the International Labour Organization (ILO)*, 1 April 1919.

<sup>63</sup> As to the ILO report mechanism, see Articles 19-23, *ibid*.

<sup>64</sup> Article 19(6), *ibid*, which states, “...they shall report to the Director- General of the International Labour Office, at appropriate intervals as requested by the Governing Body, the position of the law and practice in their country in regard to the matters dealt with in the Recommendation, showing the extent to which effect has been given or is proposed to be given, to the provisions of the Recommendation and such modifications of these provisions as it has been found or may be found necessary to make in adopting or applying them.”

<sup>65</sup> See Articles 26-34, *ibid*.

<sup>66</sup> See Articles 24-25, *ibid*.

Freedom of Association.<sup>67</sup> Third, special inquiries made by the Governing Body can demand that a member state must report at appropriate intervals on its implementation and difficulties concerning a certain convention even it does not ratify that convention.<sup>68</sup> In addition, a range of measures taken by ILO at the regional level constitute a promising picture of ILO's "positive approach" to realizing human rights on the ground.

For report reviewing and the regular supervision of the application of standards,<sup>69</sup> in 1926 the International Labour Conference adopted a resolution to establish the Committee of Experts on the Application of Conventions and Recommendations (CEACR). The ILO CEACR is composed of 20 independent eminent jurists from all over the world appointed by the Governing Body for three-year terms.<sup>70</sup> Their supervisory opinions, including their Observations and Direct Requests to each member state on the basis of the ratified conventions, are a very important source for clarifying labour standards. Observations deal with fundamental questions regarding the application of a certain ILO convention by a state, whereas the Direct Requests tackle technical questions or ask for further information.<sup>71</sup> This study will examine these CEACR opinions as a source of additional information to develop guidelines for the improvement of relevant Chinese domestic laws.

### 4.3 IHRL/ILO standards' position in China

#### 4.3.1 International law's position in China: an overview

According to the principle of international law, agreements are binding (*pacta sunt servanda*), and international treaties are to be executed in good faith.<sup>72</sup> Such principle is further enshrined in the Vienna Convention on the Law of Treaties (VCLT) as a binding provision on the parties to a treaty. According to Articles 26 and 27 of VCLT, "every treaty in force is binding upon the parties to it and must be performed by them in good faith," and "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty".<sup>73</sup> When interpreting a treaty, VCLT further obliges member states to use "good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".<sup>74</sup>

Admittedly, implementation of international treaties always relies on the domestic mechanism of each sovereign state to incorporate such provisions, by either directly making international treaties effective in the domestic legal system, or incorporating provisions of international treaties into domestic laws and then making them effective.<sup>75</sup> For example, in the United States of America, the Senate can provide its consent to declare treaties as not-self-executing (NSE), which is not clearly defined by the Senate.<sup>76</sup> Its first trial of making international treaties non-self-executing was in 1992 when it ratified ICCPR by declaring that the provisions of Article 1 through to Article 27 of the ICCPR were not self-executing, which meant that such provisions "will not create private causes of action in the US courts".<sup>77</sup> Whereas in Norway, the Norwegian Parliament passed the Human Rights Act in 1999, which incorporated the European Convention on Human Rights (ECHR), ICESR, ICCPR, CRC and CEDAW into Norwegian law and gave these conventions a higher position than domestic laws.<sup>78</sup>

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<sup>67</sup> UN Economic and Social Council (ECOSOC), *UN Economic and Social Council Resolution 277(X) concerning communications on violations of trade union rights*, 17 February 1950.

<sup>68</sup> See Article 19(5)(e), ILO, *Constitution of the International Labour Organization (ILO)*, 1 April 1919.

<sup>69</sup> Eric Gravel and Chloé Charbonneau-Jobin, *The Committee of Experts on the Application of Conventions and Recommendations: its Dynamic and Impact* (Geneva: ILO, 2003), 2.

<sup>70</sup> "CEACR," ILO, accessed 23 January 2017,

<http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-of-experts-on-the-application-of-conventions-and-recommendations/lang--en/index.htm>

<sup>71</sup> Ibid.

<sup>72</sup> Malcom Shaw, *International Law*, sixth edition (Cambridge: Cambridge University Press, 2008), 50 and 94.

<sup>73</sup> Articles 26 and 27, United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations Treaty Series, vol. 1155, p. 331.

<sup>74</sup> Article 31, Ibid.

<sup>75</sup> Haopei Li, *On International Treaty Law* (Beijing: Law Press, 1987), 26.

<sup>76</sup> David L. Sloss, *The Death of Treaty Supremacy: An Invisible Constitutional Change* (Oxford: Oxford University Press, 1999), 307-308.

<sup>77</sup> Ibid, 308.

<sup>78</sup> See Section 2, Act relating to the strengthening of the status of human rights in Norwegian law, *The Human Rights Act*, 21 May 1999, Norsk Lovtidend, Part I, 1999-06-18, Vol. 10, No. 30, p. 1119-1226.

In some legal areas, Chinese legislation has incorporated international treaties into domestic laws. For instance, the Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone<sup>79</sup> and the Law on the Exclusive Economic Zone and the Continental Shelf of the People's Republic of China,<sup>80</sup> are both laws formed from the incorporation of the United Nations Convention on the Law of the Sea (UNCLOS). Also, Regulations of the People's Republic of China Concerning Diplomatic Privileges and Immunities<sup>81</sup> and Regulations of the People's Republic of China Concerning Consular Privileges and Immunities<sup>82</sup> are formed respectively from the incorporation of the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations after China's ratification of them. In addition, many of the labour laws in China, such as the Labour Law of the People's Republic of China,<sup>83</sup> Labour Contract Law of the People's Republic of China,<sup>84</sup> Law of the People's Republic of China on Work Safety,<sup>85</sup> Law of the People's Republic of China on Promotion of Employment,<sup>86</sup> Law of the People's Republic of China on Labour-dispute Mediation and Arbitration,<sup>87</sup> have all incorporated the ratified ILO conventions in many aspects.

There are also many examples in the Chinese domestic laws that explicitly acknowledge the superior legal effect of international treaties (for examples, see below). Nonetheless, there is some disagreement concerning the hierarchy of the legal effect of international treaties vis-à-vis domestic laws. Some scholars argue that the principle of the hierarchy of the legal effect of domestic laws also applies to the international treaties, depending on the level of the bodies that ratify them.

In China, both SCNPC and State Council are entitled to ratify international treaties. Articles 67 and 89 of the Constitution of the People's Republic of China have entitled the Standing Committee of the National People's Congress to decide on the ratification or abrogation of treaties and important agreements concluded with foreign states,<sup>88</sup> whereas the State Council is also empowered to conduct foreign affairs and conclude treaties and agreements with foreign States.<sup>89</sup> As has already been explained in Chapter 2, Section 2.2, laws promulgated by SCNPC have a higher legal effect than laws issued by the State Council. Thus some scholars believe that if the treaty is ratified by the SCNPC, then the treaty enjoys the same level of legal effect as the laws issued by SCNPC; whereas if the treaty is ratified by the State Council, then it has the same legal effect as laws adopted by the State Council.<sup>90</sup> According to these constitutional provisions, many Chinese scholars reason that the international treaties concluded by the SCNPC would enjoy a higher legal effect than international treaties that are ratified by the State Council.

However, there are also some scholars who believe that no matter which body ratifies what treaty, they all ratify the treaties on behalf of the People's Republic of China, given Article 4 of the Law of the People's Republic of China on the Procedure of the Conclusion of Treaties, which states that "the People's Republic of China shall conclude treaties and agreements with other states in the name of: (1) the People's Republic of China; (2) the Government of the People's Republic of China; (3) the governmental departments of the

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<sup>79</sup> *The Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone*, adopted at the 24th Meeting of the Standing Committee of the Seventh National People's Congress on 25 February 1992, by Order of the President No.55, 25 February 1992.

<sup>80</sup> *Law on the Exclusive Economic Zone and the Continental Shelf of the People's Republic of China*, adopted at the 3rd Meeting of the Standing Committee of the Ninth National People's Congress on 26 June 1998, by Order of the President No.6, 26 June 1998.

<sup>81</sup> *Regulations of the People's Republic of China Concerning Diplomatic Privileges and Immunities*, adopted at the 17th Meeting of the Standing Committee of the Sixth National People's Congress, by Order of the President No.44, effective as of 5 September 1986.

<sup>82</sup> *Regulations of the People's Republic of China Concerning Consular Privileges and Immunities*, adopted at the 16th Meeting of the Standing Committee of the Seventh National People's Congress on October 30, 1990, by Order of the President No.35, 30 October 1990.

<sup>83</sup> *Labour Law of the People's Republic of China*, 1994.

<sup>84</sup> *Labour Contract Law of People's Republic of China*, adopted at the 28th Session of the Standing Committee of the Tenth National People's Congress of the People's Republic of China on 29 June 2007, came into force as of 1 January 2008.

<sup>85</sup> *Law of the People's Republic of China on Work Safety*, adopted at the 28th Meeting of the Standing Committee of the Ninth National People's Congress on 29 June 2002, by Order of the President No.70, 29 June 2002.

<sup>86</sup> *Law of the People's Republic of China on Promotion of Employment*, adopted at the 29th Meeting of the Standing Committee of the Tenth National People's Congress of the People's Republic of China, 30 August 2007, went into effect as of 1 January 2008.

<sup>87</sup> *The Law of the People's Republic of China on Labour Dispute Mediation and Arbitration*, adopted at the 31st meeting of the Standing Committee of the Tenth National People's Congress of the People's Republic of China on 29 December 2007, effective as of 1 May 2008.

<sup>88</sup> See Article 67 (14), *Constitution (Amendment)*, 2004.

<sup>89</sup> See Article 89 (9), *Ibid.*

<sup>90</sup> See Zhao Jianwen, 'International Treaties' Position in the Chinese Legal System', *Chinese Journal of Law*, Vol. 6 (2010):190-206, at 202.

People's Republic of China".<sup>91</sup> This means that all treaties will have the same legal effect and prevail over all domestic laws regardless of the level of the ratifying body.<sup>92</sup>

There are plenty of domestic laws that endorse the latter supposition: i.e. that treaties ratified by either SCNPC or the State Council have the same legal effect. In accordance with Article 142 of the General Principles of the Civil Law of the People's Republic of China, international treaties are given a superior position where they are in conflict with domestic civil laws, at the same time, Article 142 gives international customary law a legal position to be effective when neither international treaties nor domestic laws can be invoked.<sup>93</sup>

In a similar vein, Article 260 of the Civil Procedure Law of the People's Republic of China (2012 Amendment) also gives the international treaty a prior position in times of legal conflict by stating that "If any international treaty concluded or acceded to by the People's Republic of China contains provisions differing from the civil procedure law of the People's Republic of China, the provisions of the international treaty shall apply, unless the provisions are ones on which the People's Republic of China has announced reservations."<sup>94</sup>

In the area of maritime regulation, Article 268 of the Maritime Law of the People's Republic of China<sup>95</sup> makes the same provision as Article 142 of the General Principles of the Civil Law, i.e. giving international treaties a superior legal effect if domestic laws have different provisions. In terms of diplomatic and consular matters, Article 27 of the Regulations of the People's Republic of China Concerning Diplomatic Privileges and Immunities and the Regulations of the People's Republic of China Concerning Consular Privileges and Immunities both give international treaties prior legal effect by stating:

"Where the international treaties to which China is a contracting or acceding party provide otherwise in respect of consular privileges and immunities, such provisions shall prevail, with the exception of those on which China has declared reservations. Where the bilateral treaties or agreements between China and other countries provide otherwise in respect of consular privileges and immunities, such provisions shall prevail."<sup>96</sup>

In the Intellectual Property arena, both the Trademark Law of the People's Republic of China<sup>97</sup> and the Copyright Law of the People's Republic of China<sup>98</sup> have been formed from the incorporation of the Paris Convention for the Protection of Industrial Property after China's ratification of it.

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<sup>91</sup> *Law of the People's Republic of China on the Procedure of the Conclusion of Treaties*, adopted by the Seventeenth Session of the Standing Committee of the Seventh National People's Congress on 28 December 1990, promulgated by Decree No. 37 of President of the People's Republic of China on 28 December 1990.

<sup>92</sup> Zhao Jianwen, 'International Treaties' Position in the Chinese Legal System', *Chinese Journal of Law*, Vol. 6 (2010):190-206, at 202.

<sup>93</sup> The original text reads: "If any international treaty concluded or acceded to by the People's Republic of China contains provisions differing from those in the civil laws of the People's Republic of China, the provisions of the international treaty shall apply, unless the provisions are ones on which the People's Republic of China has announced reservations. International practice may be applied to matters for which neither the law of the People's Republic of China nor any international treaty concluded or acceded to by the People's Republic of China has any provisions." See Article 142, *General Principles of the Civil Law of the People's Republic of China*, adopted at the Fourth Session of the Sixth National People's Congress, by Order of the President No.37, 12 April 1986, and effective as of 1 January 1987.

<sup>94</sup> See Article 260, *Civil Procedure Law of the People's Republic of China* (2012 Amendment), adopted at the 4th Session of the Seventh National People's Congress on 9 April 1991, amended for the first time in accordance with the Decision on Amending the Civil Procedure Law of the People's Republic of China as adopted at the 30th Session of the Standing Committee of the Tenth National People's Congress on 28 October 2007, and amended for the second time in accordance with the Decision on Amending the Civil Procedure Law of the People's Republic of China as adopted at the 28th Session of the Standing Committee of the Eleventh National People's Congress on 31 August 2012.

<sup>95</sup> Article 268 states, "If any international treaty concluded or acceded to by the People's Republic of China contains provisions differing from those contained in this Law, the provisions of the relevant international treaty shall apply, unless the provisions are those on which the People's Republic of China has announced reservations. International practice may be applied to matters for which neither the relevant laws of the People's Republic of China nor any international treaty concluded or acceded to by the People's Republic of China contain any relevant provisions." *Maritime Law of the People's Republic of China*, adopted at the 28th Meeting of the Standing Committee of the Seventh National People's Congress on 1 November 1992, by Order of the President No.64, November 1992, and effective as of 1 July 1993.

<sup>96</sup> See Article 27, *Regulations of the People's Republic of China Concerning Diplomatic Privileges and Immunities*, 1986.

<sup>97</sup> See *Trademark Law of the People's Republic of China*, adopted at the 24th Session of the Standing Committee of the Fifth National People's Congress on 23 August 1982; amended for the first time according to the Decision on Amending the Trademark Law of the People's Republic of China as adopted at the 30th Session of the Standing Committee of the Seventh National People's Congress on 22 February 1993; amended for the second time according to the Decision on Amending the Trademark Law of the People's Republic of China as adopted at the 24th Session of the Standing Committee of the Ninth National People's Congress on 27 October 2001; and amended for the third time according to the Decision on Amending the Trademark Law of the People's Republic of China as adopted at the 4th Session of the Standing Committee of the Twelfth National People's Congress, 30 August 2013.

<sup>98</sup> *Copyright Law of the People's Republic of China*, amended by the Standing Committee of the National People's Congress on Amending the Copyright Law of the People's Republic of China, 26 February 2010.

### 4.3.2 International human rights treaties in China

China is a member of the United Nations and, since 1945, one of the five permanent members of the United Nations Security Council (UNSC). But not until 25 October 1971 with the UNGA Resolution 2758(XXVI)<sup>99</sup> was the Beijing-based “People’s Republic of China” (PRC) restored to its membership as the only lawful representative of China to the United Nations, instead of Taiwan-based “Republic of China” (ROC).<sup>100</sup> As a member of the UN and a permanent member of the UN Security Council, China is bound to “act in accordance with the Purposes and Principles of the United Nations”,<sup>101</sup> which includes “promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”.<sup>102</sup>

In the same year as the new Chinese government was accepted by the UN, China reaffirmed its acceptance of the Universal Declaration of Human Rights (UDHR). Apart from the rationalist and legalist ideas embodied in the Declaration, the Confucian doctrine of *ren*, expressed in the Declaration as “conscience”,<sup>103</sup> was introduced by Pengchun Chang in Article 1 as a parallel concept to “reason”<sup>104</sup> to bridge the ideological divisions at the time when the Declaration was in negotiation. The Confucian interpretation of human rights tends to proclaim family values, interpersonal order and harmony, the common good of the people, “to overcome one’s ego through observing social rites”,<sup>105</sup> “to do as you would be done by”,<sup>106</sup> and “good governance by the conscientious ruler”.

The attitude of the Chinese government towards the concept of human rights has experienced many twists and turns for the last few decades. After the elite-driven the Reform and Opening-up Policy reversal in the late 1970s, there was an incremental shift towards a greater acceptance of human rights ideas in China.<sup>107</sup> Although China’s human rights strategy has been stereotypically criticized as “conceptual dilution”<sup>108</sup> or “gradual erosion”<sup>109</sup> of the international human rights framework, or that China overemphasises social economic rights vis-à-vis civil and political rights,<sup>110</sup> it is fair to say that the Chinese government has devoted great efforts to promoting centrally driven policies and laws that embrace human rights and to enforcing implementation. Despite the fact that there is much room for improvement in many aspects in the human rights protection trajectory, inter alia the legal position of the intersectionally disadvantaged people, there have been witnessed significant movements and effects in safeguarding People’s dignity and rights. Since 2004, China has explicitly assumed a state responsibility to respect and protect human rights through the Constitutional Amendment adopted at the Second Session of the Tenth National People’s Congress.<sup>111</sup> This is a significant incorporation of the 26 International Human Rights Conventions ratified by China into the primary principles of the Chinese legal system via the highest ranking domestic law, which leads the way to other domestic legislation in the human rights regard, such as Amendment VIII to the Criminal Law, the Criminal Procedure Law, the Civil Procedure Law, the Law on Lawyers, Prevention and Control of Occupational Diseases Law,<sup>112</sup> and the Labour

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<sup>99</sup> UN General Assembly, 26<sup>th</sup> Session, *Resolution 2758: Restoration of the lawful rights of the People’s Republic of China in the United Nations*, A/RES/2758(XXVI), 25 October 1971, p.1.

<sup>100</sup> Before this UN Resolution was adopted, Taiwan-based “Republic of China” (ROC) had been the legal representative to the United Nations. See Sonya Sceats and Shaun Breslin, *China and the International Human Rights System* (London: The Royal Institute of International Affairs, 2012), 3.

<sup>101</sup> Article 24, United Nations, *Charter of the United Nations*, 1945.

<sup>102</sup> Article 1, *ibid.*

<sup>103</sup> Such a concept was proposed by Mr. Peng-chun Chang, Vice-Chair of the Commission on Human Rights when the Declaration was drafted.

<sup>104</sup> Article 1 states, “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.” UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

<sup>105</sup> Section Wei Linggong, *Confucian Analects*.

<sup>106</sup> Section Yan Yuan, *Confucian Analects*.

<sup>107</sup> Dingding Chen, “Explaining China’s Changing Discourse on Human Rights: 1978-2004,” *Asian Perspective*, Vol. 29, No. 3 (2005): 155-182.

<sup>108</sup> Eva Pils, “The Dislocation of the Chinese Human Rights Movement”, eds. Stacy Mosher and Patrick Poon, *A Sword and A Shield: China’s Human Rights Lawyers* (Hong Kong: China Human Rights Lawyers Concern Group, 2009), 141-159.

<sup>109</sup> Katrin Kinzelbach, “Will China’s Rise Lead to A New Normative Order? An Analysis of China’s Statements on Human Rights at the United Nations (2000–2010)”, *Netherlands Quarterly of Human Rights*, Vol. 30, No. 3 (2012): 299–332.

<sup>110</sup> Björn Ahl, “The Rise of China and International Human Rights Law,” *Human Rights Quarterly*, Vol. 37 (2015): 637–661, at 660.

<sup>111</sup> *The Constitution of the People’s Republic of China*, 2004.

<sup>112</sup> *Prevention and Control of Occupational Diseases Law of the People’s Republic of China*, adopted at the 24th Meeting of the Standing Committee of Ninth National People’s Republic of China on 27 October 2001, by Order of the President of the People’s Republic of China No. 60, promulgated and went into effect on 1 May 2002.

Contract Law.<sup>113</sup> Besides national and local laws, executive plans issued by the Central level have been promoted to realize human rights nationwide, such as the Eleventh and Twelfth Five-Year Plan for National Economic and Social Development adopted by the China's National People's Congress; National Human Rights Plan of Action of China (2009-2010), National Human Rights Plan of Action of China (2012-2015)<sup>114</sup> and National Human Rights Action Plan of China (2016-2020)<sup>115</sup> which were promoted by the State Council to instruct about and supervise human rights protection around the nation; the Outline for the Development of Chinese Women (2001-2010) and the Outline for the Development of Chinese Women (2011-2020)<sup>116</sup> both of which were promoted by the State Council.

China has also been actively performing its obligation to submit national reports on the human rights situation in relevant concerns to the supervisory human rights treaty bodies. For example, China has submitted reports on its implementation of the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and the Convention on the Rights of Persons with Disabilities (CRPD) to the responsible treaty bodies, as well as reports to be examined by the Universal Periodic Review (UPR) to the Human Rights Council.<sup>117</sup>

Specifically speaking, China pays particular attention to performing its treaty obligation towards ICESCR. Thus the primary challenges ahead are to enlarge the 'cake' sustainably and distribute the 'cake' evenly, with due consideration of the benefits of special groups such as women and children, the old and the disabled. To promote social justice, China implemented the Plan for the National System of Basic Public Services under the Twelfth Five-Year Plan in 2012 to ensure fair distribution of public resources to rural and poor areas and vulnerable social groups.<sup>118</sup> To safeguard mass employment, China promulgated its first plan to boost employment between 2011-2015 and established 3,291 labour security supervisory organs around the country to inspect the labour rights protection condition of workers.<sup>119</sup>

To address the problems of rural migrant workers, a nationwide Hukou reform has been carried out under the coordination of central and local governments.<sup>120</sup> Special vocational training programmes such as the "Urban Skills Re-employment Programme", the "Rural Labour Skills Employment Programme", the "Capacity Building Entrepreneurship Programme" and the "Special Training Programmes" were carried out to equip rural migrants with working skills to increase their competitive edge in the urban areas.<sup>121</sup> A system of social security, social assistance, social welfare and charities that also covers rural migrants in urban areas has been under construction.<sup>122</sup> By the end of 2012, over 105 million rural migrant workers had been admitted to local labour

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<sup>113</sup> Human Rights Council, Human Rights Council Working Group on the Universal Periodic Review, *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21, China*, 21 October–1 November 2013, A/HRC/WG.6/17/CHN/1, 3.

<sup>114</sup> *National Human Rights Action Plan of China (2012-2015)*, (Beijing: State Council Information Office of the People's Republic of China, 2012).

<sup>115</sup> *National Human Rights Action Plan of China (2016-2020)*, (Beijing: State Council Information Office of the People's Republic of China, 2016).

<sup>116</sup> *Program for the Development of Chinese Women (2001-2010)*, promoted by the State Council of the People's Republic of China, on 8 August 2011.

<sup>117</sup> Human Rights Council, Human Rights Council Working Group on the Universal Periodic Review, *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21, China*, 21 October–1 November 2013, A/HRC/WG.6/17/CHN/1, 3.

<sup>118</sup> *Ibid.*, para.22.

<sup>119</sup> *Ibid.*, para.27.

<sup>120</sup> See Tania Branigan, "China Reforms Hukou System to Improve Migrant Workers' Rights", *The Guardian*, 31 July 2014, accessed 29 January 2017,

<https://www.theguardian.com/world/2014/jul/31/china-reform-hukou-migrant-workers>

See also "China Reforms Hukou System of Where You Can Live and Work", *CGTN News*, 12 November 2015, accessed 29 January 2017,

<http://www.cctv-america.com/2015/11/12/china-reforms-hukou-system-of-where-you-can-live-and-work>

<sup>121</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *Implementation of the International Covenant on Economic, Social and Cultural Rights: Second periodic reports submitted by States parties under articles 16 and 17 of the Covenant: China*, 6 July 2012, E/C.12/CHN/2, 19.

<sup>122</sup> *Ibid.*, 36.

unions<sup>123</sup> and their rights to collective bargaining were guaranteed by laws such as the Labour Law, the Trade Union Law,<sup>124</sup> the Labour Contract Law, the Companies Law and the Regulations on Collective Contracts.<sup>125</sup>

In a response to the requests of CEDAW and CEDAW Committee to eliminate all forms of discrimination against women and to promote substantive gender equality, China has established a system of national laws and policies to protect women's interests on the basis of constitutional principles to ensure gender equality. On one hand, China has promoted laws and policies that explicitly prohibit discrimination against women, such as in China's Constitution, Regional Ethnic Autonomy Act, Protection of the Rights and Interests of Women Act, Protection of the Rights and Interests of Elderly People Act, Protection of Minors Act, Protection of Persons with Disabilities Act, and Employment Promotion Act.<sup>126</sup> To combat the worst form of gender discrimination, the Anti-domestic Violence Law of the People's Republic of China was recently adopted at the 18th Session of the Standing Committee of the Twelfth National People's Congress of the People's Republic of China on 27 December 2015, and came into force on 1 March 2016.<sup>127</sup> Following this national Act, more than 28 autonomous regions and municipalities have also promulgated local anti-domestic violence laws and regulations.<sup>128</sup>

China has also adopted various special measures to promote gender equality. On the basis of the Outline for Women's Development in China (2001-2010), the State Council has promulgated the 2011-2020 version for gender equality in seven major areas: health, education, the economy, participation in decision-making and management, social security, the environment, and the law.<sup>129</sup> Temporary special measures to safeguard women's employment, political participation and health care have been taken to accelerate substantive gender equality.<sup>130</sup> In practice, with the assistance of the All-China Women's Federation, judicial and administrative organs at various levels around the country have promoted public education on the rule of law and legal regulations for the protection of women's rights and to increase social gender awareness.<sup>131</sup>

#### **4.3.3 ILO conventions' position in China**

As a member state of ILO, China is supposed to abide by the obligation stated in the ILO Constitution, that is, to "bring the adopted conventions to domestic competent authorities for further legislation or action", and "keep communication between the authority and the Director General".<sup>132</sup> Even in the case of unratified conventions, member states are obliged to submit reports at appropriate intervals stating difficulties which prevent or delay the ratification if the Governing Body so requests.<sup>133</sup> Additionally, the eight core conventions have to be respected and promoted in good faith by the members of the Organization as a result of the obligation arising

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<sup>123</sup> Human Rights Council, Human Rights Council Working Group on the Universal Periodic Review, *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21, China*, 21 October–1 November 2013, A/HRC/WG.6/17/CHN/1, para.29.

<sup>124</sup> *Trade Union Law of the People's Republic of China*, adopted at the Fifth Session of the Seventh National People's Congress on 3 April 1992, by Order of the President No.57, 3 April 1992; amended in accordance with the Decision on Amending the Trade Union Law of the People's Republic of China adopted at the 24th Meeting of the Standing Committee of the Ninth National People's Congress on 27 October 2001.

<sup>125</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *Implementation of the International Covenant on Economic, Social and Cultural Rights: Second periodic reports submitted by States parties under articles 16 and 17 of the Covenant: China*, 6 July 2012, E/C.12/CHN/2, 34.

<sup>126</sup> *Ibid.*, 9.

<sup>127</sup> *Anti-domestic Violence Law of the People's Republic of China*, adopted at the 18<sup>th</sup> Session of the Standing Committee of the Twelfth National People's Congress of the People's Republic of China, 27 December 2015, come into force on 1 March 2016.

<sup>128</sup> UN Committee on the Elimination of Discrimination against Women, *Consideration of Reports Submitted by China, Combined Seventh and Eighth Periodic Report*, CEDAW/C/CHN/7-8, 17 January 2013, para.96.

<sup>129</sup> Human Rights Council, Human Rights Council Working Group on the Universal Periodic Review, *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21, China*, 21 October–1 November 2013, A/HRC/WG.6/17/CHN/1, para.67.

<sup>130</sup> UN Committee on the Elimination of Discrimination against Women, *Consideration of Reports Submitted by China, Combined Seventh and Eighth Periodic Report*, CEDAW/C/CHN/7-8, 17 January 2013, para.72-78.

<sup>131</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *Implementation of the International Covenant on Economic, Social and Cultural Rights: Second periodic reports submitted by States parties under articles 16 and 17 of the Covenant: China*, 6 July 2012, E/C.12/CHN/2, 15.

See also UN Committee on the Elimination of Discrimination against Women, *Consideration of Reports Submitted by China, Combined Seventh and Eighth Periodic Report*, CEDAW/C/CHN/7-8, 17 January 2013, para.38.

<sup>132</sup> As to member state obligations see Article 19(5), ILO, *Constitution of the International Labour Organization (ILO)*, 1 April 1919.

<sup>133</sup> *Ibid.*

from membership.<sup>134</sup> Since China's re-entrance into ILO in 1983, it has ratified 26 ILO conventions, including 4 of the ILO core conventions, namely ILO Nos. 100, 111, 138 and 182.<sup>135</sup> The ILO standards have significantly influenced Chinese labour legislation and practice, for example in the revised 1994 Labour Law, the 2007 Employment Promotion Law and the 2007 Labour Contract Law.<sup>136</sup> The current labour legislative provisions regarding weeks off, minimum wage, minimum age, equal remuneration, employment promotion, non-discrimination, no forced labour, labour inspection, social security policies and so on, found their origin in ILO labour standards.<sup>137</sup>

Taking the ratified ILO conventions on occupational safety and health as an example, China has incorporated such standards in numerous domestic laws including: the Constitution, the Law on Work Safety, the Law on Safety in Mines, the Law on the Prevention and Control of Occupational Diseases, the Labour Law, the Labour Contract Law, the Fire Protection Law, the Emergency Response Law, and Criminal Law.<sup>138</sup> There are more local regulations and department rules at each administrative level that contain the ILO standards on ensuring occupational safety and health in each branch of business, including Regulations on Coal Mine Safety Inspection, Regulations on Safety Management in Construction Projects, Regulations on Work Safety Licences etc.<sup>139</sup> The comprehensive network of domestic laws and regulations that incorporate ILO standards on occupational safety and health were not constructed in one day, but are a result of decades of legislative action following the communication of CEACR Observations and Direct Requests to China. With proper supervision and comments issued by CEACR, Chinese domestic law can live up to the ILO standards while solving domestic labour problems.

#### 4.4 Needs Categorized

##### Introduction

In the previous section, the map of the existing legal framework of international human rights treaties and international labour conventions was sketched out, and the position of these standards in the Chinese legal system was explained. In order to further identify the specific standards tailored for the benefit of migrant women working as domestic helpers, the concrete problems faced by this specific group of people have to be clarified and their specific needs derived. As analysed in Chapter 3 from a gender and intersectional perspective, the needs of migrant women working as domestic helpers are various. These needs can be generally classified into three major categories: (1) the need to be treated equally with other workers, (2) the need to be guaranteed decent working conditions, and (3) the need to get access to justice. According to these specified needs, the research will look further into the selected international human rights treaties and international labour conventions for those provisions and interpretations that safeguard these needs.

##### 4.4.1 What problems do they face? An overview

Migrant women working as domestic helpers in China are likely to be exposed to multiple levels of social oppression at work and in their lives due to their gender, their Hukou status, and their occupation. First, because of the under-regulation of the domestic service market, domestic helpers can be self-employed, or work via registered or unrecorded agencies, or work with registered companies, or through online platforms. The unregulated forms of employment cause a huge divergence in working conditions and contribute significantly to the instability of the domestic service market. Second, due to the fact that domestic helpers can work formally and informally, with or without agencies and companies, they are not organized within the labour market. Their rights and benefits are not sufficiently represented by the labour unions either. Third, whilst employees are subject to labour law protection, due to the fact that most of these domestic workers are not classed as "employees", their working conditions are not set out by law. Consequently, these domestic

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<sup>134</sup> ILO, *Declaration on Fundamental Principles and Rights at Work*, adopted by the International Labour Conference at its Eighty-sixth Session, Geneva, 18 June 1998.

<sup>135</sup> The most recently ratified is the Maritime Labour Convention, ratified by China on 12 November 2015. See "Country Profile: China," ILO, accessed 29 January 2017,

[http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11110:0::NO::P11110\\_COUNTRY\\_ID:103404](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11110:0::NO::P11110_COUNTRY_ID:103404)

<sup>136</sup> Lin Yanling ed., *International Labour Standards*, first edition (Beijing: China Human Resources and Social Security Publishing Group, 2007) at Chapter 5.

<sup>137</sup> Ibid.

<sup>138</sup> ILO, *National Profile Report on Occupational Safety and Health in China* (Geneva: ILO, 2012), 1-7.

<sup>139</sup> Ibid, 8-12.

workers are vulnerable in cases of payment default, prolonged working hours and unfavourable working environments. Fourth, the combination of private houses as work places, agricultural Hukou status and being a woman, may give rise to social exclusion, exploitative working hours, physical abuse, and even sexual harassment or assault, without proper labour inspection. Fifth, the lack of arrangements for social security for this particular group of workers exposes them to all kinds of risks such as an unsafe working environment, employment injury, invalidity, maternity expenses, unemployment and retirement without pension. Lastly, when they are in dispute with their employers or their agencies, seeking justice is often too expensive and too lengthy for them.

This situation is particularly striking in the metropolitan cities such as Beijing, Shanghai, and Guangzhou, where the Hukou policy is still strict about including rural-Hukou holders. Nonetheless, it is particularly in these urban areas that there is a call for more domestic helpers to share the burden of family chores. Given the specific characteristics of domestic service and the particular working environment they are in, migrant women working as domestic helpers in China are in desperate need to improve their legal position so as to be treated equally with normal workers and to be entitled to decent working conditions. In sum, the needs of migrant women working as domestic helpers are grouped into three major categories: the need to be entitled to equal treatment with normal employees; the need for articulation of decent working conditions given their specific characteristics, and the need to get access to justice.

#### **4.4.2 Need to be treated equally with other workers**

As was made clear in Chapter 3, migrant women working as domestic helpers face multiple levels of labour market discrimination due to their overlapping disadvantageous social categories, in comparison with, for example, male workers, male migrant workers, women migrant workers working in formal industries, urban women working as domestic helpers, etc. Thus, the primary need for this group of workers is that they are treated equally, i.e. treated just the same as normal employees as defined in the Chinese labour law, both in law and in practice. This major need for equal treatment may be divided into several sub-categories given their particular situation: such as the need to be paid equally for work of the same value; the need for their multiple disadvantages to be adequately addressed by law; the need to get equal access to social security and social benefits supported by the government and so on.

First, the gendered labour market for domestic helpers gives rise to gendered pay segregation, thus they need to work in a labour market with equal pay for work of equal value. As has been explained in the previous chapters, the predominant performers of domestic service are still women, who are stereotypically perceived as loving and caring and suitable for providing this kind of service. Nonetheless, the problem is not so much women providing such service, the problem is that domestic service is inextricably related to low payment, low stability and low status in the labour market. The real market value of domestic work has not yet been calculated, and the existing gender pay gap is not helping the situation either. As a result, in order to gain true equality for domestic helpers in comparison with other workers and to establish true equal pay for work of equal value, there is an urgent need to build an evaluation system that reveals the real value of domestic service vis-à-vis other types of work so that this group of workers is no longer under-valued, under-paid and under-estimated in society.

Second, their agricultural Hukou status places additional barriers in their way regarding their work and lives in the metropolitan cities, thus they need to be treated equally with local urban workers. In addition, the discrimination based on social origin must be explicitly prohibited by law and eliminated in practice. As was described in Chapter 2 and analysed in Chapter 3, a rural migrant with agricultural Hukou status can face various forms of unequal treatment in the urban areas, which causes real difficulties for them in finding a stable job, purchasing a house, getting access to local government-supported social welfare and social security, and even their children, who do not automatically acquire urban Hukou by birth, can face many problems in school enrolment and in taking college entrance exams. Additionally, given the particular characteristics of domestic service, these particular domestic workers need to get access to government-supported social security and social benefits plans, especially those related to maternity protection, employment injury insurance, pensions, etc. These are real problems that need to be addressed not only de jure, but de facto, with great political will and economic resources.

Third, the intersectionally disadvantaged situation of these domestic workers needs to be acknowledged and addressed by law and to be taken into consideration in the adjudication processes because such intersectionality disadvantage is quite different from single disadvantages and thus deserves particular attention. For example, their gender and their private working environment put them at extra risk of exposure

to all types of violence including abuse and harassment. Such forms of discrimination against women, together with other forms of discrimination, must be duly addressed and remedied by law. In Chinese society, there are many marginalized groups that suffer from overlapping forms of disadvantage other than migrant women working as domestic helpers, for example elderly women, disabled children etc., and their multiple problems have to be identified and tackled as well. Nonetheless, the existing Chinese legislative system and judicial system are still finding their way in dealing with discrimination, such as to make clear what discrimination is, what indirect discrimination and multiple discrimination are, and how to remedy different types of discrimination in a fair way in the legislative process and in the judicial procedures.

Fourth, the past injustices and accumulated disadvantages faced by this particular marginalized group of people need to be addressed with appropriate special measures. When reviewing the overlapping forms of disadvantage faced by migrant women working as domestic helpers, the accumulated disadvantages do not only happen in a given space and time, but have also happened in a long historic background where culture, ideology and daily practice have all been interwoven to make a complicated picture of social subordination. Because of the culture over thousands of years of valuing boys over girls and also because of relatively limited resources for education in the rural areas, rural girls without urban Hukou who migrate to cities are not equipped with sufficient qualifications to be employed in a regular business. In addition to the social gender stereotype, they have no option but to work in the less desirable businesses or in the informal sectors, such as domestic service. With the increasing demand for specialized caring skills and vocational training certificates, rural girls are now facing even greater competition in the domestic labour market. So they need at least to be granted an equal position in the Chinese law system with other workers.

#### **4.4.3 Need to be ensured decent working conditions**

Due to the fact that an individual domestic helper is usually hired by a private family, they are not regarded as “employees” per se according to the Chinese labour law system,<sup>140</sup> which means that all those provisions concerning employees in the Chinese labour law system are not applicable to most of the domestic helpers who are not affiliated with formal companies. (See Chapter 2.) At the same time, there are no national laws that address the rights for these domestic helpers despite their large population and potential growth in numbers. Thus, other than the primary need to be treated equally, the second main need of these migrant women working as domestic helpers is that decent working conditions for them must be articulated by law, either in general labour law or in specific law. The need to be guaranteed decent working conditions, which are tailored to their particular characteristics, are sub-categorized into the following several aspects.

First, the need to be sufficiently represented in the labour union and to be empowered in the process of collective bargaining. According to the Chinese labour law, being an employee is the prerequisite to joining local labour unions. But most of the domestic helpers are self-employed or employed via an on-line platform, whilst only a fraction of them are employed in a formal company, thus the labour interests of most of them are often under-represented. Even though there are some business associations concerned with domestic service at certain municipal or provincial levels, they are often associations of domestic service agencies, which do not necessarily represent the best interests of domestic helpers as individuals. Hence, domestic helpers need their representatives at each level of labour unions to make their interests and rights known. They also need to be empowered during the process of collective bargaining because they are often equipped with less bargaining power than that of urban local host families.

Second, the need to be guaranteed a written contract with details of working conditions and dispute settlement mechanisms. Preferably, such written contract models should provide the opportunity for labour inspections, with consultation with the representatives of domestic helpers who are working for the benefit of domestic helpers. Due to the fact that there is no national system of regulation to safeguard domestic servants’ rights, each administrative district has its own different practice as to the conclusion of such contracts, employment terms, working conditions and other labour standards. More often than not, such work is often undertaken without a contract, which may produce many exploitative practices in daily life, such as prolonged working hours, overtime without due compensation, intrusion upon domestic workers’ privacy or freedom of mobility and even physical abuse. (See Chapter 2.) Thus, an institutionalized written contract mechanism with

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<sup>140</sup> Similar situations are to be found in Kuwait, Saudi Arabia, and Singapore, see Similar situations can be found in Kuwait, Saudi Arabia, and Singapore. See Gabriela Rodriguez Pizarro, United Nations Commission on Human Rights, Report of the Special Rapporteur, *submitted pursuant to Commission on Human Rights Resolution 2002/62*, UN Doc. E/CN.4/2003/85/Add.4, para.25.

details of working conditions and dispute settlement channels all clearly set out is needed for domestic workers.

Third, as well as an institutionalized written contract mechanism, domestic helpers need the law to set specific standards to safeguard decent working conditions, such as normal hours of work, overtime compensation, periods of daily and weekly rest, paid annual leave, a holiday with pay in proportion to the period of service performed etc. A systematic set of labour standards established for the benefit of domestic workers is particularly important to guarantee fundamental labour rights and offer access to remedies for this group of workers. Such established standards would also provide an institutional guarantee for the terms of written contracts. In particular, extra attention must be paid in law to occupational safety and health given that in their working environment domestic workers are at the complete disposal of their host families. People working in this sector are likely to be exposed to health and safety hazards, including accidents such as knife cuts or falls, chronic occupational hazards such as skin reaction to strong detergent, or back/wrist/neck problems due to long hours of cleaning work. With poor coverage of social insurance and commercial insurance in this business, these risks are carried by the domestic helpers themselves.

Fourth, the need for their rights to privacy and their freedom of movement to be protected by law, given their private working environment. One particular aspect of doing domestic work is the private household as the work place, where the law is often reluctant to intervene. This gives rise to a relevant grey legal area and has left a disproportionate margin of discretion to the householders concerning the working conditions of the domestic helpers working for them. Such private working environments may also cause social isolation for migrant domestic helpers if they are not affiliated to any labour union or social association. The private household without any form of labour inspection makes women domestic workers extra vulnerable in cases of sexual harassment, physical and psychological abuse.

Fifth, the need to get access to sufficient social security and social benefits given that most domestic helpers are liable for the risks themselves in cases of maternity, invalidity, injury and sickness, old age etc. Being migrant women working as domestic helpers, they face extra barriers in accessing any government-supported social insurance system. First, migrant workers are not entitled to the major social benefits that urban local governments provide for local dwellers, such as house subsidies and pension plans. Second, a domestic helper, who is not usually classed as an employee, cannot enjoy the tripartite supported labour insurance and benefits such as injury insurance, invalidity insurance and maternity insurance. Thus, most domestic helpers have to rely on the commercial insurance system. Third, women will probably (although not necessarily) experience maternity, and if migrant women domestic workers are not entitled to maternity benefits and insurance due to their migrant status or their occupation, then their fundamental rights to be protected with maternity insurance and benefits need to be ensured by law. In sum, migrant women working as domestic helpers need to get access to various types of social benefits and social insurance, at least equal to those of other types of workers, regardless of their social origin, their gender, or their occupation.

#### ***4.4.4 Need to be guaranteed access to justice***

As has been explained in Chapter 2, most domestic services are still in a legal grey area in China, especially for those who are rural migrants, self-employed, or hired via agencies. Since these domestic workers are not included as normal employees according to the Chinese labour law, their working conditions are not articulated and labour inspection is not applicable to them either. When their working conditions are controlled by their host families and they are working without labour inspection, infringement of their human dignity can happen without being detected in the outside world. Once they are in dispute with their host families, they cannot go to labour arbitration which has been set up for normal employment relationships. More often than not, these domestic workers do not equip themselves with sufficient legal knowledge to defend their rights and they often cannot afford a lawyer to file a case, nor do they want to be dragged into a lengthy procedure when they can simply swallow the trouble and find a new host family. After all, deep in their hearts, they do not want to offend their host family when they might have to rely on them to introduce new employers, or they simply want to keep a good reputation to attract other employers in the neighbourhood. If they were hired via agencies or acquaintances, they would be even more careful not to cause trouble for the agencies and acquaintances. Additionally, going to court against somebody is just as provocative as a declaration of war against a person, which is what Chinese traditional culture and teaching aims to avoid. Word often travels fast in a local community, and suing people or being sued are often both stigmatized as shameful by the neighbours. All in all, there are various reasons why domestic servants, especially rural migrant domestic servants, would not want to go to court to solve their problems, but it does not mean that they do not want or deserve justice.

It is just because they are short of choices. There has to be a channel or institution that is affordable, efficient and non-confrontational for them to fall back on.

#### **4.5 A review of the IHRL/ILO standards on promoting equality and eliminating discrimination**

##### **Introduction**

Previous sections have offered a map of the international legal frameworks safeguarding fundamental human rights and decent working conditions, and have categorized the needs of migrant women working as domestic helpers in China. Living in the intersectionally disadvantaged conditions due to their gender, social origin and the particularity of their occupation (see Chapter 2), migrant women working as domestic helpers need to be treated equally with other workers, to be guaranteed decent working conditions and to be ensured access to justice. To be specific, they need to gain an equal position, despite their disadvantageous social categories, with their potential comparators, such as men workers, workers with local Hukou, and workers working in areas other than a private household, in terms of labour union rights, decent working conditions and social security. Based on the categorized need to be treated equally and to be guaranteed decent working conditions, Sections 4.5. and 4.6. will scan the existing international legal documents for provisions on promoting equality and eliminating discrimination (Section 4.5.) and for labour standards safeguarding decent working conditions for migrant women working as domestic workers in terms of labour union rights, social security and the like (Section 4.6.).

In this section, several international legal provisions for equality and non-discrimination are selected to be analysed in order to develop implications for domestic legislation safeguarding the benefits of migrant women working as domestic helpers. The section proceeds in the following way. Firstly, it looks at what is the derived obligation to ensure equality and prohibit discrimination, how is direct and indirect discrimination defined in the international legal documents, and which are the justified exceptions to the prohibition of discrimination, referring to international legal documents such as the UNC, UDHR, ICESCR, CEDAW, ILO No. 100 and so on. According to the already described situation of migrant women working as domestic helpers, the section comes up with implications to guide domestic legislation that could work to satisfy their need for equal treatment by analysing the identified provisions and interpretations. Secondly, from a gender analysis, the section specifically focuses on the positive laws and interpretations on gender equality and non-discrimination against women in the labour market, including provisions regarding equal pay for work of equal value, maternity protection, prohibitions on and remedies for gender-based violence and harassment and the like. These implications are then summarized in accordance with these aspects to be used as guidance for domestic legislation in the next chapter. Thirdly, from an intersectionality approach, the section introduces the development of “multiple discrimination” as an emerging legal concept in some of the UN’s legal documents. Implications for this development are drawn for the guidance of domestic legislation in terms of eliminating multiple discrimination.

##### ***4.5.1 Implications regarding promoting equality and eliminating discrimination: a general perspective***

As has been described in the previous chapters, migrant women working as domestic helpers belong to a particular, marginalized group of people in Chinese society due to the multiple levels of difficulties caused by their overlapping social categories. As migrant workers without local Hukou, they can face limited job opportunities because enterprises almost always prefer workers with local Hukou. Rural migrant workers are not included in the local government-supported social benefits and social security system simply because they do not hold local Hukou. In many big cities, their children have difficulty in getting enrolled in local schools or even sitting College Entrance Exam at local schools because these children do not have local urban Hukou. Also, being women workers working in a domestic household, who are outside the competence of labour inspection and at the same time usually excluded from labour unions due to their employment status, they are extra vulnerable in the face of exploitative working conditions such as prolonged working hours, unfair, physical or verbal abuse and harassment, instant dismissal, excluded from social benefits and pension plans, and with limited access to remedies etc. The multiple facets of problems faced by them call for more explicit laws on eliminating discrimination against them and promoting equal treatment for them.

The principle of promoting equality and eliminating discrimination is central to all international human rights instruments.<sup>141</sup> Since equality is often criticized as being an empty legal principle with not much moral content of its own but merely a procedural function,<sup>142</sup> this section will pay more attention to the other side of this principle, namely, the requirement of non-discrimination. The non-discrimination rationale has several implications: (1) non-discriminatory distribution of “public goods” except as otherwise justified; (2) no distinction should be made on the prohibited grounds unless justified; and (3) promotion of equality as a positive duty beyond simply refraining from discrimination.<sup>143</sup> To be specific, such implications have been found in many international legal documents. The preamble of the Charter of the United Nations reaffirms the faith in “the equal rights of men and women” as the very essential ideas of establishing this international platform to “promote and encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”.<sup>144</sup> Being the birthplace of international human rights instruments, the 1948 Universal Declaration of Human Rights explicitly states that “everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.<sup>145</sup> At the time when this document was under discussion, the Chinese representative, Mr. Pengchun Chang, was actively involved in bringing the Confucian idea of “conscientiousness” into the Declaration.<sup>146</sup>

A similar mandate to ensure equality and eliminate discrimination is also found in the ILO Constitution and other ILO declarations made since that organisation’s establishment. The principle of “equal remuneration for work of equal value” was enshrined in the preamble of the 1919 ILO Constitution, which constituted Part XIII of the Treaty of Versailles.<sup>147</sup> Later on, in the 1944 Declaration concerning the aims and purposes of the International Labour Organisation, it is declared that “all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity”.<sup>148</sup> In the 1998 ILO Declaration on Fundamental Principles and Rights at Work, “elimination of discrimination in respect of employment and occupation” has been explicitly included as one of the four fundamental categories of principles to be respected and promoted by the member states “whether or not they have ratified the relevant Conventions”.<sup>149</sup>

Apart from the general aspiration to promote equality and eliminate discrimination, there are several implications that can be drawn from the IHRL/ILO standards.

- **A clear definition of discrimination**

Given the importance of ensuring equality and eliminating discrimination, how is discrimination defined in the IHRL/ILO normative system? What implications can these provisions supply? It has to be said that, being complicated concepts, the content and scope of equality and discrimination have not yet been finally agreed upon in the international human rights law arena.<sup>150</sup> Still, we can extract some valuable principles from the existing common denominators as guidance for domestic legislation that protects the marginalized.

First, how is discrimination defined in the light of CEDAW provisions? CEDAW has explicitly prohibited discrimination against women in all its forms, and we can look at how discrimination is defined in the Conventions.<sup>151</sup> Because the Convention is a legal document adopted to protect women’s rights and to

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<sup>141</sup> UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), *General Comment No. 2 on the rights of migrant workers in an irregular situation and members of their families*, CMW/C/GC/2, 28 August 2013, para.18.

<sup>142</sup> Janneke Gerards, “The Discrimination Grounds of Article 14 of the European Convention on Human Rights,” *Human Rights Law Review*, Vol.13, Issue 1(2013):117.

<sup>143</sup> See Christopher McCrudden and Sacha Prechal, *The Concepts of Equality and Non-Discrimination in Europe: A practical approach* (Brussels: European Commission, 2009), 11-23. In this article, four meanings of equality and non-discrimination are put forward, giving examples in legal practices in Europe.

<sup>144</sup> Preamble and Article 1(3), United Nations, *Charter of the United Nations*, 1945.

<sup>145</sup> Article 2, UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

<sup>146</sup> Sumner Twiss, “Confucian Contributions to the Universal Declaration of Human Rights”, ed. Arvind Sharma, *The World’s Religions: A Contemporary Reader* (Minneapolis: Fortress Press, 2011).

<sup>147</sup> ILO, *Constitution of the International Labour Organisation (ILO)*, 1 April 1919.

<sup>148</sup> ILO, *Declaration Concerning the Aims and Purposes of The International Labour Organisation*, 10 May 1944.

<sup>149</sup> ILO, *Declaration on Fundamental Principles and Rights at Work*, adopted by the International Labour Conference at its Eighty-sixth Session, Geneva, 18 June 1998.

<sup>150</sup> A. Bayefsky, “The Principle of Equality or Non-discrimination in International Law,” *Human Rights Journal*, Vol.11 (1990): 2.

<sup>151</sup> Article 1 gives its definition of “discrimination against women” as “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any

eliminate gender discrimination affecting women, we can assume that this definition does not include the situation of males being excluded on the basis of sex, but emphasises that women have suffered from various forms of discrimination because of their gender.<sup>152</sup> Furthermore, we can assume from this definition that both direct discrimination and indirect discrimination are covered: as long as the unreasonable distinctive treatment is made on the basis of sex, no matter whether it has an objective *effect* or subjective *purpose* of impairing women's human rights and fundamental freedoms, such distinction can be regarded as discrimination against women if it is not legally justified. In this case, indirect discrimination, as is further explained by CEDAW General Recommendations, refers to the situation when the distinction, exclusion or restriction made has the actual effect of a detrimental impact on women even though such distinction may appear to be neutral.<sup>153</sup> Finally, as we can see from the definition, the protection of women against discrimination is rather comprehensive as it covers almost all social aspects including but not limited to political, economic, social, cultural, civil etc. According to this definition, implications are derived as follows:

**(1) Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise of rights by women constitutes gender discrimination.**

**(2) Both direct and indirect discrimination must be addressed in the definition and, preferably, such situation should be explicitly elaborated by law.**

**3) The anti-discrimination principle must be applied in all social fields including political, economic, social, cultural and civil or any other similar field.**

- **Distinguish direct discrimination and indirect discrimination**

Secondly, let us explore further the different definitions of direct and indirect discrimination. As such differences are not explicitly mentioned in the provisions of the IHRL/ILO normative framework, we can seek relevant interpretation from the international treaty bodies' opinions and literature. According to ICESCR General Comment No.16, direct discrimination occurs when "an individual is treated less favourably than another person in a similar situation for a reason related to a prohibited ground", without reasonable justification.<sup>154</sup> Several elements have to be examined here. Firstly, the existence of unfavourable treatment is the basis of discriminatory action. Secondly, when claiming unfavourable treatment, a comparator in a similar circumstance needs to be identified. For example, comparing male workers' remuneration with women workers' remuneration in a similar context. Thirdly, the reason for such unfavourable situation is based on a protected ground, such as sex, race, age, disability and other social categories, that is prohibited from being discriminated against by law.<sup>155</sup>

Indirect discrimination, however, is related to "measures which are not discriminatory at face value but are discriminatory in fact and effect".<sup>156</sup> As is interpreted by the ICESCR General Comment, indirect discrimination occurs when apparently neutral policies have an objective effect of unequal treatment on persons with characteristics that must not form the ground of discrimination.<sup>157</sup> In this definition, whether or not there is discriminatory intent behind such measures that cause discrimination is irrelevant in determining indirect discrimination, in fact, even some innocent, good faith measures may constitute indirect discrimination if they turn out to disproportionately impact certain people with detrimental effect.<sup>158</sup> This means that intention is not a precondition of determining indirect discrimination; the detrimental effect to a certain group of people is key.

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*other field"*. Article 1, UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations Treaty Series, vol. 1249, p. 13.

<sup>152</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures*, 2004, para.5.

<sup>153</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures*, 2004, 9.

<sup>154</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Article 3 of the Covenant)*, 11 August 2005, E/C.12/2005/4, para.12-13.

<sup>155</sup> European Union Agency for Fundamental Rights, European Court of Human Rights, *Handbook on European Non-Discrimination Law*, Council of Europe Publishing, 2011. p 22-26.

<sup>156</sup> Dagmar Schiek, "Indirect Discrimination", eds Dagmar Schiek, Lisa Waddington, Mark Bell, *Cases Materials and Texts on National, Supranational and International Non-discrimination Law* (Oxford and Portland, Oregon: Hart Publishing, 2007), 323-475, at 340.

<sup>157</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (Article 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20, para.10.

<sup>158</sup> Christa Tobler, *Indirect Discrimination, A case study into the Development of the Legal Concept of Indirect Discrimination under the EC Law* (Antwerp, Oxford: Intersentia, 2005), 235.

Transplanted from the common law to the continental law, the definition and development of indirect discrimination relies heavily on case law.<sup>159</sup> One of the pioneer cases on indirect discrimination was *Griggs v. Duke Power Co.*,<sup>160</sup> decided by the US Supreme Court in 1971, when the Duke Power Company required a high school diploma for employment at a time when black people could very rarely get such a diploma. The Supreme Court found such a formally neutral recruitment policy in effect to be racially discriminatory and thus unlawful under the US Civil Rights Act 1964. At that specific time, a requirement of a high school diploma seemed to be a fair selection criterion for employment yet, on further analysis, such prima facie innocent practice could be shown to result in an unfair consequence, namely an exclusion of most black people from being employed by the company. Such an unfair consequence of excluding a certain group of people is the characteristic of indirect discrimination.<sup>161</sup> In real life, indirect discrimination can happen anywhere. For instance, if a birth registration certificate is the prerequisite for school enrolment, it might constitute discrimination against ethnic minorities or non-nationals who possibly might not have such certificates.<sup>162</sup>

When it comes to the employment field, the ILO Declaration on Fundamental Principles and Rights at Work has a definition of indirect discrimination as “where rules or practices appear on the surface to be neutral but in practice lead to exclusions”.<sup>163</sup> The declaration offers an example in employment when a certain height is required as the criterion for recruitment which could disproportionately exclude women candidates, which might constitute indirect discrimination, unless such height was absolutely essential in performing that particular job.<sup>164</sup> Another example of indirect discrimination against women is when a certain exclusion from benefits is imposed upon part-time workers, because taking part-time work is particularly common among women who, more often than not, take on heavy responsibilities in doing household chores as well.<sup>165</sup>

Thus, implications derived from the analysis of direct and indirect discrimination can be summarized as follows:

- 1) **Direct discrimination occurs when an individual is treated less favourably than another person in a similar situation for a reason related to a prohibited ground, such as sex or gender, religion, age, ethnicity, race, social origin etc.**
- 2) **Indirect discrimination usually occurs when rules or practices appear to be neutral but have a detrimental effect on a certain group of people of a certain social category that is prohibited from being discriminated against.**

- **Eliminate discrimination in the labour market**

Thirdly, let us have a look at the definition of discrimination in the labour market. According to Article 1(1) of ILO 111 Convention concerning Discrimination in Respect of Employment and Occupation,<sup>166</sup> we can see that the focus lies within in the job market as the object and purpose of the Convention is, as its title suggests, to eliminate discrimination in employment and occupation. Furthermore, in this definition, we can also see the word ‘preference’, which is not mentioned in Article 1 CEDAW, as an action that could potentially constitute discrimination. This means that the situation of positive discrimination in the employment field, although not uncommon, is also included. In addition, the prohibited grounds of discrimination are listed as “race, colour, sex, religion, political opinion, national extraction or social origin”. Such an explicit list of prohibited grounds is

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<sup>159</sup> Dagmar Schiek, “Indirect Discrimination”, eds. Dagmar Schiek, Lisa Waddington, Mark Bell, *Cases Materials and Texts on National, Supranational and International Non-discrimination Law* (Oxford and Portland, Oregon: Hart Publishing, 2007), 323-475, at 360.

<sup>160</sup> *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

<sup>161</sup> Christa Tobler, *Limits and Potential of the Concept of Indirect Discrimination* (Brussels: European Commission, 2008), 24.

<sup>162</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (Article 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20, para.10.

<sup>163</sup> ILO, *Declaration on Fundamental Principles and Rights at Work*, adopted by the International Labour Conference at its Eighty-sixth Session, Geneva, 18 June 1998.

<sup>164</sup> *Ibid.*

<sup>165</sup> Leontine Bijleveld, “Domestic Work in The Netherlands: A Job Like No Other”, *European Equality Law Review*, Issue 1(2015):37-52, at 51.

<sup>166</sup> ‘Discrimination’ includes: “(a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;

(b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers’ and workers’ organizations, where such exist, and with other appropriate bodies.” Article 1(1), ILO, *Convention concerning Discrimination in Respect of Employment and Occupation*, C111, 25 June 1958.

of great relevance to the case of migrant workers in China, as the discriminatory treatment they are exposed to is, most of the time, discrimination based on social origin.<sup>167</sup>

“Social origin”, mentioned as a prohibited ground in many other IHRL documents, such as Article 2 of UDHR,<sup>168</sup> Article 2 of ICCPR<sup>169</sup> and Article 2 of ICESCR<sup>170</sup>, refers to a person’s inherited social status, which is closely linked to descent-based discrimination under “birth” and “economic and social status”.<sup>171</sup> The 2012 ILO General Survey further explained that “discrimination and lack of equal opportunities based on social origin refer to situations in which an individual’s membership of a class, socio-occupational category or caste determines his or her occupational future, either because he or she is denied access to certain jobs or activities, or is assigned only certain jobs”.<sup>172</sup> It may include household registration in China if privileges are attached to this registration whilst poorer conditions are experienced by those without such status.<sup>173</sup>

Lastly, it should be noted that, under Article (1)(1)(b), the situation of discrimination may be determined by the state parties, “after consultation with representative employers’ and workers’ organizations” and “with other appropriate bodies”. This part of the Article introduces a democratic basis for legislation on discrimination in a municipal system by offering a possibility of discourse to the employers’ organizations and labour unions. This part of the Article intends to take into consideration the interests of both employers and workers. According to this overview, at least three implications for improving domestic legislation can be derived:

- 1) Prohibit by law all forms of discrimination in the labour market.**
- 2) Considering the particular case of migrant workers, social origin as a discriminatory ground is to be explicitly prohibited by domestic law.**
- 3) The comprehensive definition of discrimination and the determining of such situation must be exposed to a democratic consultation process, so that the voices of both employers and workers are heard and taken account of.**

- **Prohibited grounds of discrimination**

In addition to the two previously mentioned definitions regarding discrimination made by CEDAW and ILO No. 111, several provisions also offer a complementary understanding of non-discrimination and equality, one of which is Article 2 of UDHR, which stipulates: “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”. Also, Article 2(1) of ICCPR says: “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Article 2(2) of ICESCR avows: “The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

All three provisions demonstrate that the list of protected grounds for discrimination is an open list that can be interpreted according to the evolving situation, such as age, ethnicity, disability, marital, refugee or migrant status.<sup>174</sup> Just as the CEDAW General Recommendation No. 28 makes clear, “discrimination in all its forms”

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<sup>167</sup> ILO CEACR, *Direct Request to China, on ILO Convention concerning Discrimination in Respect of Employment and Occupation, 1958(No. 111)*, adopted 2009, published 99th ILC session, 2010.

<sup>168</sup> Article 2, UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

<sup>169</sup> Article 2, UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations Treaty Series, vol. 999, p. 171.

<sup>170</sup> Article 2, UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations Treaty Series, vol. 993, p. 3.

<sup>171</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (Article 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20, para.24.

<sup>172</sup> International Labour Office, *General Survey concerning fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* (Geneva: ILO, 2012), 334.

<sup>173</sup> ILO CEACR, *Direct Request to China, on ILO Convention concerning Discrimination in Respect of Employment and Occupation, 1958(No. 111)*, adopted 2009, published 99th ILC session, 2010.

<sup>174</sup> “It prohibits differential treatment of a person or group of persons based on his/her or their particular status or situation, such as race, colour, sex, language, religion, political and other opinion, national or social origin, property, birth, or other status, such as age, ethnicity, disability, marital, refugee or migrant status.” See UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No.*

clearly includes “forms that are not explicitly mentioned in the Convention or that may be emerging”.<sup>175</sup> In addition, ICESCR General Comment No. 20 points out that the prohibition on the ground of “sex” must not be narrowly interpreted as “physiological characteristics”; “sex” is also to include the social construction of gender stereotypes, prejudices, and expected roles.<sup>176</sup> Indeed, new forms of discrimination and exclusion may evolve with the development of society, so a list of prohibited grounds with room for interpretation according to new developments keeps the non-discrimination rules alive. Thus, **an open list of protected grounds in domestic anti-discrimination law is necessary to leave room for further interpretation to cope with any new situation.**

- **Exceptions permitted**

Under certain circumstances, different treatment or exclusion is allowed, which means that where there is a principle, exceptions are permitted as well. The permitted circumstances of exception are well explained by the international legal documents, such as circumstances concerned with state security,<sup>177</sup> those related to inherent job requirements, and those concerning special protective measures and temporary measures. Theoretically speaking, domestic laws can also set boundaries to the realm of the exceptions in cases of conflict concerning the respecting of other fundamental rights such as the right to privacy, religious beliefs etc.<sup>178</sup> This section will present some examples of exceptions that are relevant to the subject to explain the matter further.

Firstly, different treatment based on genuine professional qualification is usually not deemed to be discrimination. As stipulated in Article 1(2) of ILO 111, “any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination”. But when it is applied to the case of choosing domestic helpers, a householder usually has considerable discretion over the person he or she would like to hire, leaving a good deal of room for prejudice. It seems very difficult to tell whether the host families’ choices of domestic helpers are based on professional qualifications or simply subjective prejudice. Thus, if such an exception is included in the municipal law, it has to be applied in a very strict way to avoid any abuse of the exception.

Secondly, according to Article 5(1)(2) of ILO No. 111, special protection or assistance designed to meet the particular needs of persons, such as pregnancy or motherhood, disablement, age, family responsibilities etc., are not to be considered as discrimination.<sup>179</sup> However, such exception is to be interpreted by the authoritative bodies in a very strict manner, and must not result in any detrimental effect to the protected subjects.<sup>180</sup> Additionally, as is stipulated in Article 4 of CEDAW, “temporary special measures”, which are recommended to be adopted by the state parties to accelerate *de facto* equality between men and women, are not to be considered as discrimination either.<sup>181</sup> If certain temporary special measures are promulgated by state or local policies to enhance the working opportunities of women migrant workers in the urban areas, or to improve working standards for domestic helpers, then such favourable treatment towards these vulnerable groups could not be regarded as discrimination.

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16: *The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Article 3 of the Covenant)*, 11 August 2005, E/C.12/2005/4, para.10.

<sup>175</sup> The term “discrimination in all its forms” clearly obligates the State party to be vigilant in condemning all forms of discrimination, including forms that are not explicitly mentioned in the Convention or that may be emerging. See UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 16 December 2010, CEDAW/C/GC/28, para.15.

<sup>176</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (Article 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20, para.20.

<sup>177</sup> Article 4 states that “Any measures affecting an individual who is justifiably suspected of, or engaged in, activities prejudicial to the security of the State shall not be deemed to be discrimination, provided that the individual concerned shall have the right to appeal to a competent body established in accordance with national practice.” See ILO, *Convention concerning Discrimination in Respect of Employment and Occupation*, C111, 25 June 1958.

<sup>178</sup> Jenny Goldschmidt, “A Specific Legal Patchwork: Normative System and Institutional Structure,” eds. Yuwen Li and Jenny Goldschmidt, *Taking Employment Discrimination Seriously: Chinese and European Perspectives* (the Netherlands: Martinus Nijhoff Publishers, 2009), 250.

<sup>179</sup> Article 5(1)(2) states that “Special measures of protection or assistance provided for in other Conventions or Recommendations adopted by the International Labour Conference shall not be deemed to be discrimination.” See ILO, *Convention concerning Discrimination in Respect of Employment and Occupation*, C111, 25 June 1958.

<sup>180</sup> Jenny Goldschmidt, “A Specific Legal Patchwork: Normative System and Institutional Structure,” eds. Yuwen Li and Jenny Goldschmidt, *Taking Employment Discrimination Seriously: Chinese and European Perspectives* (the Netherlands: Martinus Nijhoff Publishers, 2009), 251.

<sup>181</sup> Article 4(1), UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations Treaty Series, vol. 1249, p. 13.

From the above analysis of the exceptional situations of discrimination prescribed by the international legal documents, it is clear that it is very important to clarify such exceptions in municipal law. Thus implications are derived as follows:

- 1) **When defining discrimination in legal terms, several conditions that are not to be deemed to be discrimination are recommended to be articulated by municipal law. For example, inherent job requirements, protective measures tailored to specific needs, temporary special measures etc.**
- 2) **In practice, the interpretation of such exceptions must be strict and careful to avoid actual negative consequences.**
- 3) **Any temporary special measures that work, under strict conditions, for the benefit of groups with multiple disadvantages, are not to be regarded as discrimination.**

#### **4.5.2 Implications regarding the creation of a gender-equal labour market: a gender analysis**

Gender equality, as an essential pursuit of this study as well as a value that has been reiterated by international human rights instruments,<sup>182</sup> is given extra attention beyond the general principle of promoting equality and eliminating discrimination analysed in the previous section. Thus this section will narrow down the subject with a gender analysis based on the general requirements on ensuring equality described in section 4.5.2. What is gender equality? As is pointed out by General Recommendation No.28 of CEDAW, gender equality is realized when “all human beings, regardless of sex, are free to develop their personal abilities, pursue their professional careers and make choices without the limitations set by stereotypes, rigid gender roles and prejudices.”<sup>183</sup> However, there are many systematic obstacles that hinder the achievement of a gender-equal society in China. For example, the existing gender segregation in the labour market constantly accentuates the economic and social inequalities between men and women. Sexual-based harassment, violence and gender stereotyping, affect female workers disproportionately more than male workers. To overcome these obstacles, CEDAW GR No.28 obliges States to respect, protect and fulfil their obligation to eliminate gender discrimination by (1) abstaining from conducting discriminatory practices; (2) preventing and punishing discriminatory practices done by a third party; (3) adopting temporary special measures to achieve gender equality in practice.<sup>184</sup> In the following paragraphs, concrete provisions and relevant interpretations of international human rights treaties and international labour conventions regarding gender equality are further analysed.

- **A gender analysis on non-discrimination in the labour market**

The first and foremost task is to tackle the current gender segregation in the labour market system that is solely or inherently based on biological sex or gender. Article 1 (b) of ILO 100 requires an elimination of such system in the labour market by ensuring “equal pay for work of equal value for both men and women workers”.<sup>185</sup> Article 7 of ICESCR also emphasizes that women have to be guaranteed “conditions of work not inferior to those enjoyed by men, with equal pay for equal work”.<sup>186</sup> Article 11 (d) of CEDAW specifically requires “equality of treatment in the evaluation of the quality of work”, which means, according to Article 1(b) of ILO No. 100 Equal Remuneration Convention, “rates of remuneration established without discrimination based on sex”.<sup>187</sup>

If, as is provided in the Equal Remuneration Convention, the rates of remuneration are not set according to sex, then what should they be based on? It is recommended by both CEDAW General Recommendation No. 13 and Article 3(1) of ILO No 100 that gender-neutral criteria on the basis of the work to be performed are to be

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<sup>182</sup> Besides the general principle of non-discrimination, Article 3 of ICESCR further exhorts the states parties “to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant”. See Article 3, UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations Treaty Series, vol. 993, p. 3.

<sup>183</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 16 December 2010, CEDAW/C/GC/28, para.22.

<sup>184</sup> Lorena Sosa, *At The Centre, Or The Margins? A Review of Intersectionality in the Human Rights on Violence Against Women* (the Netherlands: Ridder Print, 2015), 46.

<sup>185</sup> Article 1 (b), ILO, Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, C100, 29 June 1951.

<sup>186</sup> Article 7 (a)(i), UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations Treaty Series, vol. 993, p. 3.

<sup>187</sup> Article 1, ILO, Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, C100, 29 June 1951.

established.<sup>188</sup> That is, the rate to determine the value of a certain job should be fixed on objective criteria that are free from gender bias,<sup>189</sup> such as what is done, how it is done, risks undertaken, skills required, effort demanded, responsibilities and working conditions.<sup>190</sup> Such a job evaluation system goes beyond the superficial elements of “similar” work, and covers work which appears to be of a different nature, yet which is essentially of equal value.<sup>191</sup> Value hereby refers to the worth of a job for the purpose of computing remuneration. But still, when determining the worth of a job, we have to be careful when market forces are used as the only benchmark to determine it, because the market itself may be inherently gender-biased.<sup>192</sup>

By establishing such gender-neutral job appraisal criteria, a direct effect is that any female-predominant sector is not undervalued as a result of gender bias.<sup>193</sup> This is essential to the domestic service sector which, as an extension of women’s family roles and a business predominantly occupied by female workers, is constantly undervalued by the labour market. Especially in Chinese society, domestic work is considered to be a low-level job and is often shunned by well-educated elites. Being a domestic servant is by no means a dream job in many Chinese People’s eyes, not only because of the social stereotype attached to this service, but also because of the unsatisfactory working conditions of this job, such as low wages, limited rest hours and prolonged working hours, long stand-by hours, at the arbitrary disposal of the host families, risks of being abused in a private sphere, limited social circles, unstable career path etc.

In respect of how to achieve equal remuneration for both men and women, it is recommended by the General Comment of ICESCR and ILO No.100 that a comprehensive combination of methods, including constitutional and legislative provisions,<sup>194</sup> legally established or recognized machinery for wage determination, collective agreements between employers and workers,<sup>195</sup> are to be adopted by the state parties. Hence, from the provisions analysed above, we can suggest several principles regarding equal pay for work of equal value to be fulfilled in domestic laws:

- 1) The principle of “equal pay for work of equal value for both men and women workers” must be explicitly established as a fundamental rule of the domestic labour market.**
- 2) The remuneration of jobs must be established not according to the gender of the performers, but according to gender-neutral criteria such as what is done, how it is done, risks undertaken, skill required, effort demanded, responsibilities and working conditions.**
- 3) A combination of measures such as constitutional and legislative provisions, legally established or recognized machinery for wage determination, collective agreements between employers and workers can be adopted by the state to achieve gender-equal remuneration in the labour market.**

- **Protection of maternity**

To ensure gender equality in the labour market, it is not sufficient to ensure equal remuneration only, but it is also necessary to safeguard women workers’ rights to social benefits and equal opportunities regardless of their maternal status. When it comes to dealing with the special needs of women workers in pregnancy, it entails offering special measures to accommodate the specific situation of pregnancy without imposing undue restrictions based on their pregnancy status. For one thing, Article 11(2)(a) of CEDAW has explicitly prohibited “dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status”.<sup>196</sup> In a similar vein, any undue restrictions on women’s free participation in the labour market in the name of “protection”, no matter if those restrictions are based on biological sex or pregnancy, are no longer warranted by either the UN or the ILO normative system. But, in practice, it is not uncommon that

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<sup>188</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 13: Equal remuneration for work of equal value*, 1989, para3.

<sup>189</sup> International Labour Office, *General Survey concerning fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* (Geneva: ILO, 2012), 291.

<sup>190</sup> ILO CEACR, Observation concerning Equal Remuneration Convention (No. 100), adopted 2007, published 97th ILC session in 2008 para.4.

<sup>191</sup> *Ibid*, para.3.

<sup>192</sup> International Labour Office, *General Survey concerning fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* (Geneva: ILO, 2012), 281.

<sup>193</sup> ILO CEACR, Observation concerning Equal Remuneration Convention (No. 100), adopted 2007, published 97th ILC session in 2008.

<sup>194</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Article 3 of the Covenant)*, 11 August 2005, E/C.12/2005/4, para.19.

<sup>195</sup> Article 2(2), ILO, *Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value*, C100, 29 June 1951.

<sup>196</sup> Article 11(2)(a), UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations Treaty Series, vol. 1249, p. 13.

domestic helpers are at high risk of being fired by their host family due to their pregnancy status.<sup>197</sup> Thus Articles 8 and 9 of ILO No. 183 (Maternity Protection Convention) provide guidance on legislation that protects domestic workers from discrimination through employment termination, with a prohibition on pregnancy testing.<sup>198</sup>

In addition, according to Article 10.2. of ICESCR, “mothers are to be accorded maternal protection, including paid leave or leave with adequate social security benefits to working mothers during a reasonable period before and after childbirth”,<sup>199</sup> and Article 11(2) of CEDAW demands “maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances”, supporting social services to enable a balance of family obligations with work responsibilities, and “special protection to women during pregnancy in types of work proved to be harmful to them”.<sup>200</sup> In the case of domestic helpers, a large majority of them being women, protection during pregnancy must also cover these people despite the fact that they are in “atypical forms of dependent work”.<sup>201</sup> As is prescribed in Article 13 of ILO No. 189 (convention on decent working conditions for domestic workers), domestic helpers deserve no less favourable conditions with respect to pregnancy than those applicable to other workers. There are more detailed provisions of special protection for pregnant workers to be found in ILO No. 183, namely: (1) they are not obliged to perform work that contains significant risk to the mother’s health or that of her child;<sup>202</sup> (2) they are entitled to maternity leave of not less than 14 weeks, including six weeks’ compulsory leave after childbirth;<sup>203</sup> (3) cash benefits, and medical benefits must be accorded to them;<sup>204</sup> (4) maternity should not constitute a source of discrimination in employment, reinstatement or unlawful dismissal;<sup>205</sup> (5) they are to be allowed to have breastfeeding rests without deduction of pay.<sup>206</sup> It is further required by this convention that all these special treatments are to be applied to all pregnant women workers, including those in atypical forms of dependent work.<sup>207</sup>

From these provisions set up to protect pregnant workers, regardless of their work type, from arbitrary dismissal, restriction or reduction of due benefits, we can summarize several implications as follows:

- 1) **Discrimination/dismissal/restriction must be prohibited by law concerning the working opportunities or payment for domestic helpers based on their pregnancy or maternity status.**
- 2) **Domestic helpers must be granted no less favourable treatment during pregnancy than that granted to other types of workers and the same maternity benefits as those applicable to other types of workers.**

- **Combatting gender-based violence and harassment**

Thirdly, women workers in the labour market are still subjected to gender-based violence,<sup>208</sup> including all kinds of violence such as sexual violence, abuse, harassment occurring within the family, at the work place, or in any other area of social life.<sup>209</sup> Such violence is regarded by treaty bodies as a form of discrimination that impairs women’s ability to enjoy equal rights and freedoms.<sup>210</sup> In particular, domestic helpers are extra vulnerable in the face of such violence due to their physical proximity to the host families, living arrangements that do not

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<sup>197</sup> International Labour Office, *Effective Protection for Domestic Workers: A guide to Designing Labour Laws, Conditions of Work and Employment Program*, Industrial and Employment Relations Department (Geneva: ILO, 2012), 38.

<sup>198</sup> See Articles 8 and 9, ILO, *Convention concerning the revision of the Maternity Protection Convention*, C183, 15 June 2000.

<sup>199</sup> See Article 10(2), UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations Treaty Series, vol. 993, p. 3.

<sup>200</sup> ILO CEACR, *Direct Request to China, on Discrimination (Employment and Occupation) Convention, 1958 (No. 111)*, adopted 2012, published 102<sup>nd</sup> ILC session, 2013, Article 5, *Special Measures of Protection and Assistance*.

<sup>201</sup> See ILO, *Convention concerning the revision of the Maternity Protection Convention*, C183, 15 June 2000.

<sup>202</sup> Article 3, *ibid.*

<sup>203</sup> Article 4, *ibid.*

<sup>204</sup> Article 6, *ibid.*

<sup>205</sup> Articles 8-9, *ibid.*

<sup>206</sup> Article 10, *ibid.*

<sup>207</sup> See Article 2, *ibid.*

<sup>208</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 19: Violence against women*, 1992, para11.

<sup>209</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 12: Violence against women*, 1989.

<sup>210</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Article 3 of the Covenant)*, 11 August 2005, E/C.12/2005/4, para.27.

secure privacy, the absence of co-workers and of labour inspections.<sup>211</sup> Women migrant domestic workers may be even more vulnerable for additional reasons, including limited awareness of rights, limited social support networks, gender discrimination and cultural barriers.<sup>212</sup> As the CEDAW General Recommendation No. 19 pointed out, girls from rural communities are “at special risk of violence and sexual exploitation when they leave the rural community to seek employment in towns”.<sup>213</sup> Thus, as is suggested by ILO Recommendation No. 201, the state must take action, in terms of legislation and enforcement, to tackle sex-based discrimination and sexual harassment, especially for migrant women working as domestic helpers with their intersectional disadvantages.<sup>214</sup> With due regard to the particularity of the working environment, it is stipulated in Article 5 of the ILO Convention No. 189 on decent work for domestic helpers that “Each Member shall take measures to ensure that domestic workers enjoy effective protection against all forms of abuse, harassment and violence.”

Take sexual harassment as an example. This particular form of discrimination is of particular concern for migrant women working as domestic helpers as their working environment is unsupervised, their working conditions are rarely articulated if at all, their access to any form of remedy is an arduous and expensive journey. The state party is bound to protect all women from “all forms of discrimination against women, including violence against women, sexual harassment, by any person, organization or enterprise”.<sup>215</sup> Moreover, states are also responsible for acts carried out in private homes by individual employers if they fail to act with due diligence to prevent, investigate, punish, or compensate for such situation.<sup>216</sup> To fulfil this state obligation, a thorough definition of violence and harassment must be found in domestic law. Such a thorough definition is given by CEDAW General Recommendation No. 19, in which it is stated that sexual harassment includes “unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demand, whether by words or actions”<sup>217</sup>. Additionally, adequate protection through laws against violence, abuse, rape, sexual assault and other gender-based violence should be taken, preventive and punitive measures should be adopted, complaints procedures and remedies should be provided.<sup>218</sup> From the above analysis, a list of implications for gender-based violence against migrant women working as domestic helpers can be developed as follows:

- 1) **Give particular emphasis in law to intersectional disadvantage, especially the extra risks of gender-based violence, faced by migrant women working as domestic helpers.**
- 2) **To include in the law violence against women as a serious form of discrimination, and explicitly prohibit such actions.**
- 3) **To include in the law abuse and harassment as a serious form of violence against women, and explicitly prohibit such actions.**
- 4) **Establish laws to prevent and punish, including the state itself and any third parties such as private persons, organizations or enterprises, if they carry out violence, abuse and harassment against women.**
- 5) **Provide an accessible remedy system in cases of violence against women.**

#### **4.5.3 Implications regarding multiple discrimination: an intersectionality approach**

As has been described in Chapter 2, migrant women working as domestic helpers, as a result of their multiple identity of social subjugation, namely, their gender, their Hukou status and their occupation, are more vulnerable than people who suffer from only one ground of discrimination. Such a situation is, as Kimberle Crenshaw put it, an intersectional form of disadvantage.<sup>219</sup> Although such intersectionality has not been explicitly given legal form in the provisions of the IHRL/ILO normative frameworks because the concept was

<sup>211</sup> International Labour Office, *Effective Protection for Domestic Workers: A guide to Designing Labour Laws, Conditions of Work and Employment Program, Industrial and Employment Relations Department* (Geneva: ILO, 2012), 37.

<sup>212</sup> *Ibid*, 41.

<sup>213</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 19: Violence against women*, 1992, para.21.

<sup>214</sup> ILO, *Recommendation concerning Decent Work for Domestic Workers* (No. 201), 16 June 2011, paras. 7, 21 and 24.

<sup>215</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 19: Violence against women*, 1992, para.1.

<sup>216</sup> *Ibid*, para.9.

<sup>217</sup> *Ibid*, para.18.

<sup>218</sup> *Ibid*, para.24. See also Articles 5, 15 and 17, ILO, *Convention Concerning Decent Work for Domestic Workers*, C189, 16 June 2011.

<sup>219</sup> Kimberle Crenshaw, “Demarginalizing the Intersection of Race and Sex,” eds. Katharine Bartlett and Rosanne Kennedy, *Feminist Legal Theory: Readings in Law and Gender, New Perspectives On Law, Culture, And Society* (New York: Westview Press, 1991), 57-80, at 64.

only formulated in 1989, it has been gradually brought to the attention of many treaty bodies, which acknowledge the situation of intersectional disadvantage in their interpretations of the IHRL/ILO provisions. A trend can be observed whereby intersectionality has been used as a form of particular concern, with years of development in case law and in theorization.

For instance, the 1995 Beijing Declaration for the Fourth World Conference on Women recognized that there are multiple barriers placed in front of women and girls and their empowerment because of their race, age, language, ethnicity, culture, religion, disability and so on.<sup>220</sup> The 2000 General Recommendations No.25 that deal with gender-related dimensions of racial discrimination, issued by the Committee on the Elimination of Racial Discrimination (CERD), also recognize that sometimes racial discrimination can disproportionately affect more women than men without being detected.<sup>221</sup> The 2010 CEDAW General Recommendation No. 28 further acknowledges that gender discrimination can be inextricably entangled with other factors such as race, ethnicity, belief, status, age, class and sexuality, thereby placing women in a more vulnerable situation, in a different manner and to a different degree from men.<sup>222</sup> This situation is also pointed out by ILO CEACR in the 2012 General Survey, “in the context of employment and occupation, some grounds of discrimination are not necessarily revealed by distinctive external features, and many individuals may be subject to discrimination based on more than one ground”, and in the specific area of gender equality in the working place, “sex-based discrimination frequently interacts with other forms of discrimination or inequality based on race, national extraction, social origin or religion, or even age, migrant status, disability or health”.<sup>223</sup> Article 8 of ILO No. 189 on decent work for domestic helpers also reveals a full awareness of the intersectional barriers faced by migrant domestic helpers and hence proposes measures to be taken by the state members for the protection of this group of people.<sup>224</sup>

- **An intersectional perspective on non-discrimination**

Such overlapping disadvantage has gradually been further conceptualized as “multiple discrimination”,<sup>225</sup> “intersectional discrimination”,<sup>226</sup> “cumulative discrimination”,<sup>227</sup> “complex bias”, “multi-dimensional inequalities” or “simultaneous interlocking oppressions” in the various treaty bodies’ opinions.<sup>228</sup> For instance, ICESCR General Comment No. 20 points out that “some individuals or groups of individuals face discrimination on more than one of the prohibited grounds”, and that such “cumulative discrimination has a unique and specific impact on individuals and merits particular consideration and remedying”.<sup>229</sup> In a similar vein, ICESCR General Comment No. 20 recommends “a flexible approach to the ground of ‘other status’”, in order to incorporate other forms of differential treatment that are not “reasonably and objectively justified and are of a comparable nature to the expressly recognized grounds” in the Covenant, because discrimination

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<sup>220</sup> United Nations, *Beijing Declaration and Platform of Action*, adopted at the Fourth World Conference on Women, 27 October 1995, para.32.

<sup>221</sup> UN Committee on the Elimination of Racial Discrimination (CERD), *General Recommendation No.25 on gender-related dimensions of racial discrimination*, 20 March 2000, 1.

<sup>222</sup> See for example UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 16 December 2010, CEDAW/C/GC/28, para.18. See also UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Article 3 of the Covenant)*, 11 August 2005, E/C.12/2005/4, para.5. See also UN Committee on the Elimination of Racial Discrimination, General Comment No. 25: Gender-related dimensions of racial discrimination, 20 March 2000, U.N. Doc. A/55/18, annex V.

<sup>223</sup> International Labour Office, *General Survey concerning fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* (Geneva: ILO, 2012), 314.

<sup>224</sup> See Article 8, ILO, *Convention Concerning Decent Work for Domestic Workers*, C189, 16 June 2011.

<sup>225</sup> “Multiple discrimination” is adopted by Article 6(1) in UN General Assembly, *Convention on the Rights of Persons with Disabilities: resolution / adopted by the General Assembly*, 24 January 2007, A/RES/61/106. “Multiple forms of discrimination” is used by UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures*, 2004, para.12.

<sup>226</sup> “Intersectional discrimination” is explicitly referred to by UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 16 December 2010, CEDAW/C/GC/28, para.26.

<sup>227</sup> “Cumulative discrimination” is referred to by UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (Article 2, para.2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20, para.17.

<sup>228</sup> Timo Makkonen, *Multiple, Compound and Intersectional Discrimination: Bringing The Experiences of the Most Marginalized to the Fore*, Institute for Human Rights (Turku: Åbo Akademi University Press, 2002), 9-12.

<sup>229</sup> See UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (Article 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20, para.27.

takes on different forms contextually over time. Noting the unique impact of such complicated forms of discrimination on individuals, the ICESCR General Comments encourage particular consideration of and remedies for it.<sup>230</sup> A CEDAW General Recommendation also recommends specific temporary special measures to deal with such “multiple forms of discrimination against women and its compounded negative impact on them”.<sup>231</sup> The CEDAW General Recommendation No. 26 points out that women migrant workers often face “intersecting forms of discrimination, suffering not only sex- and gender-based discrimination, but also xenophobia and racism”, which makes them extra “vulnerable to sexual abuse, sexual harassment and physical violence, especially in those gender-segregated sectors where women predominate”.<sup>232</sup> These continual efforts in the international legal circle to address intersectional discrimination rightly endorse the indivisibility of human rights to which different groups of people are entitled, despite the fact that some of the international human rights conventions seem to only address the human rights of a group of people with a singular social category.<sup>233</sup>

It is, at the same time, legitimate and necessary to include provisions on multiple forms of discrimination into the domestic legal system as well.<sup>234</sup> It is legitimate to do so because states are obliged to recognize and prohibit such intersectional forms of discrimination, for example, CEDAW urges state parties to eliminate “discrimination against women in *all* its forms”, which naturally includes those forms of discrimination that are not explicitly prescribed in the Convention but evolve under new circumstances.<sup>235</sup> It is necessary because a singular method of perceiving discrimination could fail to take account of the complexity of an individual’s experience of subordination in all facets of life and thus might not provide adequate legal redress for the multiply marginalized person.<sup>236</sup> Besides, to acknowledge the multiplicity of social categories and the problems which derive from them potentially strengthens the issue of gender equality given that the people who most suffer from intersectional disadvantage are women.<sup>237</sup>

For instance, when a rural migrant woman working as a domestic helper is denied access to certain social benefits in some urban areas in China or faces sexual harassment in her work place, it might have to do equally with her Hukou status, or her sex/gender, or her particular occupation. The difficulties she faces in life and work might be different from an urban woman worker who works as a member of the managerial staff in a company, or a migrant male worker who works on a construction project. In such situation, if the victim would like to go to court to seek justice for being discriminated against, she has a question, upon what ground should her claim of discrimination rely? As to the judge, no matter how sympathetic he or she is towards this migrant woman working as a domestic helper, the judge could find no way in Chinese law to offer this worker any extra remedy. What makes the situation worse is that, for some cases, it is relatively easy to find comparators, but in other cases, it is rather difficult to identify a proper comparator, and thus a “comparator methodology” becomes problematic because it consequently only allows a limited number of circumstances to be considered to be discrimination.<sup>238</sup>

Other countries’ domestic legal systems are also dealing with the case of intersectionality by means of trial and error. At the beginning of the adoption of this multi-axis way of analysing discrimination, there were states who hesitated to entertain intersectional claims either by directly denying the possibility of discrimination claims on only one ground, or implicitly rejecting the idea by ruling on one heading only. An example of explicit

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<sup>230</sup> See UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (Article 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20, para.17.

<sup>231</sup> See UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures*, 2004, para.12.

<sup>232</sup> See UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 23: Political and Public Life*, 1997, A/52/38, para.20.

<sup>233</sup> Lisa A. Crooms, “Indivisible Rights and Intersectional Identities or, What Do Women’s Human Rights Have to Do with the Race Convention?” *40 Howard Law Journal* 619 (1997): 625-626.

<sup>234</sup> International Commission of Jurists, *International Human Rights Law and Gender Equality and Non-Discrimination Legislation: Requirements and Good Practices*, ICJ Briefing Paper (Geneva: International Commission of Jurists, 2014), 7.

<sup>235</sup> See UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 16 December 2010, CEDAW/C/GC/28, para.15.

<sup>236</sup> Margaret Satterthwaite, “Crossing Borders, Claiming Rights: Using Human Rights Law to Empower Women Migrant Workers”, *Yale Human Rights and Development Journal*, Vol. 8: Issue 1 (2005): 3.

<sup>237</sup> See D. Schiek, “Broadening the Scope and the Norms of EU Gender Law: Towards a Multidimensional Conception of Equality Law”, *12 Maastricht Journal of European and Comparative Law* (2005): 427-466.

<sup>238</sup> Suzanne B. Goldberg, “Discrimination by Comparison”, *Columbia Public Law & Legal Theory Working Papers*, Paper 9185 (2010): 29.

denial of such situation can be found in *Bahl v Law Society* decided by the UK Court of Appeal, which demanded that a victim had to prove both discriminatory grounds separately.<sup>239</sup> An example of a case where implicit rejection of such an idea can be found is in the German Federal Administrative Court Ruling in a case concerning a dismissed female school teacher who wanted to wear a headscarf, where the court ruled on the basis of gender discrimination alone, without acknowledging intersectional discrimination.<sup>240</sup> After all, a legal claim on multiple grounds of discrimination is a challenge to the traditional legal method of a single-based ground in a claim for discrimination. Nevertheless, there are some positive examples for the acceptance of such a concept. For instance, in 2002, the Paris Court of Appeal accepted a case of discrimination based on both gender and race without questioning the comparators of such dual discrimination.<sup>241</sup> Later, in 2007, the Dutch Equal Treatment Commission readily acknowledged the possibility of intersectional sexual and ethnic harassment.<sup>242</sup> More and more legislators and adjudicators have realized that ignoring an intersectional approach, which highlights the differences of subordination, could lead to more marginalization.<sup>243</sup> From the above discussion, we can safely develop several implications regarding multiple discrimination:

- 1) **To raise public awareness of multiple disadvantage faced by migrant women workers as domestic helpers.**
- 2) **To include multiple discrimination as an aggravated form of discrimination in law and give particular remedy to it accordingly.**

In sum, the guidelines generated from the analysed standards are summarized as follows:

- 1) Give a clear and comprehensive definition of discrimination and strictly prohibit such discrimination in all social fields including political, economic, social, cultural and civil or any other social field. (As is required by Article 1 CEDAW and Article 1(1) of ILO No. 111.)
- 2) Direct discrimination occurs when an individual is treated less favourably than another person in a similar situation for a reason related to a prohibited ground, such as sex or gender, religion, age, ethnicity, race, social origin etc. (As is defined in ICESCR General Comment Nos.16 and 20.)
- 3) Indirect discrimination usually occurs when rules or practices appear to be neutral yet have a detrimental effect on certain groups of people. (As is defined in ICESCR General Comment Nos.16 and 20.)
- 4) Considering the particular case of migrant workers, social origin as a discriminatory ground must be explicitly prohibited by domestic law. (As is expressed by ILO CEACR Direct Request to China.)
- 5) When defining discrimination in legal terms, several conditions that must not be deemed as discrimination are recommended to be articulated; such as inherent job requirements, protective measures tailored to specific needs, temporary special measures etc. (As is allowed by Article 1(2) of ILO 111 and Article 4 CEDAW.)
- 6) The principle of “equal pay for work of equal value for both men and women workers” must be explicitly established as a fundamental rule of the domestic labour market. (As is required by Article 1 (b) of ILO 100 and Article 11 (d) of CEDAW.)
- 7) Domestic helpers must be granted no less favourable treatment concerning pregnancy and maternity benefits than the treatment applicable to other types of workers. (As is requested by Article 14 of ILO No. 189.)
- 8) Give particular emphasis by law to intersectional disadvantage, especially the vulnerability to gender-based violence, faced by migrant women working as domestic helpers. (As is expressed by CMW General Comment No.2.)

<sup>239</sup> UK Court of Appeal (Civil Division), *Bahl v The Law Society & Anor* [2004] EWCA Civ 1070, Case No: A1/2003/2787.

<http://www.bailii.org/ew/cases/EWCA/Civ/2004/1070.html>

<sup>240</sup> “Judgment of the Second Senate of 24 September 2003” on the basis of the oral hearing of 3 June 2003, 2 BvR 1436/02. As to the case ruling see “Judgment of 24 September 2003”, Bundesverfassungsgericht, accessed 26 February 2017,

[http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2003/09/rs20030924\\_2bvr143602en.html](http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2003/09/rs20030924_2bvr143602en.html)

<sup>241</sup> Judgment of the Paris Court of Appeal, no° 2001/32582, 29 January 2002.

<sup>242</sup> ETC Opinion 2007-40, cited by Susanne Burri and Dagmar Schiek eds., *Multiple Discrimination in EU Law: Opportunities for Legal Responses to Intersectional Gender Discrimination?* (Brussel: European Commission, 2009), 15.

<sup>243</sup> Francesca Bettio and Silvia Sansonetti ed., *Visions for Gender Equality* (Luxembourg: Publication Office of the European Union, 2015), 10.

- 9) To include by law violence against women as a serious form of discrimination; and to include by law abuse and harassment as a serious form of violence against women; and explicitly prohibit such actions. (As is required by CEDAW General Recommendation No. 19 and Article 5 of the ILO Convention No. 189.)
- 10) Establish laws to prevent and punish, including the state itself and any third parties such as private persons, organizations or enterprises, if they carry out violence, abuse and harassment against women. (As is required by CEDAW General Recommendation No. 19.)
- 11) To recognize multiple discrimination as an aggravated form of discrimination in law and give a particular remedy for it accordingly. (As is recommended in ICESCR General Comment No. 20.)

#### **4.6 A review of the concrete labour standards that ensure decent work for migrant women working as domestic helpers**

##### ***Introduction***

As has been discussed in the previous sections, as well as the general principles to guarantee equality and eliminate discrimination, a guarantee of the specific set of labour rights is also essential to improve the status of migrant women working as domestic helpers. Given the fact that they work and live in a specific social field where a large percentage of house rules and working conditions are set by the host family with little room for state law intervention or labour inspection, migrant women working as domestic helpers are constantly isolated from society and are exposed to potential abuse. That is why, in their case, several aspects of labour standards are greatly needed, such as freedom of association, decent working conditions and access to social security and benefits. Apart from these aspects, which are already applicable to all normal workers, being also guaranteed for domestic helpers, there are some specific requirements as well which need to be fulfilled to cope with the specific characteristics of domestic helpers. Hence, in this section, in order to come up with a list of guidelines to improve the labour law in China, provisions and relevant interpretations regarding these three aspects in the labour standards will be analysed according to the immediate needs of migrant women working as domestic helpers.

In order to identify the relevant labour standards, several provisions related to decent working conditions from both the IHRL and ILO normative system will be examined. Firstly, in the light of the need to be ensured freedom of association in the labour market field, provisions and interpretations in this regard will be analysed. This will cover such provisions as those found in UDHR, ICCPR, ICESCR, and ILO Convention Nos. 87 (Freedom of Association and Protection of the Right to Organize Convention), 98 (Right to Organize and Collective Bargaining Convention), 97 (Convention concerning Migration for Employment), 143 (Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers), and 189 (Convention on Decent Work for Domestic Helpers). Secondly, regarding the need for accessibility to social security, provisions and interpretations in this regard are found and analysed in ICESCR, CEDAW, ILO Nos. 97, 143, 189 and 102 Social Security (Minimum Standards) Convention. Lastly, to suit the needs of domestic helpers and to ensure decent working conditions for them, the provisions and interpretations that take into consideration the specificity of the characteristics of domestic service which are found in ICESCR, CEDAW, ILO Nos. 97, 143 and 183 are analysed.

##### **4.6.1 Ensure freedom of association <sup>244</sup>**

In face of the fierce competition in the labour market and the advantageous position of the host families, it is necessary to ensure that there is an organization that represents the interests of domestic helpers so as to enhance their bargaining power. The working conditions of these people fluctuate, largely depending on their salary negotiation, economic conditions of the local community and the house rules of the host family. Additionally, the relatively isolated working environment and the absence of co-workers, present great

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<sup>244</sup>ILO, *Declaration on Fundamental Principles and Rights at Work*, adopted by the International Labour Conference at its Eighty-sixth Session, Geneva, 18 June 1998,

highlights these four core labour principles endorsed by the international community:

- freedom of association and the effective recognition of the right to collective bargaining;
- the elimination of all forms of forced or compulsory labour;
- the effective abolition of child labour;
- the elimination of discrimination in respect of employment and occupation.

See International Labour Office, *The International Labour Organization's Fundamental Conventions* (Geneva: ILO, 2002), 7.

challenges to domestic helpers to achieve satisfactory bargaining powers. Such a situation is aggravated when domestic helpers cannot officially join a local labour union or form labour unions on their own, because labour union support and collective bargaining can equip them with more negotiating power to achieve minimum salary standards or decent working conditions within a certain region given the information of market supply and needs. Besides, given the social loneliness of migrant women working as domestic helpers due to their agricultural Hukou status and the isolated working environment, a legitimate representation in a labour union can also be a haven for seeking social comfort and support.

What guarantees freedom of association? As is stipulated in Article 2 of ILO 87, all workers, regardless of any distinction, are to have the right to create and join “organizations of their own choosing” “without previous authorization”. Since ILO No. 87 concerning Freedom of Association and Protection of the Right to Organize<sup>245</sup> and ILO No. 98 Convention concerning the Application of the Principles of the Right to Organize<sup>246</sup> are the two core labour conventions out of the eight,<sup>247</sup> thus China, as an ILO member state, is obliged to perform its state obligation to fulfil such core labour standards, despite the fact that China has not ratified these core conventions.<sup>248</sup> It is also required by Article 8 of ICESCR that the state parties, obviously including China, ensure the right of everyone to “form trade unions and join the trade union of his choice”, ensure the right of trade unions to collaborate nationally and internationally, ensure the right of trade unions to function freely under the law, and ensure the right to strike.<sup>249</sup> Thus China is, under the international treaty obligation, required to ensure freedom of association for all workers, regardless of any distinction.

Article 3(3) of ILO No. 189 Convention concerning Decent Work for Domestic Workers offers further details as to how to ensure the enjoyment of freedom of association and the effective recognition of the right to collective bargaining for domestic workers and their employers, stating that “members shall protect the right of domestic workers and employers of domestic workers to establish and, subject to the rules of the organization concerned, to join organizations, federations and confederations of their own choosing”.<sup>250</sup> Beyond this, the administrative authorities are required to refrain from interfering in the activities carried out by the organization, and to ensure that these organizations cannot be arbitrarily dissolved or suspended.<sup>251</sup> Although the form of trade unions, be it diversity or monopoly, is not specifically determined by the convention, yet a significant level of independence for the organizations and freedom from state interference are required.<sup>252</sup> In sum, viewed from the social conditions of migrant women working as domestic helpers, the standards of freedom of association can be developed into the following conditions to be met in the Chinese labour law:

- 1) To ensure by law the enjoyment of freedom of association and the effective recognition of the right to collective bargaining for (migrant) domestic workers.**
- 2) Such right to freedom of association to include creating and joining organizations of the labourers’ own choosing, without previous authorization.**
- 3) The state must ensure the independence of such associations and refrain from interfering with their activities or from arbitrary dissolution of such association.**

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<sup>245</sup> See ILO, *Freedom of Association and Protection of the Right to Organize Convention*, C87, 9 July 1948.

<sup>246</sup> The former convention deals with the relations of employers, labourers, labour organizations with the public authorities, whereas the latter focuses on relations amongst employers, workers and associations. See Jean-Michel Servais, *International Labour Law* (the Netherlands: Kluwer Law International, 2011), 114.

<sup>247</sup> These ILO Conventions have been identified as fundamental, and are at times referred to as the core labour standards:

- Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)
- Right to Organise and Collective Bargaining Convention, 1949 (No. 98)
- Forced Labour Convention, 1930 (No. 29)
- Abolition of Forced Labour Convention, 1957 (No. 105)
- Minimum Age Convention, 1973 (No. 138)
- Worst Forms of Child Labour Convention, 1999 (No. 182)
- Equal Remuneration Convention, 1951 (No. 100)
- Discrimination (Employment and Occupation) Convention, 1958 (No. 111)

See International Labour Office, *The International Labour Organization’s Fundamental Conventions* (Geneva: ILO, 2002), 8.

<sup>248</sup> ILO, *Declaration on Fundamental Principles and Rights at Work*, 18 June 1998.

<sup>249</sup> Article 8, UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations Treaty Series, vol. 993, p. 3.

<sup>250</sup> Article 3, ILO, *Convention Concerning Decent Work for Domestic Workers*, C189, 16 June 2011.

<sup>251</sup> See Articles 3-4, ILO, *Freedom of Association and Protection of the Right to Organize Convention*, C87, 9 July 1948.

<sup>252</sup> See Committee of the Governing Body of the ILO, *Freedom of Association, Digest of decisions and principles of the Freedom of Association*, fifth edition (Geneva: ILO, 2006), para.318 et seq.

#### 4.6.2 Ensure access to social security

Social security is a very essential part of labour standards and it holds a significant meaning for migrant women working as domestic helpers who are often deprived of the right to it due to their non-local Hukou status or their informal occupation. Article 9 of ICESCR requires state parties to “recognize the right of everyone to social security, including social insurance”.<sup>253</sup> Article 11 (1) (e) of CEDAW obliges state parties to ensure the right to social security, “particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work”.<sup>254</sup> Article 11(2) (b) further demands that states ensure “maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances”. Social security is, in the meantime, a major subject of concern expressed by both the ILO Declaration of Philadelphia<sup>255</sup> and the ILO Constitution.<sup>256</sup>

What is the content of social security to be ensured for workers? According to Article 2 of ILO No. 157 the Establishment of an International System for the Maintenance of Rights in Social Security, these branches of social security are to be applied: (a) medical care; (b) sickness benefit; (c) maternity benefit; (d) invalidity benefit; (e) old-age benefit; (f) survivors’ benefit; (g) employment injury benefit, namely benefit in respect of occupational injuries and diseases; (h) unemployment benefit; and (i) family benefit.<sup>257</sup> According to ILO No.102, social security encompasses nine main types, including medical care, sickness benefit, unemployment benefit, old-age benefit, employment injury benefit, family benefit, maternity benefit, invalidity benefit and survivors’ benefit.<sup>258</sup> Amongst these nine types of social benefits, members of this convention must comply with at least three of them and with at least one from the unemployment, old-age, employment injury, invalidity and survivors’ benefit.<sup>259</sup>

In the meantime, a certain margin of appreciation is allowed in connection with countries’ specific economic conditions and occupational characteristics, by the ILO conventions on social security. First, state parties are allowed to choose amongst types of social security and to realize at least three of these social benefits in a progressive manner.<sup>260</sup> Secondly, temporary derogations are permitted under the condition that the states regularly examine the validity of the reasons for such derogations.<sup>261</sup> Thirdly, exceptions to categories of beneficiaries, like seamen, public servants, casual workers, and self-employed workers, can be made in the enjoyment of certain rights, so that the specificity of certain occupations is taken into account.<sup>262</sup> In the case of domestic helpers, it is explicitly required by Article 14 of ILO No. 189 that state members must ensure that “domestic workers enjoy conditions that are not less favourable than those applicable to workers generally in respect of social security protection, including with respect to maternity”. It further states that such measures can be applied progressively, in consultation with the representatives of employers and workers. Considering the specificity of domestic helpers, social security schemes must be designed for them in such a way that they are fully covered, especially by the pension system when they are too old to work, by the work-related injury benefit, and by maternity benefit. In sum, there are several conditions to be met to cover the sufficient accessibility of social security for migrant women working as domestic helpers:

- 1) **To ensure by law that domestic helpers and migrant workers get no less favourable treatment than other types of workers in terms of their accessibility to social security and benefits.**
- 2) **Take measures to ensure government-supported medical benefits and work-related injury benefits as most domestic helpers rely on commercial insurance.**

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<sup>253</sup> Articles 6-9, UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations Treaty Series, vol. 993, p. 3.

<sup>254</sup> See Article 11 (e), UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations Treaty Series, vol. 1249, p. 13.

<sup>255</sup> ILO, *Declaration concerning the aims and purposes of the International Labour Organization (Declaration of Philadelphia)*, 10 May 1944, was later incorporated in the 1946 ILO Constitution.

<sup>256</sup> See *ibid.*, para.I (d) and III (f).

<sup>257</sup> ILO, *Convention concerning the Establishment of an International System for the Maintenance of Rights in Social Security*, C157, 21 June 1982.

<sup>258</sup> See ILO, *Convention concerning Minimum Standards of Social Security*, C102, 28 June 1952.

<sup>259</sup> See Article 2(a), *Ibid.*

<sup>260</sup> See for example ILO C102. See also ILO, *Invalidity, Old-Age and Survivors’ Benefits Convention*, C128, 29 June 1967.

<sup>261</sup> See for example ILO, *The Employment Injury Benefits Convention*, C121, 8 July 1964. See also ILO, *Invalidity, Old-Age and Survivors’ Benefits Convention*, C128, 29 June 1967. See also, ILO, *Convention concerning Medical Care and Sickness Benefits*, C130, 25 June 1969.

<sup>262</sup> See *ibid.*

- 3) **Take measures to ensure government-supported old-age benefits as most domestic helpers are not included in the pension system due to their employment status.**

#### **4.6.3 Ensure specific decent working conditions for domestic workers**

- **Extend labour law protection to *all* domestic workers**

Domestic helpers, with their limited access to public resources, are considered to belong to the most marginalized segments of society.<sup>263</sup> Despite the increasing demands for domestic service, their work is often disproportionately undervalued and their working conditions poorly structured, with an absence of external monitoring and, most of the time, working without a contract.<sup>264</sup> Because of the social bias towards domestic service as “non-productive work”, it has often been excluded from labour legislation, explicitly or implicitly.<sup>265</sup> In China as well, such service is largely excluded from the labour law system as domestic helpers are mostly hired by households, which are not regarded as “employers”, thus the relationship between domestic helpers and the host family is not considered to be an employment relationship. It remains a great challenge to realize decent working conditions for domestic helpers if they are excluded from the national employment legislation, thus the ILO proclaims the need to extend the scope of application of labour laws to the domestic service sector, because the protection of working conditions and social benefits offered by labour law are incomparably superior to those offered by other legal codes.<sup>266</sup> Such inclusion of domestic helpers in the national labour law system is necessary to ensure that domestic workers enjoy the same level of protection as other workers.<sup>267</sup> Furthermore, such inclusion must cover *all* domestic workers,<sup>268</sup> irrespective of their employers being private individuals, householders, enterprises or other organizations, whether the workers work part-time or full-time, are nationals or non-nationals, whether they have live-in or live-out arrangements.<sup>269</sup> Thus two general principles are derived from the analysis:

- 1) **To extend national labour protection to *all* domestic workers.**
- 2) **To ensure that employment conditions and labour protection for domestic helpers are no less favourable than for workers in general.**

Decent work is a very comprehensive set of standards that involves access to jobs, fair remuneration, safe working environment, equal opportunity and treatment, social dialogue, social security etc.<sup>270</sup> Article 7 of ICESCR has displayed a list of requirements concerning “just and favourable conditions of work”,<sup>271</sup> which is closely related to decent working conditions, such as: (a) “fair wages and equal remuneration for work of equal value” that guarantees “a decent living for themselves and their families”, (b) “safe and healthy working conditions”, (c) “equal opportunity to be promoted”, (d) “rest, leisure and reasonable limitation of working hours”. In this case, several aspects that are pertinent to domestic helpers are chosen to be analysed in the following paragraphs as they are of most relevance: ensure written contracts for domestic service; ensure normal hours of work, overtime compensation, rest periods and paid leave; ensure safe and decent living conditions. These three requirements are further explained as follows.

- **Ensure written contract for domestic service**

In practice, most domestic services are performed without contracts, causing ambiguity in working terms and further difficulties in dispute settlement. Thus, in the case of migrant women working as domestic helpers, written contracts that provide necessary conditions of employment are essential to empower domestic

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<sup>263</sup> See ILO, *Report of the Committee on Domestic Workers, Provisional Record No. 12* (Geneva: ILO, 2010), para.204–211.

<sup>264</sup> International Labour Office, *Effective Protection for Domestic Workers: A guide to Designing Labour Laws, Conditions of Work and Employment Program, Industrial and Employment Relations Department* (Geneva: ILO, 2012), 2.

<sup>265</sup> See ILO, *Decent Work for Domestic Workers, Report IV (1)*, International Labour Conference, 99th Session (Geneva: ILO, 2010).

See also ILO, *Coverage of Domestic Workers by Key Working Conditions Laws, Domestic Work Policy, Brief No. 5* (Geneva: ILO, 2011).

<sup>266</sup> See ILO, *Extending The Scope of Application of Labour Laws to The Informal Economy: Digest of Comments of The ILO's Supervisory Bodies Related to The Informal Economy* (Geneva: ILO, 2010), 68–69.

<sup>267</sup> UN Committee on Economic, Social and Cultural Rights, *General Comment No. 18, regarding Article 6 of the International Covenant on Economic, Social and Cultural Rights*, 6 February 2006, E/C.12/GC/18, para. 10.

<sup>268</sup> Article 2, ILO, *Convention Concerning Decent Work for Domestic Workers*, C189, 16 June 2011.

<sup>269</sup> International Labour Office, *Effective Protection for Domestic Workers: A guide to Designing Labour Laws, Conditions of Work and Employment Program, Industrial and Employment Relations Department* (Geneva: ILO, 2012), 11.

<sup>270</sup> See ILO, *Decent Work Indicators: Concepts and Definitions*, first edition (Geneva: ILO, 2012), 9.

<sup>271</sup> Article 7, UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations Treaty Series, vol. 993, p. 3.

helpers.<sup>272</sup> In addition to that, it is also necessary to make sure that these contracts are formulated in a way that is understandable to domestic helpers.<sup>273</sup> Article 7 of ILO No. 189 has provided the following checklist of the content in a domestic service contract, which obliges state members to ensure that domestic workers are informed of such conditions “in an appropriate, verifiable and easily understandable manner”:<sup>274</sup>

- (a) the name and address of the employer and of the worker;
- (b) the address of the usual workplace or workplaces;
- (c) the starting date and, where the contract is for a specified period of time, its duration;
- (d) the type of work to be performed;
- (e) the remuneration, method of calculation and periodicity of payments;
- (f) the normal hours of work;
- (g) paid annual leave, and daily and weekly rest periods;
- (h) the provision of food and accommodation, if applicable;
- (i) the period of probation or trial period, if applicable;
- (j) the terms of repatriation, if applicable; and
- (k) terms and conditions relating to the termination of employment, including any period of notice by either the domestic worker or the employer.

Preferably, a model contract for domestic service arrived at in consultation with the representatives of employers and workers has to be provided free of charge to domestic workers, employers, representative organizations and the general public.<sup>275</sup> According to the previous analysis, relevant guidelines are:

- 1) To require by law written contracts for domestic service, regardless of business models.**
- 2) Provide model contracts that contain all necessary items mentioned above in an understandable way to the parties concerned in the domestic service.**

- **Normal working hours and rest periods**

To ensure decent working conditions for domestic workers, an essential aspect is to ensure that domestic helpers have normal hours of work, reasonable overtime/ stand-by compensation, and rest periods. In practice, domestic workers’ working time is mostly at the disposal of their host families; sometimes they have to work overtime for special occasions or holidays, work late at night to take care of babies or the elderly, stand-by during nights and weekends. Just as, in the case of the fashion business, in high season workers have to work overtime, whereas in low season workers can earn their salary without too much extra effort,<sup>276</sup> so too domestic helpers’ working time may fluctuate throughout the year depending on external circumstances. For example, at New Year, Mid-Autumn Day, or a family member’s birthday, wedding ceremonies and other “big days” for the family, domestic helpers have to work overtime and are kept busy preparing the food and cleaning. If a domestic worker is hired to take care of babies and the elderly, their working time may have to be tailored to the special needs of the babies and the elderly. Given the irregularity of working hours and heterogeneity of tasks due to the specific requirements of this occupation, it is necessary for legislative instruments to articulate such complexities clearly: such as, for example, to set standards on reasonable working hours, overtime limits and overtime compensation, daily and weekly rest, paid annual leave, total of

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<sup>272</sup> International Labour Office, *Effective Protection for Domestic Workers: A guide to Designing Labour Laws, Conditions of Work and Employment Program*, Industrial and Employment Relations Department (Geneva: ILO, 2012), 16.

<sup>273</sup> Article 7, ILO, *Convention Concerning Decent Work for Domestic Workers*, C189, 16 June 2011.

<sup>274</sup> *Ibid.*

<sup>275</sup> ILO, *Recommendation concerning Decent Work for Domestic Workers (No. 201)*, Geneva, 100th ILC session, 16 Jun 2011, para.6 (3) and (4).

<sup>276</sup> Sally Falk Moore, “Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study”, *Law and Society Review*, Vol. 7, No. 4 (1973): 719-746.

stand-by working hours,<sup>277</sup> or holidays with pay.<sup>278</sup> Clarifying working hours can prevent exploitation of domestic helpers and ensure the workers' rights to rest and leisure.<sup>279</sup>

According to Article 10 of ILO 189, member states must ensure equal treatment for domestic helpers and workers in general regarding "normal hours of work, overtime compensation, periods of daily and weekly rest and paid annual leave in accordance with national laws, regulations or collective agreements, taking into account the special characteristics of domestic work".<sup>280</sup> "Weekly rest shall be at least 24 consecutive hours." "Periods during which domestic workers are not free to dispose of their time as they please and remain at the disposal of the household in order to respond to possible calls shall be regarded as hours of work to the extent determined by national laws, regulations or collective agreements, or any other means consistent with national practice."<sup>281</sup> This means that the stand-by hours must be counted as working hours, too. Moreover, the state laws hold discretion over the number of standby hours which equal one unit of working hours. From the above analysis and provisions, we can come up with several implications on the regulation of working hours for domestic helpers:

- 1) **The law must set equal standards for domestic workers and workers generally as to: normal hours of work, overtime compensation, periods of daily and weekly rest, paid annual leave, a holiday with pay in proportion to the period of service performed etc.**
- 2) **Limitations should be set upon permissible overtime hours and night work.**
- 3) **Rest hours are to include: period of daily rest for meals and breaks, weekly rest no less than 24 consecutive hours.**<sup>282</sup>

- **Other decent working conditions**

Extra attention must be paid to the case of live-in domestic helpers. In principle, if domestic workers reside in the household to provide services, then the living conditions, which are, at the same time the immediate working conditions, are an important aspect to which attention must be paid. Live-in arrangements happen in many families where domestic helpers are also migrant workers, who usually have limited resources to afford independent accommodation in the big cities. Such living conditions contain several aspects, such as respect for the workers' privacy and personal liberty, freedom of communication, freedom of movement, provision of adequate food, and the avoidance of forced labour situations. Thus, it is required by Articles 6 and 13 of ILO No. 189 on Decent Work for Domestic Helpers that domestic workers must enjoy fair terms of employment and decent working conditions and occupational health and safety just the same as other workers.<sup>283</sup> And if they reside in the household, such domestic workers must be ensured decent living conditions.<sup>284</sup> Furthermore, Article 9 of the ILO 189 obliges state member to ensure domestic workers:

(a) are free to reach agreement with their employer or potential employer on whether to reside in the household;

(b) who reside in the household are not obliged to remain in the household or with household members during periods of daily and weekly rest or annual leave; and

(c) are entitled to keep in their possession their travel and identity documents.

This means that domestic workers have a say in whether to work as a live-in worker, and enjoy sufficient freedom of movement beyond working hours, and have rights to their personal belongings.<sup>285</sup> Implications developed on the basis of the analysis above can be summarized as:

- 1) **Domestic workers must enjoy the freedom to reach agreement with their host family over their residence: live-in or live-out.**

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<sup>277</sup> International Labour Office, *Effective Protection for Domestic Workers: A guide to Designing Labour Laws, Conditions of Work and Employment Program*, Industrial and Employment Relations Department (Geneva: ILO, 2012), 49.

<sup>278</sup> See Article 3-5, ILO, *Convention concerning Annual Holidays with Pay (Revised)*, C132, 24 June 1970.

<sup>279</sup> Article 24 states, "everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay". UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

<sup>280</sup> Article 10, ILO, *Convention Concerning Decent Work for Domestic Workers*, C189, 16 June 2011.

<sup>281</sup> Ibid.

<sup>282</sup> See Article 6, ILO, *Convention concerning Weekly Rest in Commerce and Offices*, C106, 26 June 1957.

<sup>283</sup> Article 13, ILO, *Convention Concerning Decent Work for Domestic Workers*, C189, 16 June 2011.

<sup>284</sup> Article 6, *ibid.*

<sup>285</sup> Article 9, *ibid.*

- 2) **Decent living conditions must be granted by law to domestic helpers under a live-in arrangement.**
- 3) **Migrant domestic helpers are entitled to keep in their possession their identity documents and other personal belongings.**

**Decent living conditions cover but are not limited to: respect for workers' privacy, right to personal belongings, right to freedom of communication and movement, adequate food etc.** In sum, the guidelines in respect of the enjoyment of decent working conditions are:

- 1) To ensure by law the enjoyment of freedom of association and the effective recognition of the right to collective bargaining for (migrant) domestic workers, including creating and joining organizations of the labourers' own choosing, without previous authorization. (As is required by Article 3(3) of ILO No. 189.)
- 2) The state must ensure the independence of such associations and refrain from interfering with their activities or from arbitrary dissolution of such association. (As is required by Articles 3 and 4 of ILO No. 87.)
- 3) Take measures to ensure government-supported social insurance for all workers (as is required by Article 9 of ICESCR) including domestic helpers, especially considering the fact that most domestic helpers are not included in the pension system due to their employment status.
- 4) To ensure employment conditions and labour protection for domestic helpers are no less favourable than for other workers in general. (As is required by Article 14 of ILO No. 189.)
- 5) The law sets equal standards for domestic workers and workers generally to ensure their decent working conditions in terms of: normal hours of work, overtime compensation, periods of daily and weekly rest, paid annual leave, holiday with pay in proportion to the period of service performed etc. Limitations should be set upon permissible overtime hours and night work. Rest hours must include: periods of daily rest for meals and breaks, weekly rest no less than 24 consecutive hours. Domestic workers enjoy the freedom to reach agreement with their host family over their residence: live-in or live-out. (As is required by Article 10 of ILO 189.)
- 6) Decent living conditions must be granted by law to domestic helpers under a live-in arrangement. Decent living conditions cover but are not limited to: respect for workers' privacy, right to identity documents and personal belongings, right to freedom of communication and movement, adequate food etc. (As is required by Articles 6 and 9 of ILO 189.)

#### **4.7 Conclusion**

Based on the needs of migrant women working as domestic helpers in China as described in Chapter 2 and the theoretical underpinning of gender and intersectionality discussed in Chapter 3, this chapter examined the treaty bodies' provisions and interpretations regarding non-discrimination and work-related rights in the United Nations' human rights treaty system and International Labour Organization's convention system, in order to identify conditions to be met for the improvement of domestic legislation. With the guidelines that are generated from the IHRL/ILO normative system tailored to the needs of migrant women working as domestic helpers, taking into account gender and intersectional perspectives, Chapter 5 can further identify the gaps between the guidelines and reality, on the basis of which suggestions for improvement are proposed. Thus, Chapter 4 is a very important liaison between the previous and the following chapters.

This chapter began with an overview of the UN normative system and the ILO normative system that is aimed at protecting fundamental human rights and decent working conditions. For the UN normative system, several core and relevant legal documents were introduced, such as UDHR, ICESCR and CEDAW. Not only because they are the most fundamental ones within the IHRL system, but also because China has been actively interacting with these instruments and the mechanisms attached to them. For the ILO normative system, the core labour standards including the elimination of employment discrimination and freedom of association were introduced, as were several lesser standards for decent working conditions including ILO requirements on payment, working time, access to social security etc. The supervisory mechanism of ILO was also touched upon as some of the ILO CEACR reports were examined in this study.

The chapter then went on with an introduction to international law, including international human rights law and international labour law's position in the Chinese legal system. As far as the domestic law provides, there have been two ways of making international law effective domestically. One is to incorporate the provisions of

the international treaties into domestic laws by promulgating new laws or amending existing laws. The other is by explicitly acknowledging the superior position of the ratified international treaties and accepted international customary laws in times of legal conflict, as many of the domestic laws have done. Section 4.3 offered numerous examples to explain how these methods work in the Chinese legal system. In practice, beyond the two main ways already mentioned, China also performs its international human rights obligations by promoting administrative policies and national plans that are directly issued by the central authorities to improve the status of women, children, migrants and other marginalized groups.

In order to find the most relevant provisions and interpretations in the vast ocean of the IHRL and ILO normative systems for the benefit of migrant women working as domestic helpers, the chapter further studied the needs of migrant women working as domestic helpers. It categorized their needs into three main types, namely, to enjoy equal treatment in their lives and at work with other workers; to enjoy a comprehensive set of decent working conditions, and to get access to justice. The right to be treated equally includes working in a gender-equal labour market with equal payment for work of equal value, the elimination of discriminatory treatment based on agricultural Hukou status, recognition of intersectional disadvantage, and the entitlement to treatment arising from special measures to compensate for past injustices. Decent working conditions include not only the labour rights enjoyed by other employees, but also some specific rights that are closely related to the characteristics of domestic service, such as the right to be represented in labour unions, the right to have written contracts with details of working conditions, the right to have privacy and freedom of movement, the right to sufficient access to social security.

Hence, with an outline of the categorized needs, the chapter continued to search in the pool of the given IHRL and ILO normative systems for those provisions that can potentially satisfy the said needs. Section 4.5 translated the need to be treated equally into the principle of elimination of discrimination and promotion of equality, and then selected the relevant provisions in the mapped conventions and interpretations given by the relevant treaty bodies. The section proceeded to analyse them with due consideration of the situation of migrant women working as domestic helpers, and thus came up with implications that could be used as guidelines for improvement. The guidelines generated from the analysed standards are summarized as follows:

- 1) Give a clear and comprehensive definition of discrimination and strictly prohibit such discrimination in all social fields including political, economic, cultural and civil or any other social field. (As is required by Article 1 CEDAW and Article 1(1) of ILO No. 111.)
- 2) Direct discrimination occurs when an individual is treated less favourably than another person in a similar situation for a reason related to a prohibited ground, such as sex or gender, religion, age, ethnicity, race, social origin etc. (As is defined in ICESCR General Comment Nos.16 and 20.)
- 3) Indirect discrimination usually occurs when rules or practices appear to be neutral yet have a detrimental effect on certain groups of people. (As is defined in ICESCR General Comment Nos.16 and 20.)
- 4) Considering the particular case of migrant workers, social origin as a discriminatory ground must be explicitly prohibited by domestic law. (As is expressed by ILO CEACR Direct Request to China.)
- 5) When defining discrimination in legal terms, several conditions that must not be deemed as discrimination must be articulated by law, such as inherent job requirements, protective measures tailored to specific needs, temporary special measures etc. (As is allowed by Article 1(2) of ILO 111 and Article 4 CEDAW.)
- 6) The principle of “equal pay for work of equal value for both men and women workers” must be explicitly established as a fundamental rule of the domestic labour market. (As is required by Article 1 (b) of ILO 100 and Article 11 (d) of CEDAW.)
- 7) Domestic helpers shall be granted no less favourable treatment concerning pregnancy and maternity benefits than that applicable to other types of workers. (As is requested in Article 14 of ILO No. 189.)
- 8) Give particular emphasis by law to intersectional disadvantage, especially the vulnerability to gender-based violence, faced by migrant women working as domestic helpers. (As is expressed by CMW General Comment No.2.)
- 9) To include by law violence against women as a serious form of discrimination. To include by law abuse and harassment as a serious form of violence against women, and explicitly prohibit such actions. (As is required by CEDAW General Recommendation No. 19 and Article 5 of the ILO Convention No. 189.)

- 10) Establish laws to prevent and punish, including the state itself and any third parties such as private persons, organizations or enterprises, if they carry out violence, abuse and harassment against women. (As is required by CEDAW General Recommendation No. 19.)
- 11) To recognize multiple discrimination as an aggravated form of discrimination in law and give particular remedy to it accordingly. (As is recommended in ICESCR General Comment No. 20.)

Section 4.6 focused on the needs of migrant women working as domestic helpers to be entitled to the same decent working conditions as other workers, with due consideration of the specific characteristics of domestic service. The provisions found in the IHRL/ILO normative system with regard to labour rights and decent work were examined in three aspects. Firstly, one of the core labour rights, freedom of association, which underlines the need of migrant women working as domestic helpers to be represented by labour unions, was further analysed. Second, access to sufficient social security was analysed. Third, a series of international labour standards prescribed for the specificity of performing domestic service, such as a guarantee of written contracts, limitations set on prolonged working hours, working conditions in a private household etc. were also looked at. In sum, the guidelines in respect of the enjoyment of decent working conditions for the specific characteristics of domestic helpers are:

- 1) To ensure by law the enjoyment of freedom of association and the effective recognition of the right to collective bargaining for (migrant) domestic workers, including creating and joining organizations of the labourers' own choosing, without previous authorization. (As is required by Article 3(3) of ILO No. 189.)
- 2) The state must ensure the independence of such associations and refrain from interfering with their activities or from arbitrary dissolution of such associations. (As is required by Article 3 and 4 of ILO No. 87.)
- 3) Take measures to ensure government-supported social insurance for all workers (as is required by Article 9 of ICESCR) including domestic helpers, especially considering the fact that most domestic helpers are not included in the pension system due to their employment status.
- 4) To ensure employment conditions and labour protection for domestic helpers are no less favourable than for other workers in general. (As is required by Article 14 of ILO No. 189.)
- 5) The law sets equal standards for domestic workers and workers generally to ensure their decent working conditions in terms of: normal hours of work, overtime compensation, periods of daily and weekly rest, paid annual leave, holiday with pay in proportion to the period of service performed etc. Limitations should be set upon permissible overtime hours and night work. Resting hours are to include: periods of daily rest for meals and breaks, weekly rest no less than 24 consecutive hours. Domestic workers must enjoy the freedom to reach agreement with their host family over residence: live-in or live-out. (As is required by Article 10 of ILO 189.)
- 6) Decent living conditions must be granted by law to domestic helpers under a live-in arrangement. Decent living conditions cover but are not limited to: respect for workers' privacy, right to personal belongings and identity documents, right to freedom of communication and movement, adequate food etc. (As is required by Article 6 of ILO 189.)



### 5.1 Introduction

To answer the central research question as to what improvements in the Chinese domestic legal system have to be made to safeguard, in relation to migrant women working as domestic helpers, human rights and decent work under the state obligations arising from international human rights treaties and international labour rights conventions, this study has done the following: described, in Chapter 2, the status quo of migrant women working as domestic helpers and the concrete problems they face; introduced, in Chapter 3, intersectionality as the analytical tool that this study uses; and analysed, in Chapter 4, the existing IHRL/ILO standards and their implications as the guidelines for action.

Following these lines of thought, this chapter will, first, identify the implementation gaps between the guidelines for action developed in Chapter 4 and the Chinese legal provisions, by comparing the standards required with what the Chinese law has prescribed. **“Implementation gaps” occur when states fail to pass domestic legislation, or do not establish procedures and institutions that are required to implement an international standard.**<sup>1</sup> Thus, the implementation gaps present in two general situations, either there is no domestic law on the topic, or no domestic implementation mechanism in respect of it.<sup>2</sup> Accordingly, the possible remedies for the situation will be to establish new laws or national institutions in the relevant area.<sup>3</sup>

Before that, in order to identify the implementation gaps, the study first focuses on three aspects, namely, the aspect on ensuring equality and eliminating discrimination, the aspect on ensuring decent work and the aspect on ensuring access to justice. There are several channels, inter alia literature review, to identify the implementation gaps between the international standards and the Chinese law in terms of protecting the human rights of and decent work for migrant women working as domestic helpers. For example, the study looks into the existing international treaty bodies’ observations to China, such as ICESCR’s Concluding Observations to China, CEDAW’s Concluding Observations to China, and ILO CEACR Direct Requests to China etc. In these documents, the author focuses on those treaty bodies’ comments touching upon the afore-mentioned three aspects. The study also compares what standards are demanded in the international human rights treaties and international labour conventions with what is prescribed in the Chinese laws, then looks to see if there are implementation gaps between the two.

On the basis of the identified gaps, the chapter will then point to directions for improvements by offering suggestions to the Chinese government to adopt legislation and other measures so that China fulfils its obligations under the international human rights treaties and international labour conventions, for the benefit of migrant women working as domestic helpers. The legal suggestions come from three areas, namely, to eliminate discrimination against and promote equal treatment for migrant women working as domestic helpers on a par with other workers, to ensure decent work for migrant women working as domestic helpers, and to ensure access to justice for them given the social conditions they face. The legislative suggestions mainly come out of the reference to the relevant provisions in the ratified conventions, the treaty bodies’ general comments, and their concluding observations to China. As to the social mechanism that is proposed to be used to solve the absence of labour inspection and labour arbitration in the current domestic service business, the study will compare different formal and informal social controls that can be used to ensure supervision over labour conditions and access to justice, and then come up with further suggestions in this regard.

Hence, this chapter proceeds as follows. First, it identifies the implementation gaps between the current Chinese legal system and the international standards examined in the previous chapter regarding the protection of migrant women working as domestic helpers, that is, what still needs to be done on the domestic level to fulfil the state obligations under the ratified international human rights treaties and international labour conventions for equal protection for migrant women working as domestic helpers. The gaps are analysed under three main heads in Section 5.2.: (1) the implementation gaps between the domestic laws and the international standards on ensuring equality and eliminating discrimination for migrant women working as domestic helpers; (2) the implementation gaps between the domestic laws and the international standards on safeguarding international labour standards for migrant women working as domestic helpers; and (3) the implementation gaps between domestic mechanisms and the international standards on ensuring labour rights supervision and access to justice for migrant women working as domestic helpers.

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<sup>1</sup> International Council on Human Rights Policy, *Human Rights Standards: Learning from Experience* (Switzerland: Versoix, 2006), 9.

<sup>2</sup> *Ibid.*, 10.

<sup>3</sup> *Ibid.*

Second, based on these identified gaps, the following sections address the three types of implementation gaps respectively by proposing directions for improvements in the Chinese domestic laws. Section 5.3 puts forward suggestions for the Chinese domestic law on eliminating discrimination and promoting equal treatment for the benefit of migrant women working as domestic helpers, with reference to the derived international standards summarized in Chapter 4. Section 5.4 then provides some concrete suggestions as to how to ensure decent work for migrant women working as domestic helpers in China with reference to the afore-mentioned international standards. Finally, Section 5.5 comes up with suggestions as to how to better implement labour inspection and labour arbitration in the field of the domestic service business, in order to supervise the labour conditions of and ensure access to justice for migrant women working as domestic helpers, by comparing various formal and informal controls for ensuring access to justice for these workers, taking due consideration of the immediate social surroundings they are in.

## 5.2 Identify the gaps: comparing the ratified IHRL/ILO conventions with the Chinese Law

### Introduction

Based on the guidelines developed on the basis of the international human rights treaties and international labour conventions in Chapter 4, there are several requirements to be met in order to fulfil the state's obligations under the ratified international human rights conventions and international labour conventions to eliminate discrimination and ensure decent work for labourers. First, for eliminating discrimination and promoting equality, definitions of all forms of discrimination will have to be specified, the principle of equal pay for work of equal value will have to be given full legislative expressions, the practices of de facto discrimination on the basis of gender and social origin will have to be tackled. Second, for ensuring work-related rights, freedom of association and appropriate representation in the labour unions has to be guaranteed, accessibility to social security has to be guaranteed for workers regardless of their types of contract, specific rights have to be articulated given the characteristics of domestic helpers, such as a guarantee of written contract, rest hours, right to privacy and personal belongings, freedom from harassment and violence etc.

According to the full scheme of gaps introduced in the report, *Human Rights Standards: Learning from Experience*, normative gap, application gap, supervisory gap, ratification gap and implementation gap may occur between the international human rights legal framework and its implementation domestically.<sup>4</sup> But this study intends to focus only on identifying the implementation gaps between the domestic legal system and the developed guidelines. As has been explained in the introduction in Section 5.1, **“implementation gaps” occur when states fail to pass domestic legislation, or do not establish procedures and institutions that are required to implement an international standard.**<sup>5</sup> This focus means that this study is not going to identify the normative gaps or supervisory gaps on the international level,<sup>6</sup> despite the fact that there is no lack of criticism of CEDAW on its sole focus on women as a homogeneous group which ultimately accentuates women's need for “special protection”, as well as CEDAW's dualistic understanding of sex/gender with the associated danger of prolonging the tenacity of biological determinism or protectionism.<sup>7</sup> For the sake of this study, CEDAW is still invoked as the primary source of international law to offer guidance for domestic legislation. Additionally, the criticized “protectionism approach” adopted by Chinese domestic laws will be addressed in the study.

According to the needs of migrant women working as domestic helpers that are elaborated in Chapter 4, this section identifies the implementation gaps by comparing the requirements of the guidelines developed in Chapter 4 and the situation of the current Chinese legal system in the following ways: the implementation gaps regarding equality promotion and discrimination elimination (5.2.2), the implementation gaps concerning safeguarding decent work for migrant women working as domestic helpers (5.2.3) and the implementation gaps on ensuring labour rights supervision and access to remedies for these women (5.2.4).

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<sup>4</sup> For more details of the concepts of normative gap, application gap, supervisory gap, ratification gap and implementation gap, see *ibid*, 7-8.

<sup>5</sup> *Ibid*, 9.

<sup>6</sup> For multiple levels of gaps, including the international law on this matter, see Qinxuan Peng, “Multi-layered Gaps between ILO Conventions and the Chinese Legal Protection for Migrant Women Workers as Domestic Helpers in China,” ed. Roger Blanpain, *Protecting Labour Rights in a Multi-Polar Supply Chain and Mobile Global Economy* (the Netherlands: Kluwer Law International, 2015): 31-48.

<sup>7</sup> Dianne Otto, “International Human Rights Law: Towards Rethinking Sex/Gender Dualism and Asymmetry,” eds. Margaret Davies and Vanessa Munro, *The Ashgate Research Companion to Feminist Legal Theory* (New York: Routledge, 2016), 198.

### 5.2.1 Implementation gaps on ensuring equality and eliminating discrimination

First, let us look at the provisions of the principle of ensuring equality and eliminating discrimination *per se* in China and any room for improvement in comparison with the requirements generated from international standards. Admittedly, there are numerous provisions which can be traced in many Chinese codes in this respect. For example, Article 48 of the Constitution entitles women to “equal rights with men in all spheres of life, political, economic, cultural and social, and family life”.<sup>8</sup> Also, Article 12 of Labour Law prohibits discrimination against workers “due to their ethnic community, race, sex, or religious belief”.<sup>9</sup> But other than such declaratory sentences, no more details can be found in any legal documents to determine what discrimination is. What kinds of discrimination are there? What constitutes discrimination and what does not? Who bears the burden of proof?<sup>10</sup> What are the remedies for those who are discriminated against? Are there punitive damages or compensative damages in such situations? When the definition of discrimination or the determination test for discrimination is not clarified, it may cause problems for victims in making a sound case that is admissible to courts, it may also make it difficult for the judges to decide a discrimination case and remedies for discrimination.

A recent case in 2016 filed in the name of gender discrimination in the labour market has caught public attention. Ms. Gao Xiao (pseudonym) had always wanted to become a professional chef. To fulfil this dream, she worked hard to improve her culinary skills and gained a chef’s qualification. In June 2015, she sought employment as an apprentice chef in a restaurant in Guangdong Province but was rejected several times despite her good qualifications. The restaurant claimed that it would “only recruit male chefs”. Ms. Gao Xiao was offended by the blunt, discriminatory attitude of the restaurant and, on 18 August 2015, filed a civil case against it in the Zhuhai District Court in Guangdong City. The case was accepted on the same day. After several months’ procedure and also an appeals procedure, the Guangzhou Mediate Court in Guangdong Province decided, on 6 September 2016, that the defendants had to pay 2000 RMB (about 270 Euros) as compensation for emotional damages, in addition to the trial fee. Furthermore, the defendant restaurant was required to issue a written apology to Ms. Gao Xiao under the supervision of the court.<sup>11</sup> This case was praised by the media as progress as it was the first case on non-discrimination which resulted in a court decision demanding a written apology for the victim, amongst the handful of discrimination cases around the country.<sup>12</sup>

But this case, and the other cases, by no means indicate a perfect anti-discrimination legal system in China. There is undoubtedly some room for improvement in the existing Chinese laws, when one refers to the guidelines derived from the ratified conventions. The methods to identify the implementation gaps are, first, using the derived guidelines developed in the previous chapters on the basis of international human rights treaties and international labour conventions, this chapter compares those guidelines with the Chinese domestic laws to see if there is a distance to be closed or things yet to be further clarified in order to fulfil China’s state obligations under these international legal documents. The study also looks into the international treaty bodies’ general observations about certain provisions and concluding observations to China’s situation, to see if there are still gaps between the requirements of these international standards and Chinese domestic laws, especially those related to elimination of discrimination and those concerning decent work, as well as those ensuring access to justice.

According to the ratified ICESCR, Article 2 (2) requires States parties to safeguard non-discrimination in the exercise of all the rights prescribed in the Covenant.<sup>13</sup> Such an obligation is immediate and cross-cutting.<sup>14</sup> The

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<sup>8</sup> Article 48, *The Constitution of the People’s Republic of China*, 1982.

<sup>9</sup> Article 12, *Labour Law of the People’s Republic of China*, 1994.

<sup>10</sup> For example, Article 19 of European Union Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, has required all Member States of the European Union to place the burden of proof in their national law on the alleged perpetrator to show that the discrimination did not occur. See “Directive 2006/54/EC,” European Union Law, accessed 6 February 2017, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32006L0054>

<sup>11</sup> See: “Female candidate was rejected to be employed as a chef, court ruled a written apology from the restaurant,” *Xinhua News*, 22 September 2016, accessed 6 February 2017, [http://www.gd.xinhuanet.com/newscentre/2016-09/22/c\\_1119604273.htm](http://www.gd.xinhuanet.com/newscentre/2016-09/22/c_1119604273.htm)

<sup>12</sup> See “Court ruled apology for the first time for gender discrimination case,” *Ifeng News*, 22 September 2016, accessed 6 February 2017, <http://wemedia.ifeng.com/282574491706821/wemedia.shtml>

<sup>13</sup> Article 2(2), UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations Treaty Series, vol. 993, p. 3.

<sup>14</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (Article 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20, para. 7.

scope of discrimination, as explained in the CESCR General Comment No.20, includes not only direct/indirect exclusion based on prohibited grounds that impairs rights' enjoyment, but also incitement to discriminate and harassment.<sup>15</sup> In order to fulfil this obligation, states must take action to eliminate both formal discrimination from state laws and substantive discrimination in practice.<sup>16</sup> Meanwhile, according to the ratified ILO No. 111, States parties are requested to undertake national policies to eliminate any discrimination and to promote equality of opportunity and treatment in respect of employment and occupation.<sup>17</sup>

In examining the obligation and the Chinese situation, the CESCR Concluding Observation to China in 2014 has pointed out an existing gap in this respect that:<sup>18</sup> "Despite the incorporation of the principle of non-discrimination in the State Party's Constitution and in other laws, the Committee regrets that the State party does not have a comprehensive anti-discrimination law that protects all marginalized and disadvantaged individuals and groups in their enjoyment of economic, social and cultural rights." Hence, China is urged to take all necessary measures to **"adopt a comprehensive set of anti-discrimination laws to combat all forms of discrimination** suffered by all disadvantaged individuals and groups".<sup>19</sup>

Admittedly, to adopt a comprehensive set of anti-discrimination laws in China seems to be a necessary step to combat de jure and de facto discrimination in society, yet the purpose and the capacity of this research is not to propose an overall legislative draft on such a comprehensive set of anti-discrimination laws. Rather, what this study can do is to add to the idea of such a comprehensive set of discrimination laws, some detailed suggestions that are relevant to the interests of migrant women working as domestic helpers. Whether or not such a comprehensive discrimination law can be adopted, discrimination itself as a legal concept has to be clarified, in either labour law, or women's interests law, or laws with same level of legal effect. Discrimination, according to definitions in the international conventions, means any forms of distinction, exclusion, restriction or preference or differential treatment, which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise of certain rights, based on the prohibited grounds of discrimination such as gender, race, disability, ethnicity and etc.<sup>20</sup> Discrimination may also manifest itself in the form of incitement of discrimination, violence and harassment.<sup>21</sup> As is pointed out by the CEDAW Concluding Observations to China, "the domestic legislation contains no comprehensive definition of discrimination against women that is in line with article 1 of CEDAW."<sup>22</sup> Indeed, for many Chinese legal provisions, they only explicitly prohibit discrimination against women, but yet the definition of discrimination is never further elaborated. Such a void in the legal system causes many difficulties in the application of anti-discrimination provisions and in the offering of adequate remedies. If judges are not instructed as to what constitutes discrimination and what does not constitute discrimination, then it is hard for them to decide a case filed with a discrimination claim. This is particularly true in China, where many cases filed with a discrimination claim were not even admitted by courts, let alone adequately addressed and redressed.<sup>23</sup> That is why **China is urged to adopt a clear definition of discrimination in its national laws to make sure that women are protected against both direct and indirect forms of discrimination.**<sup>24</sup>

It is also requested by the CEACR of ILO in its examination of the implementation of ILO No.111 in China that **"a distinction between direct or indirect discrimination [needs] to be clarified in domestic legislation to ensure**

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<sup>15</sup> Ibid.

<sup>16</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Article 3 of the Covenant)*, 11 August 2005, E/C.12/2005/4.

<sup>17</sup> Article 2, ILO, *Convention concerning Discrimination in Respect of Employment and Occupation*, C111, 25 June 1958.

<sup>18</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *Concluding observations on the second periodic report of China, including Hong Kong, China, and Macao, China*, 13 June 2014, E/C.12/CHN/CO/2, para.14.

<sup>19</sup> Ibid, para.14.

<sup>20</sup> For similar definitions, see Article 1, UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations Treaty Series, vol. 660, p. 195. See also Article 1, UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations Treaty Series, vol. 1249, p. 13. See also Article 2, UN General Assembly, *Convention on the Rights of Persons with Disabilities*, 13 December 2006, A/RES/61/106, Annex I.

<sup>21</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 19: Violence against women*, 1992.

<sup>22</sup> UN Committee on the Elimination of Discrimination against Women, *Concluding observations on the combined seventh and eighth periodic reports of China*, CEDAW/C/CHN/CO/7-8, 7 November 2014, para.12. See also UN Committee on the Elimination of Discrimination against Women, *Concluding comments of the Committee on the Elimination of Discrimination against Women: China*, CEDAW/C/CHN/CO/6, 7-25 August 2006, para.9.

<sup>23</sup> ILO, Sichuan University, Human Rights Centre, *A Selection of Cases in the Chinese Courts and Tribunals on anti-discrimination in Employment* (Beijing: ILO, 2011), 3.

<sup>24</sup> UN Committee on the Elimination of Discrimination against Women, *Concluding observations on the combined seventh and eighth periodic reports of China*, CEDAW/C/CHN/CO/7-8, 7 November 2014, para.13.

**that workers are protected against both direct and indirect discrimination”.**<sup>25</sup> In the current Chinese law, there is no legal provision that touches upon such a distinction. According to the definition offered in the treaty bodies’ opinion, direct discrimination occurs when a less favourable treatment is given to an individual based on a prohibited ground, whenever there is a comparable, similar situation. For example, when a pregnant woman is dismissed from her work because of her pregnancy status, although there is no comparable situation of a “pregnant male”, such a dismissal is still a discriminatory act based on gender.<sup>26</sup> Indirect discrimination occurs when the seemingly neutral condition, treatment or criterion is applied to everyone, but in effect, it disproportionately impacts some people with certain characteristics.<sup>27</sup> For example, in the case of domestic helpers, who are often excluded from joining local labour unions, there can be a combination of direct discrimination against their occupation and of indirect discrimination against women, who predominately compose the population of domestic servants. Such types of discriminatory acts often occur in society; with a clear definition in law and with instruction, a judge can decide about a discriminatory offence hiding behind a seemingly innocent action.

As to the list of prohibited grounds in law, race, ethnicity, gender and religious belief as prohibited grounds are explicitly protected by the Chinese Labour Law, but workers, inter alia, with agricultural Hukou are not included in the list of prohibited grounds of discrimination in the Labour Law.<sup>28</sup> Discrimination based on social origin, as is suggested by the ILO CEACR Direct Request, is the situation in which an individual’s membership of a social class determines that individual’s occupational future or accessibility to certain jobs.<sup>29</sup> The condition of discrimination based on one’s agricultural Hukou status in China could well be included as a type of discrimination based on social origin.<sup>30</sup> **But the Chinese labour law fails to include social origin as one of the prohibited grounds for discrimination and fails to provide adequate redress accordingly.**<sup>31</sup>

Since the establishment of Hukou system in 1958, discrimination against people with agricultural Hukou has been implicitly endorsed de jure and de facto. The 1958 law on Hukou system itself builds a wall between the urban areas and the rural areas. During the 1960s to 1980s, the government had provided sufficient subsidies for the city dwellers from cradle to grave, extracting all the agricultural produce from the rural areas. In the meantime, the government placed strict restrictions on the movement of farmers to the cities in order to ensure enough human resources for agricultural production to sustain the industrial production in the cities. Such rural-urban segregation has remained almost untouched until today and has been the basis of inferior treatment towards agricultural Hukou holders in almost all aspects of life. (About Hukou and its implication, see Chapter 2.)

At present, China is steadily and proactively pushing forward reform of the household registration system.<sup>32</sup> Led by the State Council, 14 ministries and commissions including the Ministry of Public Security, the National Development and Reform Commission and the Legislative Affairs Office of the State Council, are currently actively consulting on matters regarding household registration reform.<sup>33</sup> Despite the fact that Hukou reform has been carried out step by step during the past two decades with many successful pilot projects in small cities, a total abolition of the Hukou system could not be achieved overnight due to the many interests at stake. This is especially so for metropolitan cities like Beijing, Shanghai, and Guangzhou, which with their large populations and significant percentages of migrants, are still hesitant to fully open their residence permits to migrant workers. Hukou reforms carried out in Zhejiang, Chengdu and Sichuan, are still wait-and-see pilots for the effect of such reforms.

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<sup>25</sup> ILO CEACR, *Direct Request to China, on Discrimination (Employment and Occupation) Convention, 1958 (No. 111)*, adopted 2012, published 102nd ILC session, 2013, para.2.

<sup>26</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (Article 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20, para.10.

<sup>27</sup> International Labour Office, *General Survey concerning fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* (Geneva: ILO, 2012), paras. 743 and 745.

<sup>28</sup> Ronald C. Brown, “China’s Employment Discrimination Laws During Economic Transition” *Columbia Journal of Asian Law*, Vol.19 (2006), 361-427, at 422.

<sup>29</sup> International Labour Office, *General Survey concerning fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* (Geneva: ILO, 2012), para.7.

<sup>30</sup> *Ibid.*, para.802.

<sup>31</sup> ILO CEACR, *Direct Request to China, on Discrimination (Employment and Occupation) Convention, 1958 (No. 111)*, adopted 2012, published 102nd ILC session, 2013, paras. 1 and 7.

<sup>32</sup> ILO CEACR, *Direct Request to China, on Discrimination (Employment and Occupation) Convention, 1958 (No. 111)*, adopted 2012, published 102nd ILC session, 2013, para.7.

<sup>33</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *Implementation of the International Covenant on Economic, Social and Cultural Rights: Second periodic reports submitted by States parties under articles 16 and 17 of the Covenant: China*, 6 July 2012, E/C.12/CHN/2.

However, despite the fact that the government has spared no efforts to reform Hukou policies around the country and has abolished many regulations that restricted rural migrant workers being employed transregionally, yet unequal treatment of rural migrant workers in terms of employment opportunities, working conditions, pension plans, accessibility to education of their children, still prevails in large cities.<sup>34</sup> Although many Chinese laws, such as the Employment Promotion Act of the People's Republic of China, do provide that "governments at the county level are encouraged to direct more surplus rural workers into the urban areas and welcome them with improved working environment",<sup>35</sup> such laws are seldom strictly obeyed in practice.<sup>36</sup> The migrant workers from rural areas continue to be *de facto* discriminated against in the fields of employment, social security, health care and education.<sup>37</sup> There are indeed implementation gaps between the prohibition of discrimination based on social origin prescribed in the ratified ILO conventions and the current Chinese situation: there is neither law explicitly prohibiting such discrimination based on social origin, nor is such discrimination wiped out in reality. **Thus, it is not only necessary to incorporate non-discrimination based on Hukou status, but also essential to adopt legislative or administrative measures to tackle *de facto* Hukou discrimination. It is further suggested that the Hukou system should be abolished eventually and laws introduced to make sure that all rural-to-urban migrants are able to enjoy the work opportunities, as well as social security, housing, health and education benefits, on an equal footing with residents in urban areas.**<sup>38</sup>

Moreover, to achieve substantive equality in society, it is not enough just to eliminate single-based discrimination, such as gender discrimination, or racial discrimination, or discrimination based on social origin. As a matter of fact, discrimination is not necessarily revealed by distinctive external features, as many people may be subject to discrimination based on more than one ground.<sup>39</sup> In the case of migrant women working as domestic helpers, for example, they are inclined to suffer from gender discrimination, discrimination based on their social origin (agricultural Hukou) and occupational discrimination. What is more, such multiple levels of discrimination may manifest themselves in different forms and in different situations, which could not be dealt with by a single-based approach to discrimination, or by offering a remedy simply by identifying a "comparator", which is not always feasible in some cases.<sup>40</sup> Hence, it is proclaimed by the CEDAW Observation that China must make efforts to eliminate intersecting forms of discrimination.<sup>41</sup> Nonetheless, addressing multiple discrimination by means of legislation or through the judiciary indeed remains a challenge. **In China, intersectionality as a legal analysis tool, as recommended by most human rights treaty bodies to be applied in the process of legislation and adjudication, is not in place yet.**

Furthermore, for the specific situation of migrant women working as domestic helpers, **gender-based domestic violence and sexual harassment in a private place of work is a particularly important legal problem to be addressed.** Although not prescribed in the CEDAW provisions, it has been explicitly pointed out by CEDAW Recommendation Nos. 12 and 19 that sexual harassment and gender-based violence are one of the various forms of discrimination against women.<sup>42</sup> Two decades have passed since the term "domestic violence" was first introduced to China, but not until 2015 has any law been promoted against domestic violence when the Anti-domestic Violence Law of the People's Republic of China was passed.<sup>43</sup> This newly adopted law against domestic violence has been effective since March 2016 and is composed of, apart from general provisions and supplementary provisions, four major parts dealing respectively with the prevention of domestic violence, the

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<sup>34</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *Concluding observations on the second periodic report of China, including Hong Kong, China, and Macao, China*, 13 June 2014, E/C.12/CHN/CO/2, para.24.

<sup>35</sup> Article 20, *ibid.*

<sup>36</sup> See Section 2.4, the *de facto* working conditions of migrant workers in China despite the laws and regulations.

<sup>37</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *Concluding observations on the second periodic report of China, including Hong Kong, China, and Macao, China*, 13 June 2014, E/C.12/CHN/CO/2, para.15.

<sup>38</sup> *Ibid.*

<sup>39</sup> International Labour Office, *General Survey concerning fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* (Geneva: ILO, 2012), para.748.

<sup>40</sup> Suzanne B. Goldberg, "Discrimination by Comparison", *Columbia Public Law & Legal Theory Working Papers*, Paper 9185 (2010): 29.

<sup>41</sup> UN Committee on the Elimination of Discrimination against Women, *Concluding observations on the combined seventh and eighth periodic reports of China*, CEDAW/C/CHN/CO/7-8, 7 November 2014, para.46. See also UN Committee on the Elimination of Discrimination against Women, *Concluding comments of the Committee on the Elimination of Discrimination against Women: China*, CEDAW/C/CHN/CO/6, 7-25 August 2006, para.27.

<sup>42</sup> See UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 19: Violence against women*, 1992. See also UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 12: Violence against women*, 1989.

<sup>43</sup> *Anti-domestic Violence Law of the People's Republic of China*, adopted at the 18th Session of the Standing Committee of the Twelfth National People's Congress of the People's Republic of China on 27 December 2015, came into force on 1 March 2016.

handling of domestic violence, personal safety protection writ, and legal liability.<sup>44</sup> It defines domestic violence as “the inflicting of physical, psychological or other harm by *a family member* on another by beating, trussing, injury, restraint and forcible limits on personal freedom, recurring verbal abuse, threats and other means”.<sup>45</sup> Article 36 of the law further points out that the law is also applicable in the situation where violence has occurred between non-family members who live together.

But if a domestic helper is subjected to violence from her host family, then it is generally better for such cases to be decided according to the Criminal Law than the Anti-Domestic Violence Law. This is because the Criminal Law was adopted during an NPC session whereas the latter was adopted during an SCNPC session thus the Criminal Law is in a higher tier of the hierarchy of law in China. Additionally, where severe harm has been caused, the Criminal Law is the one and only source for an appropriate criminal penalty. In practice, lawyers and judges can decide according to the case in question which law to invoke. Moreover, when sexual harassment has taken place against domestic helpers, it is hard to say if the Anti-Domestic Violence Law is applicable to such cases because domestic helpers will have been sexually harassed in their work place, not at home. The dilemma is that a domestic helper hired by a private family is not regarded as a normal employee, thus those laws which protect women workers from sexual harassment in the work place are not applicable to a domestic helper who is harassed in her work place. To make things worse, labour inspection is not applicable to such cases either. There seems to be a legal void concerning the situation of domestic helpers being sexually harassed.

There are also situations when different treatment for similar cases cannot be regarded as discrimination, which must be clarified by domestic laws. The clarification of such exceptions to discrimination acts as a clear instruction in relevant judicial cases. For example, genuine professional qualification is usually not considered as a form of discrimination; according to Article 1(2) of ILO 111, “any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination”.<sup>46</sup> For another instance, special measures/accommodation are not to be regarded as discrimination either. Both CEDAW and ILO No. 111 contain relevant statements on the matter. Article 4(1) of CEDAW states that, “temporary special measures”, which are recommended to be adopted by the state parties to accelerate *de facto* equality between men and women, are not to be considered discrimination; whilst Article 5(1)(2) of ILO 111 provides, “special measures of protection or assistance provided for in other Conventions or Recommendations adopted by the International Labour Conference shall not be deemed to be discrimination”. When drafting the comprehensive set of anti-discrimination laws, it will be necessary to research into those situations which are not to be deemed to be discrimination and clarify them, preferably, in that anti-discrimination law, as is recommended in the concluding observations to China by the UN Committee on Economic, Social and Cultural Rights.<sup>47</sup> **But at present it is not clarified in the Chinese law what constitute the situations that are not regarded as discrimination, or are exceptions to discrimination.**

As expressed by the CEDAW Committee, the situation of women workers in the labour market raises concerns, including the lack of legal provisions ensuring “equal pay for equal work and work of equal value”, “gender wage gap, a high percentage of women working in the informal sector, the harmful working conditions certain women workers might be exposed to...”.<sup>48</sup> Similarly, as observed by the CESCR Committee, despite the adoption of the Programme for the Development of Chinese Women (2011-2020), gender disparities prevail in practice in fields of employment, wages, housing and access to public services.<sup>49</sup> **Indeed, “equal pay for work of equal value” as an international principle of equal remuneration in the labour market has not yet been clarified in the Chinese labour law.** Gender segregation in the labour market happens as a result of the social stereotypes about women’s personality, capability, and preference, thus women are found predominantly in certain jobs, such as those in the informal sector and in caring, which are often undervalued and unstable in

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<sup>44</sup> Ibid.

<sup>45</sup> Article 2, Ibid.

<sup>46</sup> Article 1(2), ILO, *Convention concerning Discrimination in Respect of Employment and Occupation*, C111, 25 June 1958.

<sup>47</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *Concluding observations on the second periodic report of China, including Hong Kong, China, and Macao, China*, E/C.12/CHN/CO/2, 13 June 2014.

<sup>48</sup> See UN Committee on the Elimination of Discrimination against Women, *Concluding comments of the Committee on the Elimination of Discrimination against Women: China*, CEDAW/C/CHN/CO/6, 7-25 August 2006, paras. 29-30. See also UN Committee on the Elimination of Discrimination against Women, *Concluding observations on the combined seventh and eighth periodic reports of China*, CEDAW/C/CHN/CO/7-8, 7 November 2014, para.36.

<sup>49</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *Concluding observations on the second periodic report of China, including Hong Kong, China, and Macao, China*, 13 June 2014, E/C.12/CHN/CO/2, para.16.

comparison with “male jobs”.<sup>50</sup> Migrant women working as domestic helpers typify such gender and Hukou segregation: women perform as domestic helpers due to the preformed attitudes towards women, whereas migrant women working as domestic helpers are the result of both gender stereotype and Hukou-related limitations in the urban area. Viewed from a gender and intersectional perspective, the reason behind any payment gap is that the determination of wages fails to take into consideration any issue-related qualifications, but relies on sex-based or social origin-based distinctions.

There are many provisions to safeguard equal remuneration in the Chinese legal system, but they fail to reach the core of the issue by further clarifying the concept of “work of equal value”, which is the primary condition of equal remuneration<sup>51</sup> and the cornerstone of the ILO Convention No.100.<sup>52</sup> In accordance with Articles 33

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<sup>50</sup> International Labour Office, *General Survey concerning fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* (Geneva: ILO, 2012), para. 673.

<sup>51</sup> See ILO CEACR, *Direct Request to China, on Equal Remuneration Convention, 1951 (No. 100)*, adopted 2012, published 102nd ILC session, 2013, Article 1(b) of the Convention. <sup>51</sup> International Labour Office, *Effective Protection for Domestic Workers: A guide to Designing Labour Laws, Conditions of Work and Employment Program, Industrial and Employment Relations Department* (Geneva: ILO, 2012), 16.

<sup>51</sup> Article 7, ILO, *Convention Concerning Decent Work for Domestic Workers*, C189, 16 June 2011.

<sup>51</sup> Ibid.

<sup>51</sup> ILO, *Recommendation concerning Decent Work for Domestic Workers (No. 201)*, Geneva, 100th ILC session, 16 Jun 2011, para.6 (3) and (4).

<sup>51</sup> Sally Falk Moore, “Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study”, *Law and Society Review*, Vol. 7, No. 4 (1973): 719-746.

<sup>51</sup> International Labour Office, *Effective Protection for Domestic Workers: A guide to Designing Labour Laws, Conditions of Work and Employment Program, Industrial and Employment Relations Department* (Geneva: ILO, 2012), 49.

<sup>51</sup> See Article 3-5, ILO, *Convention concerning Annual Holidays with Pay (Revised)*, C132, 24 June 1970.

<sup>51</sup> Article 24 states, “everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay”. UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

<sup>51</sup> Article 10, ILO, *Convention Concerning Decent Work for Domestic Workers*, C189, 16 June 2011.

<sup>51</sup> Ibid.

<sup>51</sup> See Article 6, ILO, *Convention concerning Weekly Rest in Commerce and Offices*, C106, 26 June 1957.

<sup>51</sup> Article 13, ILO, *Convention Concerning Decent Work for Domestic Workers*, C189, 16 June 2011.

<sup>51</sup> Article 6, *ibid.*

<sup>51</sup> Article 9, *ibid.*

<sup>51</sup> International Council on Human Rights Policy, *Human Rights Standards: Learning from Experience* (Switzerland: Versoix, 2006), 9.

<sup>51</sup> *Ibid.*, 10.

<sup>51</sup> *Ibid.*

<sup>51</sup> For more details of the concepts of normative gap, application gap, supervisory gap, ratification gap and implementation gap, see *ibid.*, 7-8.

<sup>51</sup> *Ibid.*, 9.

<sup>51</sup> For multiple levels of gaps, including the international law on this matter, see Qinxuan Peng, “Multi-layered Gaps between ILO Conventions and the Chinese Legal Protection for Migrant Women Workers as Domestic Helpers in China,” ed. Roger Blanpain, *Protecting Labour Rights in a Multi-Polar Supply Chain and Mobile Global Economy* (the Netherlands: Kluwer Law International, 2015): 31-48.

<sup>51</sup> Dianne Otto, “International Human Rights Law: Towards Rethinking Sex/Gender Dualism and Asymmetry,” eds. Margaret Davies and Vanessa Munro, *The Ashgate Research Companion to Feminist Legal Theory* (New York: Routledge, 2016), 198.

<sup>51</sup> Article 48, *The Constitution of the People’s Republic of China*, 1982.

<sup>51</sup> Article 12, *Labour Law of the People’s Republic of China*, 1994.

<sup>51</sup> For example, Article 19 of European Union Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, has required all Member States of the European Union to place the burden of proof in their national law on the alleged perpetrator to show that the discrimination did not occur. See “Directive 2006/54/EC,” European Union Law, accessed 6 February 2017,

<http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32006L0054>

<sup>51</sup> See: “Female candidate was rejected to be employed as a chef, court ruled a written apology from the restaurant,” *Xinhua News*, 22 September 2016, accessed 6 February 2017,

[http://www.gd.xinhuanet.com/newscentre/2016-09/22/c\\_1119604273.htm](http://www.gd.xinhuanet.com/newscentre/2016-09/22/c_1119604273.htm)

<sup>51</sup> See “Court ruled apology for the first time for gender discrimination case,” *Ifeng News*, 22 September 2016, accessed 6 February 2017, <http://wemedia.ifeng.com/282574491706821/wemedia.shtml>

<sup>51</sup> Article 2(2), UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations Treaty Series, vol. 993, p. 3.

<sup>51</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (Article 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20, para.7.

<sup>51</sup> *Ibid.*

<sup>51</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Article 3 of the Covenant)*, 11 August 2005, E/C.12/2005/4.

<sup>51</sup> Article 2, ILO, *Convention concerning Discrimination in Respect of Employment and Occupation*, C111, 25 June 1958.

<sup>51</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *Concluding observations on the second periodic report of China, including Hong Kong, China, and Macao, China*, 13 June 2014, E/C.12/CHN/CO/2, para.14.

<sup>51</sup> *Ibid.*, para.14.

and 48 of the Constitution, “women ... enjoy equal rights with men in all spheres of life, in political, economic, cultural, social and family life” and the State ensures “equal pay for equal work to men and women alike”. In a similar vein, Article 46 of the 1994 Labour Law and Article 11 of the 2007 Labour Contract Law both refer to “equal pay for equal work”. But these principles will remain dead words on paper if such an equal pay principle is not founded on the basis of “work of equal value”, which means that equal work remuneration is granted to men and women as long as the jobs they perform are of equal value.

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<sup>51</sup> For similar definitions, see Article 1, UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations Treaty Series, vol. 660, p. 195. See also Article 1, UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations Treaty Series, vol. 1249, p. 13. See also Article 2, UN General Assembly, *Convention on the Rights of Persons with Disabilities*, 13 December 2006, A/RES/61/106, Annex I.

<sup>51</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 19: Violence against women*, 1992.

<sup>51</sup> UN Committee on the Elimination of Discrimination against Women, *Concluding observations on the combined seventh and eighth periodic reports of China*, CEDAW/C/CHN/CO/7-8, 7 November 2014, para.12. See also UN Committee on the Elimination of Discrimination against Women, *Concluding comments of the Committee on the Elimination of Discrimination against Women: China*, CEDAW/C/CHN/CO/6, 7-25 August 2006, para.9.

<sup>51</sup> ILO, Sichuan University, Human Rights Centre, *A Selection of Cases in the Chinese Courts and Tribunals on anti-discrimination in Employment* (Beijing: ILO, 2011), 3.

<sup>51</sup> UN Committee on the Elimination of Discrimination against Women, *Concluding observations on the combined seventh and eighth periodic reports of China*, CEDAW/C/CHN/CO/7-8, 7 November 2014, para.13.

<sup>51</sup> ILO CEACR, *Direct Request to China, on Discrimination (Employment and Occupation) Convention, 1958 (No. 111)*, adopted 2012, published 102nd ILC session, 2013, para.2.

<sup>51</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (Article 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20, para.10.

<sup>51</sup> International Labour Office, *General Survey concerning fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* (Geneva: ILO, 2012), paras. 743 and 745.

<sup>51</sup> Ronald C. Brown, “China’s Employment Discrimination Laws During Economic Transition” *Columbia Journal of Asian Law*, Vol.19 (2006), 361-427, at 422.

<sup>51</sup> International Labour Office, *General Survey concerning fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* (Geneva: ILO, 2012), para.7.

<sup>51</sup> *Ibid*, para.802.

<sup>51</sup> ILO CEACR, *Direct Request to China, on Discrimination (Employment and Occupation) Convention, 1958 (No. 111)*, adopted 2012, published 102nd ILC session, 2013, paras. 1 and 7.

<sup>51</sup> ILO CEACR, *Direct Request to China, on Discrimination (Employment and Occupation) Convention, 1958 (No. 111)*, adopted 2012, published 102nd ILC session, 2013, para.7.

<sup>51</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *Implementation of the International Covenant on Economic, Social and Cultural Rights: Second periodic reports submitted by States parties under articles 16 and 17 of the Covenant: China*, 6 July 2012, E/C.12/CHN/2.

<sup>51</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *Concluding observations on the second periodic report of China, including Hong Kong, China, and Macao, China*, 13 June 2014, E/C.12/CHN/CO/2, para.24.

<sup>51</sup> Article 20, *ibid*.

<sup>51</sup> See Section 2.4, the de facto working conditions of migrant workers in China despite the laws and regulations.

<sup>51</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *Concluding observations on the second periodic report of China, including Hong Kong, China, and Macao, China*, 13 June 2014, E/C.12/CHN/CO/2, para.15.

<sup>51</sup> *Ibid*.

<sup>51</sup> International Labour Office, *General Survey concerning fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* (Geneva: ILO, 2012), para.748.

<sup>51</sup> Suzanne B. Goldberg, “Discrimination by Comparison”, *Columbia Public Law & Legal Theory Working Papers*, Paper 9185 (2010): 29.

<sup>51</sup> UN Committee on the Elimination of Discrimination against Women, *Concluding observations on the combined seventh and eighth periodic reports of China*, CEDAW/C/CHN/CO/7-8, 7 November 2014, para.46. See also UN Committee on the Elimination of Discrimination against Women, *Concluding comments of the Committee on the Elimination of Discrimination against Women: China*, CEDAW/C/CHN/CO/6, 7-25 August 2006, para.27.

<sup>51</sup> See UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 19: Violence against women*, 1992. See also UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 12: Violence against women*, 1989.

<sup>51</sup> *Anti-domestic Violence Law of the People’s Republic of China*, adopted at the 18th Session of the Standing Committee of the Twelfth National People’s Congress of the People’s Republic of China on 27 December 2015, came into force on 1 March 2016.

<sup>51</sup> *Ibid*.

<sup>51</sup> Article 2, *Ibid*.

<sup>51</sup> Article 1(2), ILO, *Convention concerning Discrimination in Respect of Employment and Occupation*, C111, 25 June 1958.

<sup>51</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *Concluding observations on the second periodic report of China, including Hong Kong, China, and Macao, China*, E/C.12/CHN/CO/2, 13 June 2014.

<sup>51</sup> See UN Committee on the Elimination of Discrimination against Women, *Concluding comments of the Committee on the*

<sup>52</sup> International Labour Office, *General Survey concerning fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* (Geneva: ILO, 2012), 281.

How to measure the value of the varieties of jobs depends on an objective evaluation system for work values that is free from gender bias, or any other form of stereotype. This means the way to examine the value of a certain job relies on objective criteria, like the skills involved, labour intensity, responsibilities and working conditions.<sup>53</sup> That said, a simple prohibition of sex-based wage discrimination is not sufficient, if it does not capture the concept of “work of equal value”.<sup>54</sup> In order to establish the principle of “work of equal value”, much needs to be done to reconstruct the current evaluation system for work. For example, a job evaluation system without gender-bias needs to be established as a pre-requisite to achieving a labour market with equal remuneration for work of equal value. This point will be further elaborated in Sections 5.3 and 5.4.

A final implementation gap to be discussed is the protectionism in Chinese domestic law. In China, due to the traditional social stereotypes and gender bias, women have been portrayed as physically fragile and intellectually inferior to men. Nowadays, many Chinese legal provisions still regard women as a special category to be “protected”, analogous with children and other “vulnerable people”. Such a “vulnerable” rhetoric for women in the legal system may well perpetuate such gender stereotype and even women’s subordinate position in society. A pertinent example is the provision that lists “unsuitable jobs for women”: according to the Appendix of the Special Stipulation on Labour Protection for Women Workers passed by the State Council in 2012, there are four categories of work, altogether 19 types of work, that are not allowed to be performed by women workers respectively in general terms, during menstruation, in pregnancy and whilst breastfeeding.<sup>55</sup> Categorically speaking, an explicit prohibition for women to be engaged in any of these 19 types of jobs simply because of their biological status is overt discrimination against women, because such overall prohibition cannot possibly be justified in the name of “protection”. Similar rules of exclusion of women workers from certain jobs on the basis of their biological sex can also be found in the ILO convention No. 45 concerning the Employment of Women on Underground Work in Mines of all Kinds, Article 2 of which states that “no female, whatever her age, shall be employed on underground work in any mine”.<sup>56</sup> However, this particular convention was concluded more than 80 years ago and its use has been discontinued by ILO because it was noted that such exclusion of women from underground work in any mine is just as discriminatory as any other exclusion of opportunities for women.

Such exclusive provisions may actually harm women in reality, because employers would have a “legal” basis not to hire women under such “protective” provisions. For example, Article 23 of the Law of the People’s Republic of China on the Protection of Rights and Interests of Women stipulates that “with the exception of the special types of work or post unsuitable to women, no unit may, in employing staff and workers, refuse to employ women by reason of sex or raise the employment standards for women”, and “the employment contract or service agreement shall not contain restrictions on her matrimony and child-bearing”.<sup>57</sup> Such a list of “unsuitable” jobs provides a solid legal basis for labour market exclusions for women workers, even if such provisions are well meant. **Thus, in terms of offering equal protection and eliminating discrimination, there still lacks a balance in the Chinese legal system between reasonable protection of and undue restriction towards women.**

### **5.2.2 Implementation gaps on safeguarding decent work**

China places great emphasis on the protection of citizens’ economic, social and cultural rights,<sup>58</sup> amongst which labour rights are especially accentuated by the Chinese laws. In the Constitution, “citizens ... have the right as well as the duty to work”.<sup>59</sup> There are numerous sets of rules that make up the enormous labour law system in China, the main two core labour laws are the Labour Law and the Labour Contract Law. There are also important laws and regulations such as the Employment Promotion Act, Trade Union Law, Social Security Law, Law on Labour Dispute Mediation and Arbitration, Law on the Prevention and Control of Occupational Diseases,

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<sup>53</sup> ILO CEACR, *Direct Request to China, on Equal Remuneration Convention, 1951 (No. 100)*, adopted 2012, published 102nd ILC session, 2013.

<sup>54</sup> International Labour Office, *General Survey concerning fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* (Geneva: ILO, 2012), 283.

<sup>55</sup> *The Special Rules on the Labour Protection of Female Employees*, adopted according to the Order of the State Council of the People’s Republic of China No.619, at the 200th executive meeting of the State Council on 18 April 2012.

<sup>56</sup> Article 2, ILO, *Convention concerning the Employment of Women on Underground Work in Mines of all Kinds*, C45, 21 June 1935.

<sup>57</sup> Article 23, *Law of the People’s Republic of China on the Protection of Rights and Interests of Women*, 2005.

<sup>58</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *Implementation of the International Covenant on Economic, Social and Cultural Rights: Second periodic reports submitted by States parties under articles 16 and 17 of the Covenant: China*, 6 July 2012, E/C.12/CHN/2.

<sup>59</sup> Article 42, *The Constitution of the People’s Republic of China*, 2004 Amendment.

Regulations on Work-Related Injury Insurances, Regulation on Labour Security Supervision, Special Rules on the Labour Protection of Female Employees and so forth.<sup>60</sup> Several Interpretations of the Supreme People's Court on Several Issues about the Application of Laws for the Trial of Labour Dispute Cases are also of legal effect and act as a guide for the judiciary in the labour law arena.

Despite the established systematic set of rules and regulations safeguarding labour rights, there are still implementation gaps in comparison to the guidelines derived from the ratified international human rights and labour standards that ensure the equal right to decent work, for migrant women working as domestic helpers in the Chinese labour market. First, for domestic helpers, their benefits and interests are not sufficiently represented in terms of freedom of association as required by ILO No.87, which binds all ILO member states, including China, regardless of ratification status.<sup>61</sup> Secondly, there is still no legal guarantee of access to social security for all workers. Thirdly, there is still a lack of specific legal provisions on safeguarding decent work for domestic helpers, which gives full consideration to their specific characteristics. The following paragraphs will further elaborate on each point.

**The Chinese law to guarantee freedom of association is not sufficiently inclusive for domestic helpers.** Although it states in the Trade Union Law that “all manual and mental workers in enterprises, institutions and government departments” “have the right to organize or join trade unions according to law” “irrespective of their nationality, race, sex, occupation, religious belief or educational background”,<sup>62</sup> much of the right to freedom of association is exercised under the framework of the All-China Federation of Trade Unions (ACFTU) both at the central level and the local level. This is probably because of one of the key features of China's official conception of human rights, that is, China regards the maintenance of social harmony and solidarity as a major theme in its human rights discourse.<sup>63</sup> A unified labour union contributes to the maintenance of social order, especially in the labour market. Nonetheless, the trade unions in China are not inclusive enough, especially for domestic workers who are employed by private families. As in the segregation of the labour market, women workers and migrant workers are often nudged into informal sectors with lower pay and less stability, and are easily excluded from the labour law protection concerning their rights to join and form trade unions. Solutions should be found to make domestic workers' benefits and interests properly represented in the labour associations.

**There is no legal guarantee on the accessibility to social security and social benefits for all workers.** As has been described in Chapter 2, the entitlement to government-supported social security is conditional on the occupational status and Hukou status for workers, which means that many rural migrant workers or workers in the informal sector cannot get equal access to the government-supported social security and social benefits with local workers.<sup>64</sup> Furthermore, children in the rural areas and children of rural-to-urban migrant workers often face more barriers than local urban children in getting access to urban government-supported educational services and have higher rates of dropout.<sup>65</sup> Domestic helpers, due to the nature of their occupation, are also excluded from social security benefits provided by national plans.<sup>66</sup> To safeguard the right to social security is not only a state obligation signed up to under Article 9 of the ICESCR, but is also an important aspect emphasized by the ILO conventions, such as ILO No.102.<sup>67</sup>

With increasing demand for domestic service against the background of rapid economic growth, the necessity to regulate this market on a national scale is undeniably on the rise. Now a significant percentage of domestic service is not performed through formal companies or agencies, this means that domestic workers' legitimate labour rights are not protected by the labour law system in China. The “unrecognized” status as “workers” makes it more difficult for domestic helpers to exercise and claim labour rights granted by labour law than

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<sup>60</sup> See “Country Profile: China”, ILO, accessed 6 February 2017,

[http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11110:0::NO::P11110\\_COUNTRY\\_ID:103404](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11110:0::NO::P11110_COUNTRY_ID:103404)

<sup>61</sup> ILO, *Declaration on Fundamental Principles and Rights at Work*, adopted by the International Labour Conference at its Eighty-sixth Session, Geneva, 18 June 1998.

<sup>62</sup> Article 3, *Trade Union Law of the People's Republic of China*, 2001.

<sup>63</sup> Sonya Sceats and Shaun Breslin, *China and the International Human Rights System* (London: The Royal Institute of International Affairs, 2012), 9.

<sup>64</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *Concluding observations on the second periodic report of China, including Hong Kong, China, and Macao, China*, 13 June 2014, E/C.12/CHN/CO/2, para.24.

<sup>65</sup> *Ibid*, para.35.

<sup>66</sup> UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), *General Comment No. 1 on Migrant Domestic Workers*, 23 February 2011, CMW/C/GC/1, para.24.

<sup>67</sup> ILO, *Convention concerning Minimum Standards of Social Security*, C102, 28 June 1952.

other types of workers.<sup>68</sup> **Thus, there is still a lack of national labour standards to safeguard decent work for domestic servants, who are often not legally recognized as “employees” in the Chinese labour law.** The current domestic service market is still under the regulation of the Department of Commerce of the Government, which regulates the domestic service market from the perspective of commercial administration instead of labour protection, thus the focus of the commercial regulation is to regulate the action of domestic service agencies and companies. For example, the 2013 Interim Measures for the Administration of Family Services Sector issued by the Ministry of Commerce (MOFCOM) has provided systematic instructions on the running of a domestic service company, the behaviour framework of domestic helpers and the customers, the administration and legal liability.<sup>69</sup> Furthermore, there are still no nationally effective and systemic laws articulating the rights and liabilities of the host family, and the rights and responsibilities of the agencies/online platform/companies.

Like many other jobs in the informal sector, domestic service is often provided without a contract, which may result in exploitative working conditions such as prolonged working hours, default on payment, abuse and harassment, insufficient social security schemes, difficulty in seeking justice etc. Since 2007, some local administrative stipulations regarding standard contracts for the domestic service market in large cities such as Beijing, Shanghai, Guangzhou and Chongqing have gradually been developed, for example Beijing and its Standard Contract for Domestic Services.<sup>70</sup> Yet most of the standard contracts are not drafted according to Labour Law, but Contract Law<sup>71</sup> and the Law of the People’s Republic of China on Protection of Consumer Rights and Interests.<sup>72</sup> This means that the relationship between host families and domestic helpers is considered to be that of “consumers and service providers” on the basis of civil contracts, instead of employment relationships on the basis of labour contracts. Consequently, domestic service provided on the basis of such standard contracts is not protected by labour law and labour standards. Hence, it remains a dilemma for domestic helpers whether they use the standard contracts provided by local government or not, because the standard contract does not extend specific labour standards to domestic helpers anyway.

**There is still a lack of legal provisions that take into consideration the specific characteristics of domestic helpers to offer adequate labour standards for them.** As expressed in the observation of ICESCR Committee to China, note has been taken of the unfavourable working conditions faced by migrant workers, in particular, migrant domestic workers who are employed without formal labour contracts, who are excluded from the minimum wage scheme and from the social welfare system, with insufficient medical and accident insurance, and who are constantly required to work for long hours.<sup>73</sup> Given the specific characteristics of domestic service, the legal void has to be filled so as to ensure their labour rights in matters such as working hours, safe and healthy working environment, freedom from violence and harassment, access to sufficient medical and injury insurance, access to pension plans, right to retain personal belongings and identification documents etc.

### **5.2.3 Implementation gaps on ensuring access to justice**

One important way to ensure effective supervision and enforcement of the non-discrimination provisions and labour standards prescribed in the international human rights/labour conventions in China is to make sure that workers can bring court cases or make requests for mediation/arbitration of relevant labour disputes and get due attention from effective national machinery, institutions and procedures.<sup>74</sup> **However, the labour inspection and labour arbitration institutions prescribed in the labour law system are not applicable to privately hired domestic helpers, which limits their choices when seeking remedies.**

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<sup>68</sup> A similar situation is also addressed in UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), *General Comment No. 1 on Migrant Domestic Workers*, 23 February 2011, CMW/C/GC/1, para.19.

<sup>69</sup> *Interim Measures for the Administration of Family Services Sector*, 2013.

<sup>70</sup> *The Standard Contract for Domestic Service in Beijing*, Commercial Bureau of Beijing Government, 2007.

<sup>71</sup> *Contract Law of the People’s Republic of China*, adopted at the Second Session of the Ninth National People’s Congress on 15 March 1999, by Order [1999] No.15 of the President of the People’s Republic of China, and came into force as of 1 October 1999.

<sup>72</sup> *Law of the People’s Republic of China on Protection of Consumer Rights and Interests*, adopted at the Fourth Meeting of the Standing Committee of the Eighth National People’s Congress on 31 October 1993, and entered into force as of 1 January 1994.

<sup>73</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *Concluding observations on the second periodic report of China, including Hong Kong, China, and Macao, China*, 13 June 2014, E/C.12/CHN/CO/2, paras. 20 and 56. See also UN Committee on Economic, Social and Cultural Rights (CESCR), *Concluding observations: People’s Republic of China, including Hong Kong and Macao*, 13 May 2005, E/C.12/1/Add.107, para.24.

<sup>74</sup> See, for example, requirements in UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 6: Effective National Machinery and Publicity*, 1988.

The labour inspection mechanism is set up by the labour law to supervise the implementation of labour standards in the working place, whilst the special mechanism of labour dispute settlement arbitration is designed by the Law on Labour Dispute Mediation and Arbitration to settle minor labour disputes such as payment default in a speedy and efficient manner.<sup>75</sup> Neither mechanism is applicable to privately hired domestic helpers in terms of the inspection of their labour conditions or for dispute settlements. This is because, according to labour law, domestic servants hired by private families are not in an employment relationship *per se*. Thus, disputes between the host family and domestic helpers are not regulated by the labour law system, which only regulates those employment relationships which occur in “enterprises and individual economic organisations” or “state organs, institutional organisations and societies”.<sup>76</sup> The contracts between the host family and domestic helpers are seldom recognized as creating an employment relationship under the labour law system, but are mostly regulated by Contract Law or Consumer Interest Law, and so the disputes are not subject to labour arbitration procedures.

Additionally, labour inspectors seldom go to private families to supervise the labour conditions of domestic helpers. Apart from labour inspection, there is no alternative supervisory mechanism that could step into the private sphere to see if domestic helpers enjoy basic labour rights. In addition, whether such a supervisory mechanism should be brought under the labour department or the commercial department remains a debatable question. All the while that the labour arbitration procedure is not an option for most domestic service disputes, the journey to seek justice for domestic helpers when their rights are violated is a long one.

Many disputes between domestic helpers and their host families are small scale, such as payment default, or disagreement on working conditions. To deal with payment default cases, in 2007 the Standing Committee of the National People’s Congress adopted the Labour Contract Act, which provides that employer units must “pay sufficient remuneration for labour in a timely manner” to workers.<sup>77</sup> To tackle the problems of unreasonable deductions of payment and arrears of wages, which constantly occur for migrant workers, the Supreme People’s Court rolled out the Opinions on the Provision of Judicial Protection by People’s Courts for the Purpose of Building a New Socialist Countryside (2006). This made the explicit provision that courts must, in a timely fashion, make and enforce rulings in five types of civil cases, including disputes over wage arrears for rural migrant workers and labour remuneration.<sup>78</sup>

**In cases of other disputes or accidents, given that labour inspection and labour arbitration is not usually applicable to domestic helpers, there is still no specific social mechanism that is affordable, accessible and appropriate for access to justice for migrant women working as domestic helpers in China.** In reality, apart from the availability problems as mentioned above, migrant women working as domestic helpers, experiencing multiple levels of disadvantage, find it difficult to get access to justice when their rights are violated.<sup>79</sup> For one thing, many internationally acknowledged labour rights that are supposed to be extended to migrant workers have not yet been articulated by the Chinese domestic laws. For another thing, insufficient information and knowledge about the channels for getting access to justice and a reluctance to contact the police may also contribute to the fact that there is a low percentage of complaint reports. Additionally, going to court is expensive and time-consuming, with a possible negative effect on future possibilities of finding another host family in the close neighbourhood.

## **Conclusion**

This section has, based on the guidelines developed in Chapter 4, identified implementation gaps in the current Chinese legal system on eliminating discrimination and ensuring equality (Section 5.2.1), on the realization of international labour standards (Section 5.2.2), and on effective supervision and remedy (Section 5.2.3).

- Implementation gaps on eliminating discrimination and ensuring equality
  - 1) There is no comprehensive set of anti-discrimination laws.
  - 2) The domestic legislation contains no clear definition of discrimination.

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<sup>75</sup> Articles 1 and 2, *The Law of the People’s Republic of China on Labour Dispute Mediation and Arbitration*, 2008.

<sup>76</sup> Article 2, *Labour Law of the People’s Republic of China*, 1994.

<sup>77</sup> *Labour Contract Law of People’s Republic of China*, 2008.

<sup>78</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *Implementation of the International Covenant on Economic, Social and Cultural Rights: Second periodic reports submitted by States parties under articles 16 and 17 of the Covenant: China*, 6 July 2012, E/C.12/CHN/2.

<sup>79</sup> UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), *General Comment No. 1 on Migrant Domestic Workers*, 23 February 2011, CMW/C/GC/1.

- 3) No distinction is made by law between direct and indirect discrimination.
  - 4) The Chinese laws fail to include social origin as one of the prohibited grounds for discrimination.
  - 5) There is no recognition of or remedy in cases of intersectionality in either legislation or the adjudication process.
  - 6) The laws on domestic violence and sexual harassment need to be further clarified in the case of domestic helpers.
  - 7) There are no legal provisions that ensure “equal pay for equal work and work of equal value” in the labour market.
  - 8) It is not clarified in the Chinese law what situations are not regarded as discrimination, namely the permitted exceptions.
  - 9) There is a strong strand of protectionism for women in the Chinese law which restricts women’s freedom of choice in the labour market and may well perpetuate women’s subordination in society.
- Implementation gaps on the realization of international labour standards
    - 1) There is no institutional set-up for freedom of association for workers in the informal sector, such as domestic helpers.
    - 2) There is no legal guarantee of access to social security for migrant workers and domestic helpers.
    - 3) There are no specific legal provisions on safeguarding decent work for migrant workers and domestic helpers which give full consideration to their specific characteristics.
  - Implementation gaps on access to justice:
    - 1) In China, the labour inspection and labour arbitration institutions prescribed in the labour law system are not applicable to privately hired domestic helpers.
    - 2) There are still no affordable, accessible and convenient social mechanisms to provide appropriate remedies in the employment sphere for socially underprivileged people, such as migrant women working as domestic helpers.

Based on the identified gaps, Chapter 6 will propose directions to fulfil the state obligations to the requirements arising from the ratified international human rights/labour conventions for the benefit of migrant women working as domestic helpers.

### **5.3 Fill the gaps: some suggestions on anti-discrimination law for the benefit of migrant women working as domestic helpers**

#### ***Introduction***

In the previous section (5.2), the implementation gaps between the standards derived from Chapter 4 and the current Chinese law for the benefit of migrant women working as domestic helpers have been identified. This section (5.3), together with the following two sections (5.4 and 5.5), will put forward suggestions for filling the gaps between the derived standards and the Chinese domestic legal system. Specifically speaking, this section focuses on the aspect of eliminating discrimination and promoting equality, that is, as encouraged in the Concluding Observation on China by the Committee of ICESCR, to “adopt a comprehensive set of anti-discrimination laws to combat all forms of discrimination...”.<sup>80</sup> This study is not so ambitious as to come up with a draft of such an anti-discrimination code, but will at least provide some guiding suggestions in this regard for the benefit of migrant women working as domestic helpers. This section offers a list of legislative suggestions on the basis of the identified IHRL/ILO standards, taking a gender and an intersectionality approach, with due consideration of the concrete problems faced by migrant women working as domestic helpers.

#### ***5.3.1 Incorporate substantive gender equality in Chinese legal system***

Equality between women and men is a predominant indicator for sustainable people-centred development.<sup>81</sup> Now one of the major goals in the Millennium Development Goals (MDGs) established following the United Nations Millennium Summit,<sup>82</sup> gender equality as a common aspiration has gained much momentum in the

<sup>80</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *Concluding observations on the second periodic report of China, including Hong Kong, China, and Macao, China*, 13 June 2014, E/C.12/CHN/CO/2.

<sup>81</sup> “Gender and Gender Equality”, UN Women, accessed 6 February 2017, <http://www.un.org/womenwatch/osagi/conceptsanddefinitions.htm>

<sup>82</sup> The Millennium Development Goals, see UN General Assembly, *United Nations Millennium Declaration, Resolution Adopted by the General Assembly*, 18 September 2000, A/RES/55/2.

international human rights discourse since the adoption of the Beijing Declaration and Platform for Action at the 1995 Beijing World Conference on Women.<sup>83</sup> In many societies, gender-based assumptions about women's behaviour, attitudes, personality and capability still place women in a disadvantageous position with regard to their rights and entitlements, social participation, personal development etc.<sup>84</sup> Even decision-making powers may be based on an individual's biological sex, sometimes compounded with social status, race, age, religious belief, disability and so on. Such a reality is still undeniable in Chinese society due to deep-rooted traditions despite the government having gone to great lengths to elevate women's status by reversing by law many practices which harm women's interests. (See Chapter 2.)

However, as has been pointed out in Section 5.2, some of the Chinese legal provisions still resort to the "victim rhetoric" which assumes women to be vulnerable and dependent, so that these provisions explicitly exclude women from performing certain "dangerous" types of work that are considered "unhealthy" for women workers and their babies. These provisions are known as "protective" provisions<sup>85</sup> which set out to protect a woman's primary role as a mother. In some ways this treats women as analogous to irrational children who are not able to make intelligent decisions about their lives; thus women are subjected to a paternal state restricting their participation in certain areas of activity.<sup>86</sup> The provisions regarding prohibited working types for women workers prescribed in the Appendix of the Special Rules on the Labour Protection of Female Employees<sup>87</sup> can be taken as an example. This list stated four categories of work (72 types of work) that are "not suitable" for women to do. Such kinds of exclusive rules actually derive from the ratified ILO convention No. 45, Article 2 of which explicitly prohibits women from being employed on underground work in any mine, at whatever age.<sup>88</sup> This convention, however, was adopted in 1935, representing a now anachronistic perception of women's capability and women's free will. The ILO normative framework has already set aside this article and the Direct Request of ILO No.111 has notified China that such a restriction would have a detrimental effect on the equality of opportunity of women in employment.<sup>89</sup> The ILO General Survey has also pointed out that women must have the right to pursue any job free from any negative prejudice about women's role.<sup>90</sup>

**Thus, it is thus suggested that the prohibited list of works for women workers be abolished in the Chinese law because such a list may well be used by employers as an excuse for not hiring women workers, and such "protective provisions" are in effect counter-productive in safeguarding women's equal opportunities in the labour market, and are thus contrary to the object and purpose of ILO Convention No.111.<sup>91</sup>**

Additionally, in the light of Article 11 of CEDAW, **it is essential to guarantee the same employment opportunities for women workers as for their male counterparts, as well as the right to free choice of profession and employment.**<sup>92</sup> This provision reflects the requirement of gender equality, which eliminates gender bias by not judging capability, allocating responsibility or distributing resources based on gender, but promotes the idea that men and women deserve the same opportunities to take responsibility, to realize themselves and to achieve their goals based on their own ambition, autonomy and ability, neither on the basis of their biological traits, nor on the basis of being the object of exclusionary protection. It further implies that "the interests, needs and priorities of both women and men are taken into consideration to ensure the diversity of different groups of women and men".<sup>93</sup> This naturally requires a shared responsibility in the family between men and women instead of entrenched gender roles in the family, which are likely to be extended

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<sup>83</sup> United Nations, *Beijing Declaration and Platform of Action*, adopted at the Fourth World Conference on Women, 27 October 1995.

<sup>84</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Article 3 of the Covenant)*, 11 August 2005, E/C.12/2005/4, para.14.

<sup>85</sup> Protective category, corrective category and non-discriminatory category are classified by Natalie Kaufman Hevener, "An Analysis of Gender Based Treaty Law: Contemporary Developments in Historical Perspective," *Human Rights Quarterly*, Vol. 8, No. 1 (1986): 70-88.

<sup>86</sup> *Ibid*, at 72.

<sup>87</sup> *Regulations Concerning the Labour Protection of Female Staff and Workers*, adopted by the 200th Regular Session of the State Council of People's Republic of China, came into effect on 18 April 2012.

<sup>88</sup> Article 2 states, "No female, whatever her age, shall be employed on underground work in any mine." See ILO, *Convention concerning the Employment of Women on Underground Work in Mines of all Kinds*, C45, 21 June 1935.

<sup>89</sup> ILO CEACR, *Direct Request to China, on Discrimination (Employment and Occupation) Convention, 1958 (No. 111)*, adopted 2012, published 102nd ILC session, 2013, para.10.

<sup>90</sup> International Labour Office, *General Survey concerning fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* (Geneva: ILO, 2012), 330.

<sup>91</sup> *Ibid*, para.838.

<sup>92</sup> UN General Assembly, Article 11 (2) and (3), *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations Treaty Series, vol. 1249, p. 13.

<sup>93</sup> "Gender and Gender Equality", UN Women, accessed 6 February 2017, <http://www.un.org/womenwatch/osagi/conceptsanddefinitions.htm>

and strengthened to the societal level to perpetuate gender differentiation.<sup>94</sup> **It is suggested that these basic notions of substantive gender equality be embodied in the contemporary Chinese laws, that is, to assume that women, just like men, are reasonable and capable human beings who deserve the same opportunities as men in working, social participation, and all aspects of life.**

### **5.3.2 Several suggestions on anti-discrimination law that works for the benefit of migrant women working as domestic helpers**

To combat discrimination, as a general principle, is enshrined in many Chinese laws, such as the Constitution, the Labour Law, the Labour Contract Law, the Employment Promotion Law, and the Women's Interests Law. However, as has been analysed in Section 5.2, many details are still lacking, such as a clear definition and scope of discrimination in these laws, let alone a clear definition of indirect discrimination, multiple discrimination, systemic discrimination etc., which makes it difficult for legal application in relevant cases. There are no procedural instructions as to how to determine what does and does not constitute discrimination, or how to determine burden of proof, or ways of obtaining remedies. In terms of dealing with de facto discrimination and relevant intrusion occurring in the private sphere, there is no form of legal intervention. These implementation gaps are further elaborated below.

Many international human rights legal provisions can provide examples for domestic legislation in terms of defining discrimination and displaying prohibited grounds. Technically speaking, protected grounds are traditionally established by law in different ways, such as being provided in an exhaustive list as the current Chinese law does, or being provided in an open-textured list, or even in a non-exhaustive list in the form of "or other status".<sup>95</sup> For example, Article 1 of CEDAW has provided a comprehensive definition of "discrimination against women", which means "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field".<sup>96</sup> It is also prescribed in the ICESCR General Comments that discrimination occurs when "an individual is treated less favourably than another person in a similar situation for a reason related to a prohibited ground", without reasonable justification.<sup>97</sup> Article 1 of ILO No. 111 defines discrimination as "distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation".<sup>98</sup> EU Directive 2006/54/EC for gender equality defines direct discrimination as "where one person is treated less favourably ... than another is, has been or would be treated in a comparable situation".<sup>99</sup> **Given the examples of these provisions, it is suggested that discrimination could be further clarified by Chinese law as a situation when a person is treated less favourably than another person in a comparable case based on a certain prohibited ground, which is recommended by the CEDAW, ILO No.111 and ILO CEACR Direct Request to include at least gender, race, colour, religion, political opinion, national extraction, and social origin,<sup>100</sup> preferably with an open list of prohibited grounds leaving room for judicial interpretation to deal with any further circumstances.**

What is worth mentioning here is the prohibited ground of social origin stated in the ILO Convention No.111 which is of particular relevance to the discrimination against rural migrant workers. As has been explained before, "the lack of equal opportunities based on social origin" means "the situations in which an individual's membership of a class, socio-occupational category or caste determines his or her occupational future...".<sup>101</sup> In

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<sup>94</sup> See United Nations Sustainable Development Goals (SDGs), Goal No.5: Achieve gender equality and empower all women and girls, "Recognize and value unpaid care and domestic work through the provision of public services, infrastructure and social protection policies and the promotion of shared responsibility within the household and the family as nationally appropriate." See UN General Assembly, *Transforming Our World: the 2030 Agenda for Sustainable Development, Resolution Adopted by the General Assembly on 25 September 2015*, 21 October 2015, A/RES/70/1, 14.

<sup>95</sup> Sandra Fredman, *Discrimination Law*, second edition (Oxford: Oxford University Press, 2011), 125.

<sup>96</sup> Article 1, UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations Treaty Series, vol. 1249, p. 13.

<sup>97</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (Article 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20, para.10.

<sup>98</sup> Article 1(1), ILO, *Convention concerning Discrimination in Respect of Employment and Occupation*, C111, 25 June 1958.

<sup>99</sup> Article 1(a), EU Directive 2006/54/EC. See "Directive 2006/54/EC," European Union Law, accessed 6 February 2017, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32006L0054>

<sup>100</sup> ILO CEACR, *Direct Request to China, on Discrimination (Employment and Occupation) Convention, 1958 (No. 111)*, adopted 2012, published 102nd ILC session, 2013, para.1.

<sup>101</sup> *Ibid*, para.7.

the context of China, discrimination on the basis of social origin is closely linked to the unequal treatment of migrant workers which has drawn the attention of the CEACR. For the sake of the targeted group of people, **it is suggested that discrimination based on social origin be expressly prohibited de jure and eliminated de facto by Chinese domestic laws and regulations for the sake of migrant workers.**

Indirect discrimination, a subtler kind of discrimination that is often neglected in real life, also has to be brought within the sphere of anti-discrimination legislation. The concept of indirect discrimination is important because it bears great implications for substantive equality, which requires that the effects of laws, policies and practices do not maintain the disadvantages which a particular group experiences.<sup>102</sup> It is clear that de facto discrimination will not be extinguished with a simple prohibition against direct discrimination; that is why ILO CEACR Direct Request on ILO Convention No.111 urges China to “provide information on how workers are protected against indirect discrimination in employment and occupation,” and to make it clear whether a definition of indirect discrimination is included in the relevant laws.<sup>103</sup>

According to the interpretation of treaty bodies’ comments, indirect discrimination occurs when apparently neutral policies have an objective effect of unequal treatment on persons with certain specified characteristics.<sup>104</sup> Indirect discrimination is determined by ILO Convention No.111 as “distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment”.<sup>105</sup> EU Directive 2006/54/EC on gender equality defines indirect discrimination as “where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary”.<sup>106</sup> In the case of domestic helpers, indirect discrimination may occur to them in many situations because domestic helpers are predominantly women; thus an exclusion of domestic helpers from certain opportunities or social participation may constitute indirect discrimination against women. In order to address such situation in law, a clear definition has to be institutionalized in domestic law. Hence, **it is suggested that indirect discrimination could be further clarified by Chinese law as a situation when a prima facie neutral policy has a detrimental effect on persons with a certain characteristic, in comparison with another group, unless such policy is justified.** It is also suggested that multiple discrimination, which is an empirical concept that has only been brought to legal attention in recent decades, should be incorporated into the modern Chinese legal system. Examples of defining multiple discrimination can be found in ICESCR General Comment No. 20, which points out that “some individuals or groups of individuals face discrimination on more than one of the prohibited grounds”,<sup>107</sup> and that such “cumulative discrimination has a unique and specific impact on individuals and merits particular consideration and remedying”.<sup>108</sup> CEDAW General Recommendation No. 28 further acknowledges that gender discrimination can be inextricably entangled with other factors such as race, ethnicity, belief, status, age, class and sexuality, placing women in a more vulnerable situation, in a different manner and to a different degree from men.<sup>109</sup> ILO CEACR also recognizes that gender discrimination is often intertwined with other forms of inequality based on race, national extraction, social origin, religion, age, migrant status, or disability.<sup>110</sup>

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<sup>102</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Article 3 of the Covenant)*, 11 August 2005, E/C.12/2005/4, para.7.

<sup>103</sup> ILO CEACR, *Direct Request to China, on Discrimination (Employment and Occupation) Convention, 1958 (No. 111)*, adopted 2012, published 102nd ILC session, 2013, para.2.

<sup>104</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (Article 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20, para.10.

<sup>105</sup> Article 1 (2), ILO, *Convention concerning Discrimination in Respect of Employment and Occupation*, C111, 25 June 1958.

<sup>106</sup> Article 1(b), EU Directive 2006/54/EC. See “Directive 2006/54/EC,” European Union Law, accessed 6 February 2017, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32006L0054>

<sup>107</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (Article 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20, para.17.

<sup>108</sup> *Ibid*, para.27.

<sup>109</sup> See for example UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 16 December 2010, CEDAW/C/GC/28, para.18. See also UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Article 3 of the Covenant)*, 11 August 2005, E/C.12/2005/4, para.5. See also UN Committee on the Elimination of Racial Discrimination, *General Comment No. 25, Gender-related dimensions of racial discrimination*, 20 March 2000, U.N. Doc. A/55/18, annex V.

<sup>110</sup> International Labour Office, *General Survey concerning fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* (Geneva: ILO, 2012) 314.

In the Chinese context, such cases of intersectional disadvantage are noticeable and worthy of attention. For example, rural women may face multiple discrimination in connection to their access to education, health care, employment and land tenure.<sup>111</sup> For the particular situation of migrant women working as domestic helpers, intersectionality or multiple discrimination is an essential aspect to be addressed by Chinese domestic laws.

However, given the complexity of the intersectional situation, in some cases it is easy to identify the comparators for the situation whilst in other cases it is not. Thus a “comparator methodology” does not always work to identify discrimination; on the contrary, to adopt such approach may well exclude some situations from being considered as discrimination with the consequence of an absence of adequate remedy.<sup>112</sup> Hence, it is suggested that two approaches are adopted in dealing with the comparators in cases of multiple discrimination. One approach is to creatively widen the comparative lens when no comparable elements can be found; this is sometimes known as the proxy comparison method.<sup>113</sup> Another approach is to focus on the contextual realities of the disadvantage experienced by the victim; after all, not all claims have to be addressed via a rigid comparison methodology.<sup>114</sup> For the specific case of migrant women working as domestic helpers, the second approach is more appropriate to their situation because it is difficult to identify a comparator, thus it is suggested that their situation be addressed on a case-by-case basis. The bottom line is that intersectional discrimination is recognized and adequately redressed by Chinese domestic law. **Thus, it is suggested that a definition of multiple discrimination, where discrimination happens on the basis of more than one disadvantageous ground, be adopted in the Chinese legal system and that such situation is provided with an adequate remedy by law.**

Moreover, it has to be brought into the spotlight that gender-based violence and sexual harassment are special types of discrimination that need to be eliminated, especially in the case of migrant women working as domestic helpers, who face extra risks of being abused or harassed due to their gender, their non-local residence and their inspection-free working environment. According to CEDAW General Recommendation No.19, gender-based violence is “a form of discrimination that seriously inhibits women’s ability to enjoy rights and freedoms on a basis of equality with men”. It has various forms that “inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty”.<sup>115</sup> EU Directive 2006/54/EC on gender equality gives a broad scope to sexual harassment as being “where any form of unwanted verbal, non-verbal or physical conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment”.<sup>116</sup> CEDAW General Recommendation 19 further lists sexual harassment as “physical contact and advances, sexually coloured remarks, showing pornography and sexual demand”.<sup>117</sup> ILO CEACR Direct Request on ILO Convention No.111 urges China to include a definition of sexual harassment at the workplace that “covers both quid pro quo and hostile environment harassment”.<sup>118</sup> **Thus, in order to tackle these special types of discrimination that particularly affect women, it is suggested that “ laws against family violence and abuse, rape, sexual assault and other gender-based violence give adequate protection to all women, and respect their integrity and dignity”<sup>119</sup> and that “effective legal measures, including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence, including inter alia violence and abuse in the family, sexual assault and sexual harassment in the workplace”<sup>120</sup> be adopted. Such legislative measures additionally require legal intervention in the private sphere.**

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<sup>111</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *Concluding observations on the second periodic report of China, including Hong Kong, China, and Macao, China*, 13 June 2014, E/C.12/CHN/CO/2, para.16.

<sup>112</sup> Suzanne B. Goldberg, “Discrimination by Comparison”, *Columbia Public Law & Legal Theory Working Papers*, Paper 9185 (2010): 29.

<sup>113</sup> Colleen Sheppard, *Multiple Discrimination in the World of Work*, International Labour Office, Programme for the Promotion of the ILO Declaration on Fundamental Principles and Rights at Work, Working Paper No. 66 (Geneva: International Labour Organization, 2011), 28.

<sup>114</sup> *Ibid.*

<sup>115</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 19: Violence against women*, 1992, para.1.

<sup>116</sup> Article 1(c) of EU Directive 2006/54/EC. See “Directive 2006/54/EC,” European Union Law, accessed 6 February 2017, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32006L0054>

<sup>117</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 19: Violence against women*, 1992, para.18.

<sup>118</sup> ILO CEACR, *Direct Request to China, on Discrimination (Employment and Occupation) Convention, 1958 (No. 111)*, adopted 2012, published 102nd ILC session, 2013, para.5.

<sup>119</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 19: Violence against women*, 1992, para.24(b).

<sup>120</sup> *Ibid.*, para.24(i).

In sum, it is suggested that clear definitions and procedural rules of discrimination are provided by law, covering such matters as direct discrimination, indirect discrimination, multiple discrimination, harassment and violence; and that a principle is introduced to eliminate all forms of discrimination de jure and de facto in all aspects of life including in the private sphere.<sup>121</sup>

### 5.3.3 Give legislative expression to the principle of equal pay for work of equal value

Due to the historic attitudes and social stereotypes regarding men's and women's roles, preferences and capabilities, certain jobs, such as care-providers, are predominantly performed by women and, more often than not, such "female jobs" are undervalued in comparison to work of equal value performed by their male counterparts when wage rates are being determined.<sup>122</sup> This is particularly the case in China, especially in the domestic service business. Hence the principle of "equal pay for work of equal value" is fundamental in tackling gender segregation in the labour market because it takes into consideration not only equal remuneration for the same or similar work, but also equal remuneration for work that is of a different nature yet of similar value.<sup>123</sup> In order to ensure genuine decent work for domestic helpers, the very first step is to identify the real value of such work and to make it equivalent to other respected jobs of the same value in the labour market.

Article 3 of ICESCR obliges the State party to "undertake effective measures to ensure the equal right of men and women to enjoy economic, social and cultural rights ... by implementing the principle of equal pay for work of equal value, eliminating wage gaps between men and women, and providing equal opportunities for both men and women".<sup>124</sup> To make this happen, Article 7 of ICESCR emphasizes that women have to be guaranteed "conditions of work not inferior to those enjoyed by men, with equal pay for equal work".<sup>125</sup> An important implication of this principle is that, whether or not the remuneration received is equal, the compared job is to be "of equal value", and the "rate of remuneration" is to be "established without discrimination based on sex."<sup>126</sup> This means that the method of examining the value of a certain job must rely on issue-related qualifications like the involved skills, labour intensity, responsibilities and working conditions,<sup>127</sup> rather than biological differences, gender stereotype or other social constructions. Only when the benchmark for the job's value is consistent, can the remuneration based on the value of the job be considered to be comparable. That is to say, the prohibition of sex-based wage discrimination per se is not sufficient if it does not take account of the concept of "work of equal value".<sup>128</sup> **Thus, it is suggested that China give full legislative expression to the objective job evaluation system and the principle of "equal pay for work of equal value", so that it covers not only situations when men and women do the same job but also includes work that is different yet of equal value.**<sup>129</sup> The legal recognition of these principles is essential to address "the horizontal and vertical gender segregation" in the labour market and the subsequent gender income gap.<sup>130</sup>

### Conclusion

In the light of the gaps identified in Section 5.2, this section (5.3) has proposed some legislative suggestions on combating discrimination and promoting equality for the sake of migrant women working as domestic helpers. The very first suggestion is to incorporate substantive gender equality in Chinese law to guarantee full personal liberty to women in choosing an occupation and to abolish those protective measures that go beyond 'maternity' in the strictest sense of the word. On top of this, it is suggested that China, as a state party of ICESCR, in order to abide by the Concluding Observation to China, should adopt a comprehensive anti-

<sup>121</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (Article 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20, para.37.

<sup>122</sup> ILO CEACR, *Observation to China, on Equal Remuneration Convention (No. 100)*, adopted 2007, published 97th ILC session in 2008, paras. 1-3.

<sup>123</sup> Ibid.

<sup>124</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *Concluding observations: People's Republic of China, including Hong Kong and Macao*, 13 May 2005, E/C.12/1/Add.107.

<sup>125</sup> Article 7 (a)(i), UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations Treaty Series, vol. 993, p. 3.

<sup>126</sup> Article 1(b), ILO, *Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value*, C100, 29 June 1951.

<sup>127</sup> ILO CEACR, *Direct Request to China, on Equal Remuneration Convention, 1951 (No. 100)*, adopted 2012, published 102nd ILC session, 2013, para.5.

<sup>128</sup> International Labour Office, *General Survey concerning fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* (Geneva: ILO, 2012), 283.

<sup>129</sup> ILO CEACR, *Observation to China, on Equal Remuneration Convention, 1951 (No. 100)*, adopted 2012, published 102nd ILC session, 2013.

<sup>130</sup> ILO CEACR, *Direct Request to China, on Discrimination (Employment and Occupation) Convention, 1958 (No. 111)*, adopted 2012, published 102nd ILC session, 2013, para.8.

discrimination law. This law is to include but is not limited to the following aspects that work for the benefit of migrant women working as domestic helpers: (1) give clear definitions of discrimination that are in line with the ratified international conventions, with a clear prohibition against discrimination on the basis of social origin; (2) make clear the distinction between direct discrimination and indirect discrimination for the benefit of domestic helpers who are predominately composed of women, (3) to recognize multiple discrimination so that the intersectional disadvantages faced by migrant women working as domestic helpers can be adequately redressed; (4) include gender-based violence and sexual harassment as one form of discrimination and strictly prohibit it, because migrant women working as domestic helpers face extra risks of such abuse or harassment due to their gender and their private working environment. Finally, it is further suggested that China should give full legislative expression to the objective job evaluation system and the principle of “equal pay for work of equal value”, so that it covers not only situations when men and women do the same job but also includes work that is different yet of equal value.

#### **5.4 Fill the gaps: to ensure decent work for migrant women working as domestic helpers by law**

##### ***Introduction***

In this study, working conditions have been defined according to the ILO standards, and cover a broad range of topics and issues, such as hours of work, rest periods, work schedules, remuneration, as well as the physical conditions and mental demands that exist in the workplace.<sup>131</sup> Decent work, however, is required to be satisfied in the light of Article 7 of the ICESCR so that it “respects the fundamental rights of the human person as well as the rights of workers in terms of conditions of work safety and remuneration ... [and shows] respect for the physical and mental integrity of the worker in the exercise of his/her employment”.<sup>132</sup> ILO has further elaborated the connotation of decent work as work which is “productive and delivers a fair income, security in the workplace and social protection for families, better prospects for personal development and social integration, freedom for people to express their concerns, organize and participate in the decisions that affect their lives and equality of opportunity and treatment for all women and men”.<sup>133</sup> “Decent work for all” is also incorporated in the General Assembly Resolution of 25 September 2015 as one of the goals to be achieved in the 2030 Agenda for Sustainable Development.<sup>134</sup>

According to the identified gaps in this aspect of Chinese labour law stated in the previous section, this section tries to fill the gaps, for the benefit of migrant women working as domestic helpers, between the international standards on ensuring decent work for domestic helpers and the current Chinese labour law system. This section will address the following aspects according to the identified gaps stated in Section 5.2: (1) ensure freedom of association for domestic helpers in practice; (2) safeguard access to social security for those who are excluded from the social insurance scheme; (3) establish specific labour standards to ensure decent work for rural migrant workers; and (4) establish specific labour standards for decent work for domestic helpers. Each sub-section begins with an analysis of the existing problems and then puts forward guidelines for change according to the guidelines developed on the basis of international law and using a gender/intersectionality approach, in the hope of modernising the current Chinese labour law, which still has great room for improvement if it is to meet the international labour standards for the specific problems.

##### ***5.4.1 Ensure freedom of association for domestic helpers in practice***

Freedom of association indicates that people are entitled to establish, join and run their own labour association without interference from the authorities and without requiring previous authorization.<sup>135</sup> Accordingly, it is not enough to enact legislation simply ensuring the right of everyone to “form trade unions and join the trade union of his choice” as stipulated by Article 8 of ICESCR, and also ensuring the right of trade unions to

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<sup>131</sup> “Working Conditions,” ILO, accessed 6 February 2017, <http://www.ilo.org/global/topics/working-conditions/lang--en/index.htm>

<sup>132</sup> UN Committee on Economic, Social and Cultural Rights, *General Comment No. 18, regarding Article 6 of the International Covenant on Economic, Social and Cultural Rights*, 6 February 2006, E/C.12/GC/18.

<sup>133</sup> “Decent work,” ILO, accessed 6 February 2017, <http://ilo.org/global/topics/decent-work/lang--en/index.htm>

<sup>134</sup> Goal No.8: “promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all,” see UN General Assembly, *Transforming Our World: the 2030 Agenda for Sustainable Development, Resolution Adopted by the General Assembly on 25 September 2015*, 21 October 2015, A/RES/70/1, 19.

<sup>135</sup> Articles 1 and 2, ILO, *Freedom of Association and Protection of the Right to Organize Convention*, C087, 9 July 1948.

collaborate nationally and internationally, and the right of trade unions to function freely under the law.<sup>136</sup> On top of this, the inclusiveness of such right for all sorts of workers has to be ensured, especially for those who are excluded due to their informal working status.

Nonetheless, the level of freedom of association in China can be significantly improved by increasing the diversity and inclusiveness of the labour union.<sup>137</sup> At present, there is only one central labour union nationwide in China, the All-China Federation of Trade Unions (ACFTU), which represents the workers' interests with local branches at each administrative level and in each employment unit. What is more, the representative percentage of migrant workers in the labour union is usually very limited, and those workers working in the informal sectors are not so well represented either. Although there are some business associations concerning domestic service in certain districts, they are often established amongst domestic service agencies and companies, instead of being representative of domestic helpers. ICESCR General Comment No. 16 accentuates the fact that "particular attention should be given to domestic workers, rural women, women working in female-dominated industries and women working at home, who are often deprived of this right". Thus, preferably, the domestic law should allow more diversity in the existence and functioning of labour unions than solely the ACFTU.

Even within the current institutional setting, it is suggested that an observatory status be given to the members who represent domestic helpers in order to enhance the representation in the ACFTU system of the interests of migrant women working as domestic helpers. The establishment of a Domestic Workers Observatory would be a collective voice for all the individual domestic helpers. The ACFTU could act as a cooperative or supervisory organisation of such observatory and invite the observatory members to local and national ACFTU meetings. This could be a big step towards trade union membership and representation. Further, the role of local trade unions has to be enhanced to give legal effect to the right to freedom of association, especially in the case of concluding contracts with domestic workers. A Domestic Workers Observatory would have to be consulted about working hours, rest hours, standard salary, working conditions and so on in order to have an effect on the bargaining process between workers and employers. The establishment of such observatory could be a trial step towards giving full recognition to the "employee" status for domestic helpers in the informal sector in China.

#### **5.4.2 Safeguard access to social security for migrant workers and domestic helpers**

The right of everyone to social security, including social insurance, is one of the fundamental human rights stated in Article 9 of ICESCR.<sup>138</sup> However, as there is no compulsory insurance system in China, many people live without any insurance when they are not an employee or when they do not pay for commercial insurance. For example, a migrant worker working in the urban area cannot join the social insurance system supported by the local government because they do not hold local Hukou. If that worker performs temporary contract work instead of permanent contract work, then it is up to the employer and the migrant worker to buy commercial insurance for the latter, but that worker cannot enjoy the social insurance supported by the government and the employers. Given their migrant status, even if these workers managed to participate in the government supported social insurance plan, there is no legal mechanism to ensure that their social benefits would be accumulated when they migrated to another city. This means that they would automatically lose all the social benefits they had gained through years of work, if they were to go to another city for work, or if they were to retire. As for domestic helpers, as has been explained before, most of them are self-employed or hired via agencies, which means that they too cannot join the social insurance plan co-supported by the government and the employers. Thus either they or their host family would have to purchase commercial insurance to cover social benefits. **Thus, it is suggested that a compulsory and inclusive insurance system be established that would cover "retirement, unemployment, sickness, invalidity and old age and other incapacity to work",<sup>139</sup> especially "maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances",<sup>140</sup> and that would include those working in the informal**

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<sup>136</sup> Article 8, UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations Treaty Series, vol. 993, p. 3.

<sup>137</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *Concluding observations on the second periodic report of China, including Hong Kong, China, and Macao, China*, 13 June 2014, E/C.12/CHN/CO/2, para.23.

<sup>138</sup> Article 9, UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations Treaty Series, vol. 993, p. 3.

<sup>139</sup> Article 11 (1) (e), UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations Treaty Series, vol. 1249, p. 13.

<sup>140</sup> Article 11(2) (b), *ibid.*

**sector.**<sup>141</sup> Ideally, this insurance system should be as comprehensive as that which is described in Article 2 of ILO No. 157, or at least cover five types of the following: (a) medical care; (b) sickness benefit; (c) maternity benefit; (d) invalidity benefit; (e) old-age benefit; (f) survivors' benefit; (g) employment injury benefit, namely benefit in respect of occupational injuries and diseases; (h) unemployment benefit; and (i) family benefit.<sup>142</sup>

#### **5.4.3 Establish specific labour standards to ensure decent work for rural migrant workers**

The de facto discrimination against internal migrants still prevails “in the fields of employment, social security, health services, housing and education”,<sup>143</sup> especially “generally poor conditions of work, including excessive working hours, lack of sufficient rest breaks and hazardous working conditions”.<sup>144</sup> Additionally, migrant workers do not have equal access to medical care subsidies with urban residents, and pay proportionately more for medical insurance and medical costs,<sup>145</sup> which are all an indirect result of, inter alia, the *Hukou* system. This is a China-specific problem arising from the rural-urban segregation of the Command Economy Era when farmers in the rural area were given a different identity, called Agricultural Hukou, from workers in the urban areas.

With market economic reforms carried out by the government in the 1970s, a widening gap was witnessed between the rural residents and the urban dwellers in terms of working and educational opportunities, economic and social status, accessibility to public services and social benefits plans. Although discrimination against migrant workers is prohibited by the Promotion of Employment Law in China, each city and each province still enjoys a high level of discretion over its fiscal allocation towards social security plans for non-local residents, and each commercial owner has a say in deciding the working conditions of migrant workers.

In order to bridge the gap between the harsh reality and the aspiration of non-discrimination, this section also refers to the specific convention on protecting the interests of migrant workers, namely, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), in addition to the ratified conventions such as ICESCR, CEDAW, ILO Nos. 111 and 100. Although CMW has not been ratified by China (nor by many migrant-receiving countries either), the provisions of the convention are pertinent to the situation of migrant workers in China. It has to be mentioned that, in this particular convention, “migrant worker” is defined as “a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national”.<sup>146</sup> This means that the subjects of protection under this convention are transnational migrant workers rather than the rural migrant workers in the Chinese context. Still, given the similar situation which the latter face, the study finds the provisions to be of highly relevant to the protection of rural migrant workers in China, even though these provisions are not legally binding on China.

Apart from including social origin as a prohibited ground for discrimination in a comprehensive anti-discrimination law, the study comes up with the following suggestions in order to ensure decent work for rural migrant workers, referring to the guidelines generated in Chapter 4 in combination with the particular identified gaps in China set out in Chapter 5. **Firstly, to grant rural migrant workers equal remuneration and equal working conditions with local workers by law.**<sup>147</sup> **Secondly, the right to join and form labour associations must also be granted to migrant workers by law and in practice.**<sup>148</sup> **Thirdly, special protection**

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<sup>141</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *Concluding observations on the second periodic report of China, including Hong Kong, China, and Macao, China*, 13 June 2014, E/C.12/CHN/CO/2, para.20.

<sup>142</sup> ILO, *Convention concerning the Establishment of an International System for the Maintenance of Rights in Social Security*, C157, 21 June 1982.

<sup>143</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *Concluding observations: People's Republic of China, including Hong Kong and Macao*, 13 May 2005, E/C.12/1/Add.107, para.15.

<sup>144</sup> *Ibid.*, para.24.

<sup>145</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *Concluding observations on the second periodic report of China, including Hong Kong, China, and Macao, China*, 13 June 2014, E/C.12/CHN/CO/2, para.33.

<sup>146</sup> See Article 2 (1), UN General Assembly, *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, 18 December 1990, A/RES/45/158.

<sup>147</sup> Article 25, UN General Assembly, *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, 18 December 1990, A/RES/45/158. See also Article 6(a), ILO, *Convention concerning Migration for Employment*, C097, 1 July 1949. See also Articles 8 and 12(g), ILO, *Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers*, C143, 24 June 1975.

<sup>148</sup> Article 26, UN General Assembly, *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, 18 December 1990, A/RES/45/158. See also Article 6(a) ILO, *Convention concerning Migration for Employment*, C097, 1 July 1949. See also Articles 10 and 40, ILO, *Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers*, C143, 24 June 1975.

must be guaranteed to children of migrant workers by the State and steps are to be taken to eliminate discrimination against them.<sup>149</sup> The right to be accepted by local schools and the right to take national college examinations are to be guaranteed for the children of rural migrant workers to reduce dropout rates in education,<sup>150</sup> given the specific context in China. Lastly, it is suggested that the State must incorporate a gender and intersectional perspective in understanding the specific problems and in offering appropriate remedies for migrant women working as domestic helpers when their basic rights are violated.<sup>151</sup>

#### 5.4.4 Establish specific labour standards to ensure decent work for domestic workers

Domestic service, as an extension of women's family role, is often undervalued in comparison with male-dominated businesses. Like other informal sectors of the economy, much domestic service is provided without a contract, or via free-will contracts, with insufficient medical and accident insurance.<sup>152</sup> Consequently, the labour standards, including payment standards, working conditions, occupational safety and health, and social security are not guaranteed by contracts. What makes things worse is that domestic service is performed in the relatively isolated setting of a private house where labour law and labour inspection cannot intervene, and thus the workers are particularly vulnerable to physical abuse and sexual harassment.<sup>153</sup> Migrant domestic helpers face even higher risks of vulnerability due to their isolation from the community and dependence on their employers. Migrant women working as domestic helpers are likely to face additional risks such as gender-based harassment and violence.<sup>154</sup> When such violation of fundamental dignity happens, domestic servants, with their intersectional disadvantages and limited social resources, are often in an unfavourable bargaining position vis-à-vis their host families or their agencies.

To address the rights for domestic helpers, ILO Convention No.189 on Domestic Workers provides comprehensive guidance on measures to ensure decent work for domestic helpers in many respects. Although this convention has not been ratified by China, the spirit and provisions enshrined in the convention are highly relevant to the subject matter of this research and can provide models for national legislation to ensure decent work for domestic helpers. Besides, many provisions have been derived from the fundamental principles of the core human rights and labour rights conventions, such as ICESCR, CEDAW, ILO Nos. 100 and 111, which are all ratified by China. For example, according to the ratified ILO Convention No.111, the labour rights listed by the convention cover "all workers", irrespective of the branch of economic activity or profession one belongs to.<sup>155</sup> Thus it is suggested that national legislation should include domestic helpers as normal employees who enjoy no less favourable level of labour law protection than other employees in terms of minimum wages, working hours, rest periods, freedom of association and collective bargaining, access to social security, including with respect to maternity, pension rights and health insurance. There should also be additional relevant provisions to take account of the specific characteristics of domestic work.<sup>156</sup>

Specifically speaking, given the prevailing lack of contracts in the domestic service business, it is suggested that the state must ensure all domestic service is performed under explicit written terms of employment, outlining necessary details of working conditions.<sup>157</sup> Domestic workers must be fully informed of their terms and conditions of employment in an appropriate, verifiable and easily understandable manner and preferably, where possible, through written contracts in accordance with national laws, regulations or collective agreements; in particular:<sup>158</sup> (a) the name and address of the employer and of the worker; (b) the address of

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<sup>149</sup> UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), *General Comment No. 1 on Migrant Domestic Workers*, 23 February 2011, CMW/C/GC/1, paras. 56-59.

<sup>150</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *Concluding observations on the second periodic report of China, including Hong Kong, China, and Macao, China*, 13 June 2014, E/C.12/CHN/CO/2, para.35.

<sup>151</sup> UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), *General Comment No. 1 on Migrant Domestic Workers*, 23 February 2011, CMW/C/GC/1, para.60.

<sup>152</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *Concluding observations on the second periodic report of China, including Hong Kong, China, and Macao, China*, 13 June 2014, E/C.12/CHN/CO/2, para.20.

<sup>153</sup> International Labour Office, *General Survey concerning fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* (Geneva: ILO, 2012), 333.

<sup>154</sup> UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), *General Comment No. 1 on Migrant Domestic Workers*, 23 February 2011, CMW/C/GC/1, para.7.

<sup>155</sup> International Labour Office, *General Survey concerning fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* (Geneva: ILO, 2012), 315.

<sup>156</sup> UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), *General Comment No. 1 on Migrant Domestic Workers*, 23 February 2011, CMW/C/GC/1, para.38.

<sup>157</sup> *Ibid.*, para.40.

<sup>158</sup> Article 7, ILO, *Convention Concerning Decent Work for Domestic Workers*, C189, 16 June 2011.

the usual workplace or workplaces; (c) the starting date and, where the contract is for a specified period of time, its duration; (d) the type of work to be performed; (e) the remuneration, method of calculation and periodicity of payments; (f) the normal hours of work; (g) paid annual leave, and daily and weekly rest periods; (h) the provision of food and accommodation, if applicable; (i) the period of probation or trial period, if applicable; (j) the terms of repatriation, if applicable; and (k) terms and conditions relating to the termination of employment, including any period of notice by either the domestic worker or the employer.

Considering their specific situation and based on the guidelines developed, it is suggested that the law should pay extra attention to ensuring decent work for domestic helpers in the following aspects. **Firstly, like other types of workers, domestic helpers must be granted the right to freedom of association and collective bargaining by law and in practice.**<sup>159</sup> **Secondly, it is suggested that the law should recognize the intersectional disadvantages experienced by a female domestic servants, who have usually migrated from a rural area and who have a limited educational background, and offer adequate remedies when their fundamental rights are violated.**<sup>160</sup> **Thirdly, a legal supervisory mechanism should be developed to protect domestic workers from all forms of abuse, harassment and violence, and to offer effective remedies and complaint mechanisms for such abusive practices.**<sup>161</sup> **If necessary, sexual harassment in the workplace should be incorporated in the criminal legislation.**<sup>162</sup> **Fourthly, the law must make sure that the right to privacy, individual liberty over residence, leave and personal belongings should be granted to domestic workers.**<sup>163</sup> **Fifthly, the law must make sure that 24 consecutive hours weekly rest is explicitly stated by the contract to make sure that domestic workers have sufficient rest, and that stand-by hours should be counted as working hours, too.**<sup>164</sup>

### **Conclusion**

This section (5.4) has proposed guidelines to fill the gaps in the field of Chinese labour law for the benefit of migrant women working as domestic helpers. First and foremost, it is suggested that China should give full legislative expression to the principle of “equal pay for work of equal value” and, preferably, establish an objective job evaluation system. Second, in order to ensure representation of domestic helpers in the trade unions, it is suggested that the law allows freedom of association for domestic helpers, or alternatively, that a Domestic Workers Observatory should be established under the legal framework of ACFTU. Third, it is suggested that a compulsory and inclusive insurance system should be established that covers “retirement, unemployment, sickness, invalidity and old age and other incapacity to work”, especially “maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances”, for those who work in the informal sector and are usually excluded from the local social insurance plan. Fourth, specifically for rural migrant workers and domestic helpers, labour standards that are tailored to their needs must be given expression in the labour law system.

## **5.5 Fill the gaps: where to claim rights and seek remedies?**

### **Introduction**

Admittedly, the international human rights treaties and conventions are considered to have “soft legality”, which may have a trivial effect on the ground.<sup>165</sup> Thus it is suggested that, in order to have real influence, such soft aspirations and quasi-legal international procedures have to be ultimately boiled down to “strong legitimacy” in the law and practice of the land, and the legitimacy would come from wide acceptance by the people and authorities in the national legal context.<sup>166</sup> A very important way of turning the soft legality of the international human rights standards into strong legitimacy is to use the standards in the process of domestic legal supervision and in the domestic legal remedy mechanism.

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<sup>159</sup> Article 3, *ibid.*

<sup>160</sup> Article 8, *ibid.*

<sup>161</sup> Articles 5, 15 and 17, *ibid.*

<sup>162</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *Concluding observations on the second periodic report of China, including Hong Kong, China, and Macao, China*, 13 June 2014, E/C.12/CHN/CO/2, para.21.

<sup>163</sup> Article 9, ILO, *Convention concerning decent work for domestic workers*, C189, 16 June 2011.

<sup>164</sup> Article 10(2) and 10(3), *ibid.*

<sup>165</sup> Bas de Gaay Fortman and Michela Marcatelli, “Between Soft Legality and Strong Legitimacy: A Political Economy Approach to the Struggle for Basic Entitlements to Safe Water and Sanitation” *Human Rights Quarterly*, Vol.37, No. 4 (2015): 941-976, at 944.

<sup>166</sup> *Ibid.*

Moreover, it is also the obligation of state parties not only to incorporate international standards into domestic laws, but also to establish adequate social mechanisms to ensure enforcement of these standards. In a similar vein, as a State party of ICESCR, CEDAW, ILO No. 100 and ILO No.111, China does not only assume the obligation to establish relevant laws and policies to combat discrimination and ensure decent labour conditions for the workers, but also shoulders the obligation to fulfil such rights. This obligation entails establishing appropriate social mechanisms for **access to justice** such as courts, tribunals or other mechanisms that are accessible even to the most marginalized people in society, and making accessible appropriate remedies, such as compensation, reparation, restitution, rehabilitation, guarantees of non-repetition, declarations, public apologies, educational programmes and prevention programmes.<sup>167</sup> Furthermore, the remedial process or mechanism has to be effective, timely, affordable, physically accessible and with law-endorsed liability and credibility.<sup>168</sup>

Access to justice is recognized as a fundamental right as important as the rights to education, health care and social security.<sup>169</sup> Ambiguous as it is, justice is a fascinating concept to which almost all parts of society can subscribe. Despite the fact that opinions about what justice is may differ from one community to another, to ensure an individual's access to justice almost always rely on certain social mechanisms, namely, courts, tribunals, mediation, petition or other social institutions. According to an ICESCR General Comment, institutions dealing with allegations of discrimination such as courts and tribunals, administrative authorities, national human rights institutions and/or ombudspersons, should be accessible to everyone without discrimination and must be empowered to provide effective remedies.<sup>170</sup>

Hence, after providing legislative guidelines for non-discrimination law and labour law in Section 5.3 and 5.4, this section (5.5) explores what social mechanisms are accessible to migrant women working as domestic helpers in order to ensure their access to justice, taking due consideration of the immediate social surroundings of migrant women working as domestic helpers. The implementation of certain standards is most effective when people are willing to use laws and abide by rules in a specific social condition. Thus, this section believes that the concrete social conditions and the problems which people face in the work place must be examined first in order to allocate appropriate enforcement mechanisms for realizing certain rules effectively, rather than blindly enforcing them without taking into consideration local concerns. Hence, this section proceeds as follows: Section 5.5.2 describes the micro social and macro social conditions of migrant women working as domestic helpers and the problems they face when seeking remedies for their legitimate claims. Section 5.5.3 compares the social mechanisms for access to justice that could work for the benefit of migrant women working as domestic helpers given their specific social conditions. Section 5.5.4 tenders several further action points for improvement regarding the substantive institution, the procedural mechanism, and the working guidelines.

### **5.5.1 The specific social conditions faced by migrant women working as domestic helpers**

To come up with appropriate suggestions to ensure access to justice in practice, the very first question is, what are the social conditions in the work place? That is, in this particular case, what social fields do migrant women working as domestic helpers live in? Generally speaking, rootless rural migrants in the urban areas can rarely find strong social networks of support or equal access to social welfare compared with their urban counterparts, due to various social barriers. In reality, the disadvantages of being a rural migrant and being a woman are compounded when working in a private household where everything is decided arbitrarily by the host family and everything is performed without any form of labour inspection. The study looks into the concrete social conditions of these migrant women working as domestic helpers and divides this area into the macro social field and the micro social field. The macro social field refers to the urban society to which these rural migrant workers travelled for work, whereas the micro social field mainly refers to the private house/close neighbourhood in which these domestic helpers work. The macro social field, i.e., society with its discriminatory policies and stereotypes, renders them second-class citizens in the urban areas due to their gender, Hukou status and their occupation. The micro social field, i.e., the private house they are working in,

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<sup>167</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Article 3 of the Covenant)*, 11 August 2005, E/C.12/2005/4, para.21.

<sup>168</sup> As to the summarized criteria for the remedial procedures, see International Commission of Jurists, *International Human Rights Law and Gender Equality and Non-Discrimination Legislation: Requirements and Good Practices*, ICJ Briefing Paper (Geneva: International Commission of Jurists, 2014), 8.

<sup>169</sup> Marjorie Mayo, *Access to Justice for Disadvantaged Communities* (Bristol: Policy Press, 2015), 23.

<sup>170</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (Article 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20.

makes them disposable at the mercy of their host families, who are free from labour inspection or any forms of supervision. Both social fields contribute to the difficulty for migrant women working as domestic helpers to claim rights and seek remedies.

In the macro social field, numerous legal gaps exclude them from being guaranteed labour rights on the legislative level. Firstly, the Hukou registration system is still the basis of a solid social stratification between rural dwellers and urban dwellers, who enjoy two sets of different social support systems and who still face difficulties when moving from one stratum to another. Despite the fact that “Top-Down Designed” Hukou reform has been conceived and implemented through pilot projects in various towns and cities for decades, yet for the cities like Beijing, Shanghai and Guangzhou with the largest numbers of migrants, completely open access to local social support for rural migrant workers is still taking time to be realized. Disadvantage based upon Hukou status faced by migrant workers will still exist into the foreseeable future.

Secondly, mostly performed through individual initiatives and introductions made by informal go-betweens,<sup>171</sup> domestic service usually belongs to the informal economy.<sup>172</sup> A common problem of all the jobs in the informal sector is that the informal sector lacks labour law protection over its working conditions including a minimum wage, safety and security, health and injury insurance arrangement, pension arrangements, paid leave and dismissal procedures. The consequence of such under-regulation is that the work is often temporary, turbulent, unsecured, unprotected and performed without a contract. The specificity of domestic service, added to its informality, is that, as a service concluded between an individual and a private household, it is explicitly excluded from the Chinese labour law system, which includes labour law, labour contract law, labour arbitration law, work-related injury law, social security law and so on. Thus, the working conditions of domestic helpers in a private house are free from labour inspections and any disputes between domestic helpers and their host family are not subject to labour arbitration, although labour arbitration is expedient and inclined to protect the interests of labour.<sup>173</sup>

Thirdly, normally, the law refrains from stepping into the private sphere – what happens in private stays private. For domestic service, there is no labour inspection or any form of supervision over the working conditions of domestic helpers. But as a woman, a migrant from a less-developed rural area and working in private families, these workers’ risks of being exposed to possible physical abuse cannot be ignored since discrimination against women in China is often intertwined with their social status. The picture of gender equality in China is very diverse amongst different social strata, but in general, women’s status versus men’s status is comparably better amongst the elite than amongst those at the very bottom of society. So when the law keeps its distance from intervening in the private sphere, the negative effect that it has on those women at the bottom of society is severe, especially on those rootless migrant women, working as servants in private households. Their problems are often unseen, unreported and outside public concern.

In the micro social field, domestic helpers find themselves dealing with a very delicate situation as well. Firstly, the understanding of non-discrimination and justice may be distorted compared with the average understanding of those matters, due to the specificity of the private working environment that domestic helpers work in and the private relationship between workers and host families that they deal with on a daily basis. It might be possible to claim being discriminated against by an employer who publicly states “men only” in a recruitment advertisement, yet it is hard for workers to claim being discriminated against by a host family which has almost complete discretion to choose local or non-local workers, male or female, good-looking or less well-favoured ones, everything can be based on individual preference in such cases. If a worker is not hired for an obvious reason based on any prohibited ground of discrimination, it is often still difficult to claim discrimination simply because the members of the host family want to choose a good domestic worker according to their own personal likings, even out of sheer bias. In many places, host families prefer local domestic workers to migrant ones because locals are, intuitively to the families, more trustworthy and with a similar urban cultural background. Thus, in order to improve the employment rate in society, many domestic service agencies and companies also prefer to hire local domestic helpers rather than migrants in their recruitment policies. What is more, workers with local Hukou enjoy more government-supported social benefits, which saves a large amount of money for these domestic service agencies and companies.

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<sup>171</sup> Admittedly, there are also a small number of registered companies for domestic service in China, which are not the focus of this study.

<sup>172</sup> “Informal Economy in China and Mongolia”, ILO, accessed 6 February 2017, <http://www.ilo.org/beijing/areas-of-work/informal-economy/lang--en/index.htm>

<sup>173</sup> Article 3, *Law of the People’s Republic of China on Labour Dispute Mediation and Arbitration*.

Secondly, working conditions, which include salary, resting hours, overtime compensation, safety and health, insurance, and other normal conditions enjoyed by normal labourers and which are guaranteed by labour law, are at the discretion of the host family in the case of domestic helpers. Since families enjoy a high level of discretion over the contract clauses of domestic service, the working conditions of domestic servants fluctuate depending on the subjective preference of the host family, the demand and supply of the market, and the integrity of the go-between, if there is one. In general, working conditions are not reliably fixed for domestic helpers, who are often not equipped with sufficient knowledge or not supported by a labour union so as to be able to bargain for more reasonable working conditions. In most cases, a contract is not concluded, which makes it very difficult to file a case when legitimate rights are violated.

Thirdly, working for a private family brings employment uncertainties and exclusion from society. Besides performing properly, it is extremely important to please or even delight the householder, or at the very least to keep a benign relationship between the two parties so that the domestic helper does not get sacked right away. Thus, on some occasions, small insults and disagreements are absorbed by domestic helpers to keep a harmonious atmosphere. The case introduced in Chapter 1 might be a most extreme demonstration of such compromise: Min-min kept silent for five years, suffering physical abuse, she was quite alone in a hectic big city, she was a little girl migrant from a remote village, and her only contact was her employer, who cruelly abused her. She dared not report her dire situation, probably because she did not want to antagonize her employer or, even more likely, because beside her employer, she had no other person to turn to anyway. Such isolation is particularly true for migrant domestic helpers, who have no family or friends in the urban areas, are not able to join local trade unions, have no sense of belonging without a permanent residence (Hukou) in the urban areas.

### **5.5.2 Ensure access to justice: a comparison of available social mechanisms in China**

As has already been described, the subtle specificity of the micro social and macro social fields that migrant women working as domestic helpers face, calls for specific solutions. The channels that these domestic workers use to solve their problems in work and life are not usually limited to formal law suits, which are perceived to be high publicity, energy consuming, costly and lengthy, with a negative impact on the relationship for both sides. Legal standards for human rights and labour rights are often best realized through a social mechanism that this group of workers has a reason to use, and through a social mechanism as a legal resource to truly solve these People's problems instead of escalating them.<sup>174</sup> This section aims to identify such social mechanisms for effective legal implementation of these rights given the social fields that these migrant women domestic helpers are in. Fortunately for these women, far from relying solely on legal processes, human rights standards and law can also be enforced through informal mechanisms.<sup>175</sup>

Hence, let us have a look at the various formal and informal social mechanisms that guarantee enforcement and remedies, such as formal courts, labour arbitration, National Human Rights Institute, petition, mediation and the ombudsman process.

As has been explained before, going into formal courts is more often than not too expensive and time-consuming for migrant domestic helpers who are paid poorly and have to work long hours. Many of the trivial disputes in the domestic service sector will be mediated by the courts in their capacity as courts anyway.<sup>176</sup> It does not mean that going to court should not be an option for such workers, but that the state has to figure out ways to assist the marginalized through legal procedures, for example by offering subsidies for pro bono legal work to avoid justice being the exclusive prerogative of the rich, if domestic workers insist on seeking justice via the courts or the case calls for a court solution. On the other hand, the state must also provide adequate options of alternative dispute resolution (ADR)<sup>177</sup> for domestic helpers, to make the dispute process less traumatic and to offer redress in a more effective, speedy and affordable way.

ADR often consists of arbitration, mediation, petition or the ombudsman process.<sup>178</sup> This section will compare these types of ADR to see which one works best for migrant women working as domestic helpers. In China, labour arbitration is indeed an effective way to solve labour disputes at all levels of employment, with sufficient authority and enforcement powers. However, the current Labour Arbitration Law only solves

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<sup>174</sup> John Griffiths, "The Social Working of Anti-Discrimination Law," eds. Titia Loenen and P.R. Rodrigues, *Non-Discrimination Law: Comparative Perspectives* (Dordrecht/Boston/London: Kluwer Law International, 1999): 313 – 330, at 322.

<sup>175</sup> Bas de Gaay Fortman, *Political Economy of Human Rights: Rights, Realities and Realization* (New York: Routledge, 2012), at section 1.6.

<sup>176</sup> Article 18, *Interim Measures for the Administration of Family Services Sector*.

<sup>177</sup> For further information on ADR, see Steven Vago, *Law and Society*, ninth edition (New Jersey: Prentice Hall, 2008), 276.

<sup>178</sup> *Ibid.*

disputes between the legally recognized “employers” and “employees”,<sup>179</sup> meaning that such labour arbitration procedures will not be applicable for most domestic helpers because they are self-employed or hired via agencies and are not included as “employees” in the Chinese labour law system. Furthermore, for those disputes which have occurred before a labour contract has even been signed, for example a discriminatory act against a migrant worker in the recruiting process, labour arbitration is not applicable either. Hence, either the law itself needs to change to include *all* domestic helpers as “employees” or, before that happens, alternative methods have to be found to settle disputes between domestic helpers and their host families.

As for the National Human Rights Institute<sup>180</sup> or Ombudsman<sup>181</sup> system, both seem to be good options for domestic helpers to seek justice if they are working in Western society. However, since neither of these systems is yet established in China, and further research is still needed on the effect of them in the Chinese context, this study will not put forward these mechanisms at the moment.

Both petition and mediation are local-grown mechanisms to safeguard rights and ensure access to justice in civil society. The petition system certainly enjoys a wide acceptance at the grass roots and has a long cultural, political, economic and institutional tradition in Chinese society.<sup>182</sup> Petition is a channel to reach justice for marginalized people in the lower classes, in comparison to the court system which is usually used by the well-off families who can afford it. Yet petition itself is often perceived, in many scholars’ eyes, as an arbitrary procedure which lacks sufficient formality, professionalism, rationality and certainty to enable it to fit into the rule of law context.<sup>183</sup> Additionally, in the specific case of migrant women working as domestic helpers, the opposing parties are usually host families rather than administrative organs, whereas the petition system is more suitable for solving administrative disputes, and is thus perhaps not an appropriate option for this specific case anyway.

Apart from going to court, mediation seems to be an affordable and expedient option for seeking justice when there are disputes between the host family and domestic helpers. At the same time, mediation is also flexible in its timing, physically accessible in the community, and can increase opportunities for normal people in the close neighbourhood to understand justice.<sup>184</sup> In China, mediation can be carried out by private parties or under the supervision of the Local Residents’ Committee. According to law, the Local Residents’ Committee at each administrative level in either rural areas or urban areas will establish a People’s Mediation Commission, which is composed of between three and nine elected members, including female members.<sup>185</sup> If the mediation is successful, the People’s mediation procedure often ends with a binding mediation agreement, which is normally in written form with detailed information of both parties, the facts and issues of the dispute, the rights and responsibilities after mediation, the performance details and the signatures of both parties and the mediators.<sup>186</sup> Legally binding as a civil contract, such mediation agreement can further be “judicially confirmed” (*sifa queren*) by local courts afterwards, in cases of non-compliance. With a mediation agreement

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<sup>179</sup> See *Labour Dispute Mediation and Arbitration Law of the People’s Republic of China*.

Article 2 states, “This Law shall apply to the following labour disputes arising between an employer and an employee within the territories of the People’s Republic of China:

- (1). A dispute arising from the confirmation of a labour relationship;
- (2). A dispute arising from the conclusion, performance, modification, rescission or termination of a labour contract;
- (3). A dispute arising from the removal or layoff of an employee or the resignation or retirement of an employee;
- (4). A dispute arising from the work hours, breaks, vacations, social insurance, benefits, training, or labour safety;
- (5). A dispute arising from the labour remunerations, medical expenses for a work-related injury, economic indemnity, compensation, etc.;

or

- (6). Any other labour dispute as provided for by a law or administrative regulation.”

<sup>180</sup> See UN Commission on Human Rights, *National institutions for the promotion and protection of human rights*, 9 March 1993, E/CN.4/RES/1993/55.

<sup>181</sup> It is suggested that a domestic workers’ Ombudsperson be designated to ensure their access to remedies. See UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), *General Comment No. 1 on Migrant Domestic Workers*, 23 February 2011, CMW/C/GC/1, para.49.

<sup>182</sup> Li Hongbo, “On Petition System in the Human Rights and Rule of Law Discourse,” ed. Xu Xianming, *Human Rights*, Vol.12 (Shandong: Shandong People’s Publishing House, 2013), 64.

<sup>183</sup> Zhou Yongkun, “Petition and the Various Channels for Dispute Settlement in China,” ed. Wang Qinghua and Ying Xing, *A Study on the Experience of Dispute Settlement Mechanisms in the Basic Administrative Level in China* (Shanghai: Shanghai Sanlian Book Shop, 2010), 38-39.

<sup>184</sup> Steven Vago, *Law and Society*, 9th edition (New Jersey: Prentice Hall, 2008), 279.

<sup>185</sup> See Article 8, *The People’s Mediation Law of the People’s Republic of China*, adopted at the 16th meeting of the Standing Committee of the 11th National People’s Congress of the People’s Republic of China on 28 August 2010, and came into force on 1 January 2011.

<sup>186</sup> Articles 28-29, *ibid*.

that has been judicially confirmed, one can apply for compulsory enforcement (qiangzhi zhixing) at a local court in a case of non-compliance.

People's mediation is ideal for settling non-violent disputes between host families and domestic helpers. This is because there is a deep cultural tradition and wide acceptance of mediation as a dispute settlement mechanism amongst ordinary workers throughout Chinese history. People are willing to use it as a convenient and accessible tool to solve their small points of friction with their acquaintances. Plus, unlike formal courts, People's mediation is free of charge, it does not require expensive lawyers to be involved, nor does it require a lengthy procedure or the filing of cases. Finally, People's mediation is carried out by means of contracts under the supervision of the Local Residents' Committee, which bears more authority than private mediation.

People's mediation is also suitable because it principally deals with disputes arising in civil and private relationships, such as family disputes, agricultural land disputes, personal debt, physical injury and so on. Normally, problems which domestic helpers face in their daily life are mostly between them and their host families, and thus, according to the existing Chinese labour law, of a civil nature. Additionally, as long as the dispute is not as severe as a criminal offence, small scale conflicts are better mediated by a third party peacefully, which saves the reputation of the domestic helpers in case they want to find another employer, and also maintains the reputation of the host family in the dispute. Mediation process is often done privately with the conflicting parties and the mediator, it respects the privacy of both parties to the maximum degree if the parties request confidentiality.

Mediation is feasible and physically accessible because the Mediation Commission is universally provided by each Local Residents' Committee, where domestic helpers and host families can always go when small-scale disputes occur between them. According to statistics provided by the National Bureau of Statistics (NBS) of China in 2009,<sup>187</sup> there were 823,700 People's Mediation Committees and 4,930,000 mediators nationwide. In rural areas there is a self-autonomous organisation called the Villagers' Committee in each village, and there is a People's Mediation Commission at each Villagers' Committee. In the same vein, in urban areas, there is a Residents' Committee in each town and each county, and there is a People's Mediation Commission at each Residents' Committee. Nationwide, in 2009, the number of successfully mediated civil disputes was about 5,790,000,<sup>188</sup> which is similar to the number of first trial civil cases in courts in the same year which was 5,800,000.<sup>189</sup> These figures show that there is still a significant proportion of the public that prefers to rely on mediation to solve civil and private disputes.

Additionally, as self-autonomous organisations formed at each small residence community, the local Residents' Committees are there for both supervisory work in daily life and for monitoring implementation after the mediation procedure is finished. On the one hand, they have their ear close to the ground and are able to pick up on abuse and exploitation soon enough in the community. On the other hand, they can ensure implementation of the result of the mediation with their authoritative role in the local neighbourhood. Since they can already play a role in settling disputes and mediation, this only comes as a logical extension of their role. Such social mechanism arising from the Residents' Committees is organic, local-grown and widely accepted by ordinary people; at the same time, it also meets the requirements of international human rights standards as being affordable, efficient and physically accessible. It is especially appropriate for ensuring that domestic helpers' legitimate rights are well respected in a private family in daily practice, and for making sure that host families abide by the result of a mediation carried out by a Local Residents' Committee.

According to the newly passed People's Mediation Law of the People's Republic of China,<sup>190</sup> such a mechanism for civil dispute settlement is now legally institutionalized by both national and local laws, with governmental fiscal support, allocated staff, an official record system, enforcement machineries and so on.<sup>191</sup> Pursuant to *Some Provisions Concerning the Work of People's Mediation issued by the Ministry of Justice*, mediation should strictly abide by the following principles.<sup>192</sup> First, during mediation, the dispute parties are regarded as

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<sup>187</sup> The latest statistics available regarding People's Mediation on a national level are for 2009. "Basic Statistics on the People's Mediation," National Bureau of Statistics of People's Republic of China, accessed 5 February 2017.

[http://www.stats.gov.cn/ztc/ztsj/hstjnj/sh2009/201209/t20120905\\_73015.html](http://www.stats.gov.cn/ztc/ztsj/hstjnj/sh2009/201209/t20120905_73015.html)

<sup>188</sup> Ibid.

<sup>189</sup> "First Trial Cases by Courts", National Bureau of Statistics of People's Republic of China, accessed 5 February 2017.

[http://www.stats.gov.cn/ztc/ztsj/hstjnj/sh2009/201209/t20120905\\_72998.html](http://www.stats.gov.cn/ztc/ztsj/hstjnj/sh2009/201209/t20120905_72998.html)

<sup>190</sup> *The People's Mediation Law of the People's Republic of China*, 2010.

<sup>191</sup> Ibid.

<sup>192</sup> Article 4, *Some Provisions Concerning the Work of People's Mediation*, adopted at the working meeting of Ministers of the Ministry of Justice on 11 September 2002, effective as of 1 November 2002.

autonomous and viewed on an equal basis; the mediators must not prejudice or discriminate against any party. Second, mediators should mediate according to law and regulations, uphold justice and safeguard individual interests. Third, People's mediation is not a preliminary procedure or mandatory procedure, and thus it respects both parties' consensus over any other transitional mechanism and it does not repudiate lawsuits in any phase of mediation. Finally, in the process of civil court suits, judges can also play the role of a mediator, or even delegate the case to a local People's Mediation Commission should both parties agree.

Last but not least, the purpose behind identifying People's mediation as an appropriate option to ensure access to justice is not to exclude the role of courts in dispute settlements and offering remedies; in severe human rights intrusion cases in particular, the state is obliged to equip the victim with all necessary means to seek justice via court procedures. Rather, this section has tried to put forward an alternative dispute resolution channel for the benefits of migrant women working as domestic helpers given the specific social conditions they are in. In order to make legal standards work at the lowest levels of employment, informal controls such as Local Residents' Committees and People's mediation can play roles in the implementation process such as supervision over working conditions and offering channels for solving disputes. It has to be mentioned that, although People's mediation is free of -charge, expedient, physically reachable and of legal effect, there is still room for improvement in some aspects in order to fulfil the international human rights standards and guarantee genuine equality.

### **5.5.3 Some additional suggestions**

Although mediation is an acceptable, suitable, and feasible local social mechanism to enhance enforcement of rights, given the particular social fields that migrant women workers are in, it still requires improvement to bring it up to international standards. While building on the mechanism that is feasible and accessible as a problem-solver for people at grass-roots level, it is equally important to make the mechanism adhere to the standards set by the international human rights conventions ratified by China. This requires adapting and improving the mechanism in such a way that it embodies such standards.

Needless to say, the preliminary condition to facilitate People's mediation in dispute settlements is sufficient governmental fiscal allocation to improve the institutional set-up, and to provide hardware and software support, personnel of high quality and staff diversity. According to the 2011 People's Mediation Law, Local Villagers' Committees and Residents' Committees should appropriate sufficient office accommodation and working financial support for People's mediation.<sup>193</sup> Although People's mediation is free of charge for disputed parties, the mediators deserve proper subsidies for their efforts, and must be provided all necessary assistance or compensation if they are injured during mediation.<sup>194</sup>

But beyond all these fundamental requirements that make People's mediation function, there are still many aspects that call for improvement to make it function *well*. First and foremost, it is suggested that professional training on mediating skills, knowledge of international standards and national laws, and gender awareness education should be offered to mediators who are facing increasingly complicated disputes.<sup>195</sup> It has to be acknowledged that, more often than not, domestic helpers are in a relatively poorer bargaining position than their host family. Legally speaking, they are equal civil parties and must be regarded by law as equals, but actually, they are not necessarily on an equal footing in terms of bargaining power. Thus, to raise awareness of the intersectional disadvantages which such domestic helpers experience is helpful for the mediators and enables them to make just and sound decisions in such cases of power imbalance.

Second, as far as procedural matters are concerned, it is suggested that People's mediation must directly apply the ratified international human rights conventions or labour conventions as the sources for any decision. Although there is no precedent for such direct application of IHRL/ILO in the Chinese domestic court procedures,<sup>196</sup> the Local Residents' Committees could try to be pioneers in this regard. After all, there is no domestic law that forbids such a practice. It is further suggested that mediation must, according to what is suggested by ICESCR General Comments, adopt diversified methods of redress such as compensation, reparation, restitution, rehabilitation, guarantees of non-repetition and public apologies, and State parties

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<sup>193</sup> Article 12, *People's Mediation Law of the People's Republic of China*.

<sup>194</sup> Article 16, *ibid*.

<sup>195</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *Concluding observations on the second periodic report of China, including Hong Kong, China, and Macao, China*, 13 June 2014, E/C.12/CHN/CO/2, para.10.

<sup>196</sup> *Ibid*, para.9.

should ensure that these measures are effectively implemented.<sup>197</sup> This can be done effectively with the assistance and under the supervision of Local Residents' Committees.

Third, to enhance the predictability of such mechanism for the sake of the disputing parties, it is suggested that a "case law" system be developed on the basis of the existing mediation records to guarantee fair mediation. Mediation is a process of practical wisdom, which involves applying general principles to empirical cases, to transform conflict into harmony. A systematic archive of such mediation "case law" would serve as a collection of such wisdom. Such records of mediated cases could keep track of the evolution of social relations, ways of legal application and the interaction between the two. Additionally, the mediation case-law system could provide a reliable reference for both the mediators and disputing parties to ensure consistency and predictability. The accessibility of such mediation case law would need to be regulated in a way that would both benefit mediators and respect the parties' privacy.

Fourth, to enhance the legal enforceability of People's mediation calls for the backing of legislation rather than relying too heavily on judicial confirmation. After all, as a complementary mechanism for dispute settlement outside the law courts, People's mediation is free, accessible to the grass roots, expeditious and local-grown. People's mediation is especially suitable for small-scale and private disputes that are repeatedly happening from day to day but which are not severe enough to be brought to court, disputes such as domestic arguments, neighbourhood disputes, small debts, minor infringements, and doctor-patient disagreements and so on. If the legal effect of People's mediation has to be backed up each time by judicial confirmation, it is not only a waste of judicial resources, but may also turn people's mediation into a replaceable mechanism, instead of being a complementary one. Thus judicial confirmation and compulsory implementation must serve as a final line of defence, rather than a regular guarantee.

Finally, as the People's Mediation Law reaffirms the independent legal enforceability of mediation agreement,<sup>198</sup> it does not mean that there is no room for mutual complementarity between mediation and court cases. Rather, when each mechanism is doing its own job, it can still ask for assistance from the other when a situation may be better solved by the other. For example, when a court faces trivial cases that can be handled by mediation, it can firstly mediate in its capacity as a court, but can also delegate the case to People's mediation if both parties so agree.<sup>199</sup> On the other hand, the disputing parties are free to stop the mediation or to revoke the mediation agreement and bring a law suit to the court in a smooth transition.<sup>200</sup> In sum, People's mediation must assume independent legal effect on the basis of national legislation rather than judicial confirmation, but at the same time it needs to be a complementary mechanism for small civil dispute settlements outside the civil courts.

## **Conclusion**

In connection with fulfilling the state's obligation to IHRL/ILO to realize human rights and labour rights, this section has focused on identifying appropriate formal or informal social controls that ensure access to justice for migrant women working as domestic helpers, given the specific social fields they are in. By comparing several channels of social mechanisms that ensure access to justice, this section has identified People's mediation within the setting of Local Residents' Committees as a social mechanism that is acceptable, accessible and appropriate for access to justice for migrant women working as domestic helpers.

This section built upon the idea that the effectiveness of law and legal mechanisms can only be ensured if they are appropriate for solving individual problems in a given social situation. Thus it first analysed the macro social and micro social conditions faced by migrant women working as domestic helpers. On the basis of such factual situations, the section compared various channels of formal and informal social control and came to the conclusion that People's mediation is an acceptable, suitable and feasible mechanism for domestic helpers to use to solve problems concerning their legitimate rights in a host family. The section further explained the role of Local Residents' Committees in the supervision of labour standards and in ensuring access to justice for minor disputes. The section ended with some additional suggestions as to how People's mediation might further meet international standards. On the existing basis of People's mediation, it is recommended that: the

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<sup>197</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (Article 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20, para.40.

<sup>198</sup> Article 5, *People's Mediation Law of the People's Republic of China*.

<sup>199</sup> *Some Suggestions on Delegating Civil Disputes to People's Mediation*, Qufu People's Court and Qufu Judicial Bureau, 12 December 2010.

<sup>200</sup> Articles 37 and 38, *People's Mediation Law of the People's Republic of China*.

professionalism of mediators should be increased through systematic training; direct application of international human rights and labour rights legal standards should be allowed in the process of dispute settlement; the predictability of mediation should be enhanced by developing mediation “case law”. It has to be made clear that to adopt mediation procedure in such cases is by no means an exclusion of court or arbitration procedures. Various social mechanisms can be used in a complementary way in order to ensure realization of human rights at grass-roots level.

## 5.6 Conclusion

To answer the central research question as to what improvements in the Chinese domestic legal system can be made to safeguard the human rights and labour rights, under the international human rights and labour rights legal framework, of migrant women working as domestic helpers, this study has: described the status quo of migrant women working as domestic helpers and the concrete problems they face in Chapter 2; introduced intersectionality as the analytical tool that this study uses in Chapter 3; and analysed the existing IHRL/ILO standards and their implications as guidelines for action in Chapter 4. Following this line of thought, Chapter 5 first identified the implementation gaps between the guidelines for action developed in Chapter 4 and the reality of Chinese law for the benefit of migrant women working as domestic helpers. On the basis of the identified gaps, the chapter proposed directions by offering suggestions which China could adopt in legislation and in practice so that it would thus fulfil its obligation to the IHRL/ILO for migrant women working as domestic helpers.

This chapter first identified the implementation gaps in the current Chinese legal system on eliminating discrimination and ensuring equality (5.2.2), on the realization of international labour standards (5.2.3), and on access to justice (5.2.4). The implementation gaps on anti-discrimination are as follows. (1) There is no comprehensive set of laws to promote equality and eliminate discrimination. (2) The domestic legislation contains no comprehensive definition of discrimination. (3) No distinction is made by statutory law or case law between direct and indirect discrimination. (4) The Chinese laws fail to include social origin as one of the prohibited grounds for discrimination *de jure* to protect migrant workers from discrimination. (5) There are no regulations or special measures to eliminate *de facto* discrimination based on social origin. (6) There is not yet a legal concept that incorporates multiple discrimination, nor is there legal acknowledgement of extra remedies for those who suffer from multiple forms of discrimination. (7) It is not clarified in Chinese law what constitute those situations that are not regarded as discrimination. (8) Chinese law has not reached a good balance between reasonable accommodation and undue restriction, as women are still treated as though they are as vulnerable as children and thus are restricted in their freedom in certain aspects in employment.

The implementation gaps on the realization of international labour standards for migrant women working as domestic helpers are: (1) the lack of legal provisions that ensure “equal pay for equal work and work of equal value” in the labour market; (2) the lack of an institutional set-up for freedom of association as is required by the core ILO conventions, which oblige all ILO member states regardless of ratification status; (3) the lack of legal guarantee for equal access to social security to all workers; (4) the lack of specific legal provisions on safeguarding decent work for migrant workers and domestic helpers, with full consideration of their specific characteristics. Given that labour inspection and labour arbitration is not usually applicable to domestic helpers, there is still no specific social mechanism that is affordable, accessible and appropriate to ensure access to justice for migrant women working as domestic helpers in China.

In the light of the gaps identified in the previous section, the next three sections addressed the three aspects respectively. Section 5.3. proposed some legislative suggestions on combating discrimination and promoting equality for the benefit of migrant women working as domestic helpers. The first suggestion is to incorporate substantive gender equality in Chinese law to guarantee full personal liberty for women in choosing an occupation and to abolish those protective measures that go beyond maternity in the strictest sense. On top of this, it is suggested that China, as a state party of ICESCR, should abide by the CESCR’s Concluding Observation to China, and adopt a comprehensive set of anti-discrimination laws. This law must include but is not limited to the following aspects: (1) a clear definition of discrimination that is in line with the international conventions, especially the ratified CEDAW and ILO conventions; (2) a clear distinction between direct discrimination and indirect discrimination; (3) a legalized concept of multiple discrimination so that the intersectionality approach is taken into account in law and an adequate remedy is offered; (4) the inclusion of gender-based violence and sexual harassment as one form of discrimination and a strict prohibition on them; (5) full legislative expression

of the principle of “equal pay for work of equal value” and preferably, the establishment of a system of objective job evaluation system.

Section 5.4 proposed, in response to the identified gaps, recommendations to fill those gaps in the field of Chinese labour law for the benefit of migrant women working as domestic helpers. First and foremost, in order to ensure representation of domestic helpers, it is suggested that the law allows freedom of association for domestic helpers, or alternatively, that a Domestic Workers Observatory be established under the legal framework of ACFTU. Second, it is suggested that a compulsory and inclusive insurance system be established that covers “retirement, unemployment, sickness, invalidity and old age and other incapacity to work”, especially “maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances”, for those working in the informal sector, who are usually excluded from the local social insurance plan. Third, specifically for rural migrant workers and domestic helpers, labour standards that are tailored to their needs must be given expression in the labour law system, such as working hours, safe and healthy working environment, right to privacy, right to personal belongings, etc.

Section 5.5 aimed to find the social mechanism that works most appropriately to ensure access to justice for migrant women working as domestic helpers, given the specific condition of the social fields they are in. By comparing several channels of social mechanisms that ensure access to justice, the section identified People’s mediation within the setting of Local Residents’ Committees as a social mechanism that is affordable, effective, and physically accessible for migrant women working as domestic helpers. It further analysed how People’s mediation fits with domestic helpers to solve problems concerning their legitimate rights in a host family. It further explained the role of Local Residents’ Committees in the supervision of labour conditions and in the process of mediation. It further suggested that, on the existing basis of People’s mediation: the professionalism of mediators should be increased through systematic training; direct application of international human rights and labour rights legal standards should be allowed in the process of dispute settlement; international human rights principles should be directly applied in the process of mediation; the predictability of mediation should be enhanced by developing mediation “case law”. It has to be made clear that to adopt mediation procedure in such cases is by no means an exclusion of court or arbitration procedures. Various social mechanisms can be used on a case-by-case basis to ensure realization of human rights at the grass-roots level.



### 6.1. An overview of the study

The shocking case of Cai Minmin – a teenaged girl from a rural area brutally abused by her (female) employer for five years – drew my attention to the existing problems in the Chinese legal system for the most marginalized people in society. With great sympathy for the sufferings of the most marginalized group of people in contemporary China, the author of this study set out to answer the following question: **what needs to be done to improve the domestic legal system in the aspects of anti-discrimination and safeguarding decent working conditions for migrant women working as domestic helpers, referring to the international human rights/labour standards, especially those ratified by China?**

To answer the central research question, the research proceeded along the following lines of argument. First, the study gave an overview of Chinese domestic law regarding the status of women, Hukou, and the domestic service business to offer a general picture of the law in the relevant subjects. Then it set out an extensive description of the de facto situation of women workers in China, rural migrants working in the urban areas without local Hukou, and the working conditions of domestic helpers, so that the readers were informed of the de facto situation beyond de jure requirements. Second, it introduced the gender and intersectionality approach as an analytical tool to understand the situation of migrant women working as domestic helpers on the basis of the description of women workers, rural migrant workers, and domestic helpers. By doing this, a comprehensive understanding of the intersectional disadvantages experienced by migrant women working as domestic helpers could be gained. Third, based on the intersectional analysis of the situation of migrant women working as domestic helpers, the need to be treated equally and the need to be ensured decent working conditions were identified and categorized. Based on these identified needs of migrant women working as domestic helpers, the study scanned the international human rights treaties and international labour conventions, especially those ratified by China, for relevant provisions and standards. A series of guidelines covering the aspects of anti-discrimination and decent working conditions were then generated from these international human rights and labour rights legal documents.

Fourth, based on the previously developed guidelines, the study identified the implementation gaps between the guidelines and existing Chinese laws, which served as the foundation for suggesting possible improvements in the law with due consideration of the benefit for migrant women working as domestic helpers in China. Legislative proposals that are in line with the standards set in the international human rights conventions and international labour conventions were put forward to ensure the basic human rights and labour rights for migrant women working as domestic helpers.

To be specific, in Chapter 1, the case of Cai Minmin, who was continually abused by her host family for five years, was introduced as an example. This case has raised concerns over the most marginalized people in society and the absence of proper legal protection for their human rights and their labour rights resulting from the overlapping forms of exclusion which they have faced. Chapter 1 went on to introduce the derived research questions for this study and the structure of the book, touching upon the gender and intersectionality approach to be adopted to analyse the complicated social barriers faced by migrant women working as domestic helpers in China. The study, which is legal research, uses legal text analysis as its main research methodology, in combination with semi-structured interviews, literature reviews and analysis of many statistics and surveys.

In Chapter 2, the study described the relevant aspects of the Chinese law and the status quo of migrant women working as domestic helpers in the specific social context. “The Socialist Legal System with Chinese Characteristics” contains 240 effective laws, 706 administrative regulations, and over 8,600 local regulations covering nearly all aspects of legal relations,<sup>1</sup> including laws that generally prohibit discrimination based on gender and specific laws that protect women’s interests. Chapter 2 went on to trace the history and the status quo of Hukou segregation as endorsed by laws and policies, as well as looking at the situation of national laws established for the regulation of the domestic service market. Despite this comprehensive network of laws and policies, women, rural migrants and domestic helpers still have to face de facto social barriers in their work and lives. A story, with three strands, of women workers revealed the interwoven barriers derived from Confucian patriarchal practice, the socialist formal gender equality practice and the capitalist gender segregation in reality.

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<sup>1</sup> Information Office of the State Council of the People’s Republic of China, *White Paper on the Establishment of the Socialist Legal System with Chinese Characteristics* (Beijing: Information Office of the State Council, 2011), accessed 15 February 2017, [http://www.china.org.cn/government/whitepaper/node\\_7137666.htm](http://www.china.org.cn/government/whitepaper/node_7137666.htm)

A description of the dual society divided by the urban and agricultural Hukou registration system showed a picture of social stratification between urban dwellers and rural workers. A review of the unsatisfactory working conditions of domestic helpers displayed an invisible group in society that is under-protected by law.

Chapter 3 introduced a gender analysis and an intersectionality approach as the lens for examining the situation of migrant women working as domestic helpers and the intersectional predicament caused by their social categories of gender, agricultural Hukou status and occupation. Gender and intersectionality help us to look behind the power and dominance between men and women, and amongst the different groups of other social categories. Migrant women working as domestic helpers are most likely to face all the problems faced by women, rural migrants and domestic helpers, not in a simple 'adding-up' way, but in a compound way, with different permutations on a case-by-case basis. To put it another way, the intersectional problems faced by migrant women working as domestic helpers are more complicated than the disadvantageous situations faced singly by women, or rural migrant workers or domestic helpers; and more aggravated than the situations faced by female rural migrant workers working in other spheres, urban women domestic helpers, and male rural migrants working as domestic helpers. Such compounded disadvantages give rise to complicated problems including but not limited to labour market discrimination, labour union exclusion, exploitative working conditions, potential abuse within a private house as the work place, safety and health concerns, limited access to social security and social benefits, and limited access to justice when the human rights and labour rights of this particular group of women are violated.

Chapter 4 provided a list of implications derived from the selected standards found in the hard laws and soft laws, including the provisions in the existing international human rights/labour conventions and treaty bodies' opinions, for the benefit of migrant women working as domestic helpers regarding both non-discrimination and working conditions, taking into consideration their concrete needs: to be treated equally; to be ensured decent work and to be able to get access to justice. The examined IHRL/ILO provisions are mainly those ratified by China, such as CEDAW, ICESCR, ILO No.100 on equal remuneration of men and women workers, ILO No.111 on non-discrimination in employment and occupation, etc. Those conventions that are highly relevant to the theme of the research but not ratified by China, such as ICCPR, CMW on the rights of migrant workers and their families, ILO No. 189 on decent work for domestic helpers, were also referred to. Supplementary documents, such as treaty bodies' general comments, concluding observations to China, Direct Requests to China and other supervisory reports, were also examined. For the aspects of anti-discrimination and decent work, the chapter developed a series of guidelines, based on the analysis of these provisions and documents, for China to improve its domestic legal system so as to better ensure the human rights and working conditions of migrant women working as domestic helpers.

According to these developed guidelines, Chapter 5 first identified the implementation gaps in the current Chinese legal system on eliminating discrimination and ensuring equality, on the realization of international labour standards, and on access to justice. In the light of the gaps identified in Section 5.2 the next three Sections (5.3, 5.4 and 5.5) respectively addressed these three aspects: combating discrimination and promoting equality for migrant women working as domestic helpers; ensuring decent working conditions for them; and guaranteeing access to justice with an appropriate social mechanism. Several specific points of action were provided in Sections 5.3 and 5.4 with reference to the guidelines derived in Chapter 4. After comparing different social mechanisms that ensure access to justice in China, Section 5.5 found People's mediation, within the setting of Local Residents' Committees, to be a complementary social mechanism outside trial courts that is acceptable, accessible and affordable for the specific situation of migrant women working as domestic helpers, both to supervise their working conditions and to offer them access to justice.

This research intends, first of all, to raise the overall awareness, in contemporary Chinese society, of the existence of this group of people, who are discriminated against in many aspects of their lives. Secondly, it reminds the Chinese government that there are still implementation gaps in the current Chinese legal system compared with existing international human rights/labour standards, and that a lot of work remains to be done by China to fulfil its state obligations for the realization of human rights and labour rights. Thirdly, by developing a series of guidelines for the human rights protection of migrant women working as domestic helpers based on the IHRL/ILO standards, this research intends to offer legislative suggestions for improving the current Chinese legal system to meet those standards. Finally, the specific social conditions faced by migrant women working as domestic helpers were taken into consideration when the author was looking for appropriate mechanisms for ensuring access to justice in the specific social context, so that the standards would truly be used in reality for the benefit of the workers instead of remaining just theory.

## 6.2. Migrant women working as domestic helpers: a gender and intersectional analysis

Gender in this study is more than just another word for “women”,<sup>2</sup> or a mere social construction of biological sex; it is used in this study as a category of analysis, and as a way to talk about social relations.<sup>3</sup> Gender analysis is used as an analytical tool to understand the dire situation of gender imbalance in both contemporary Chinese society and the spirit of Chinese laws, serving as the basis for any meaningful social engineering. It helps the author to look into how the patriarchal tradition has contributed to the unchanging role played by women in the family arena, how socialist ideology in China has promoted women’s emancipation and formal equality, and how the essence of capitalism has encouraged women into the labour market whilst perpetuating gender inequality via meritocratic standards where men and women are not on an equal footing from the very start. A gender analysis helps the author to identify the additional disadvantages faced by migrant workers caused by both gender and their Hukou status. It further equips the author with a strong lens to examine the typical manifestation of gender segregation in the labour market, namely a predominant percentage of females working as domestic helpers in China. Seen from a gender analysis, women domestic helpers are more susceptible than their male counterparts in the face of a hostile working environment, enduring verbal and physical abuse, sexual harassment and other forms of violence.

On the basis of a gender analysis, an intersectionality approach is applied as a complementary lens in analysing the compounded disadvantages experienced by migrant women working as domestic helpers in China. Intersectionality is one of the feminist theories used to understand the complicated social power dynamics. It sees gender, together with other social categories such as social origin, race, nationality, ethnicity, sexual orientation and so on, as the basis of social power division. With intersectionality as an analytical tool, we see different groups of minorities facing multiple levels of social oppression due to various configurations of social categories in varying degrees of intensity.<sup>4</sup> Seen from an intersectionality approach, people in real life do not experience neatly compartmentalized forms of disadvantage, but multiple systems of oppression interplaying with each other simultaneously.<sup>5</sup>

Before intersectionality was applied to this case, the status quo of women, rural migrants and domestic helpers were respectively described. A triple-stranded account of women workers in China depicts a picture of Confucian patriarchal practice, formal gender equality under socialist ideology, and unfair competition in the capitalist environment. The Confucian practice portrays women as being as vulnerable and incapable as children and pins them down in family chores. Women are expected to fulfil their roles of being obedient daughters, subordinate wives and loving mothers. A career ambition is a cultural taboo for “benign” women. Admittedly, the socialist reform made great strides in reversing the feudalistic subordination of women in society, yet the promotion of formal gender equality and the application of male standards to women were not necessarily beneficial for women, as a whole, or as an individual in the 1960s. With the Reform and Opening-up Policy which has been carried out since the late 1970s, China gradually embraced a market economy and abandoned the command economy step by step. An increasing number of women entered into the labour market, which is often characterized by gender segregation and gender stereotyping.

Rural migrants face a dual society divided by the Hukou system. An urban Hukou opens the door to access children’s education, job opportunities and salaries, career development, social insurances, public services and other multifaceted necessities required for a normal and decent standard of living. A agricultural Hukou, by contrast, is often the ground for inferior treatment in all aspects of work and life, such as employment, social security, health care and education,<sup>6</sup> not only for the agricultural Hukou holders themselves, but also for their children. In China, there are more than 277 million national migrant workers,<sup>7</sup> making up almost 35% of the work force around the country.<sup>8</sup> This number has been consistently on the rise during recent years against the

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<sup>2</sup> Joan Scott, “Gender: A Useful Category of Historic Analysis”, *The American Historical Review*, Vol. 91, No. 5 (1986): 1053-1075, at 1056.

<sup>3</sup> *Ibid.*, at 1066.

<sup>4</sup> George Ritzer and Jeff Stepnisky, *Contemporary Sociological Theory and Its Classical Roots: The Basics*, second edition (New York: McGraw-Hill Higher Education, 2007), 204.

<sup>5</sup> Johanna Bond, “International Intersectionality: A Theoretical and Pragmatic Exploration of Women’s International Human Rights Violations,” *Emory Law Journal*, Vol. 52, No. 71 (2003): 71-186, at 76.

<sup>6</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *Concluding observations on the second periodic report of China, including Hong Kong, China, and Macao, China*, 13 June 2014, E/C.12/CHN/CO/2, para.15.

<sup>7</sup> National Bureau of Statistics of People’s Republic of China, *The 2015 Investigation and Survey Report on the National Migrant Workers*, 28 April 2016, accessed on 12 February 2017,

[http://www.stats.gov.cn/tjsj/zxfb/201604/t20160428\\_1349713.html](http://www.stats.gov.cn/tjsj/zxfb/201604/t20160428_1349713.html)

<sup>8</sup> “Labour force”, World Bank, accessed 11 February 2017,

background of rapid urbanization in China.<sup>9</sup> It is acknowledged by the new generation of Chinese leaders that an urgent reform of the Hukou system nationwide has to be carried out for a more inclusive society.<sup>10</sup> But there is still a long way to go to have all these disadvantages abolished de jure and de facto.

The poor working conditions of domestic helpers are worth attention as well. Surveys of 1,600 households in Shenyang, Qingdao, Changsha and Chengdu concluded that over 40% of households needed domestic services,<sup>11</sup> and the demand for domestic servants amounted to 14 million such workers nationwide in the year of 2008.<sup>12</sup> The domestic service business has contributed significantly to the national Gross Domestic Product: it has been calculated that there are 500,000 home service agencies with 160 billion RMB (roughly 22 billion Euros) income in total per year in China.<sup>13</sup> Despite its great potential and contribution to society, the domestic service business remains an unattractive career track to follow, given the fact that such service is considered to be of low status, is unreliable, poorly paid, with constant working overtime without compensation, working in poor conditions, with high turnover of personnel and usually without social insurance.<sup>14</sup> There are about 20 million people working as domestic workers in China, amongst these people, 15 million are laid-off workers, migrant workers and college school students,<sup>15</sup> 90% of them are female, excluding unreported juvenile females.<sup>16</sup> Despite this huge number, the national labour laws do not usually include domestic servants working for a private family as “employees”. In addition, the decent working conditions of domestic helpers are not articulated in the Chinese legal system.

When intersectional analysis is applied to the status quo of migrant women working as domestic helpers in China, the assumed three social categories, namely, gender, social origin of rural residence, and occupation, are viewed in an inter-connected way. The social barriers arising from being a woman, being a rural migrant worker and being a domestic helper will all likely be experienced by migrant women working as domestic helpers. In addition, the three social categories are also likely to interchange into each other in certain situations, especially when there are more women migrating to urban areas for work, which is known as “feminization of migration”.<sup>17</sup> It is difficult to address their situation by appointing a “comparator” when there is simply no comparator for their situation under certain circumstances; their dilemma is concrete and complicated, calling for attention on a case-by-case basis.

Such intersectional social categories place these workers in a specific social field that combines under-regulation in society with the arbitrariness of the private household. First and foremost, despite great efforts of Hukou reform in various districts around the country, exclusion from social security and public services of rural migrants in big cities still prevails in practice. Second, domestic service usually belongs to the informal economy,<sup>18</sup> which lacks labour law protection over working conditions including minimum wage, safety and security, health and injury insurance arrangement, pension arrangement, paid leave, and dismissal procedure. Third, the private household as the work place creates great difficulty in terms of labour inspection and supervision, as well as equal access to justice for domestic helpers, who can be exposed to abuse behind closed

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<http://data.worldbank.org/indicator/SL.TLF.TOTL.IN/countries>

What is worth mentioning here is that the total labour force figures in China given by the World Bank include the employed and the unemployed and even the armed forces, but do not include the number of those workers in the informal sector.

<sup>9</sup> See Pan Jiahua and Wei Houkai, ed. *Blue Book of Cities in China: Annual Report on Urban Development in China No.5*, first edition (Beijing: Social Science Academic Press, 2012).

<sup>10</sup> Hukou reform was written into the *Communiqué of the Third Plenary Session of the 18th Central Committee of the Communist Party of China*, adopted at the Third Plenary Session of the 18th Central Committee of the Communist Party of China, 12 November 2013.

<sup>11</sup> China Home Service Association (CHSA), *Prospect of Domestic Service Industry and Governmental Support*, 13 April 2012, accessed 11 February 2017,

<http://www.chsa.com.cn/xhjs2/hydt/2012/04/13/9852.html>

<sup>12</sup> May Wong, “Domestic Workers and Rights in China,” *Solidarity*, April 2008, accessed 11 February 2017,

<http://solidarity-us.org/site/node/1394>

<sup>13</sup> China Home Service Association (CHSA), *Prospect of Domestic Service Industry and Governmental Support*, 13 April 2012, accessed 11 February 2017,

<http://www.chsa.com.cn/xhjs2/hydt/2012/04/13/9852.html>

<sup>14</sup> Dong Xiaoyuan, Feng Jin and Yu Yangyang, “Relative Pay of Domestic Eldercare Workers in Shanghai, China,” *Feminist Economics*, Vol.23 (2017):135-159.

<sup>15</sup> China Home Service Association (CHSA), *Prospect of Domestic Service Industry and Governmental Support*, 13 April 2012, accessed 11 February 2017,

<http://www.chsa.com.cn/xhjs2/hydt/2012/04/13/9852.html>

<sup>16</sup> ILO, *Fact Sheet: Domestic Workers in China*, 2009, 1.

<sup>17</sup> As to feminization of migration, see for example, UN Economic and Social Council, *Feminization of Migration, Remittances, Migrants’ Rights, Brain Drain*, Commission on Population and Development, Thirty-ninth Session, 5th and 6th Meetings, 5 April 2006.

<sup>18</sup> “Informal Economy in China and Mongolia,” ILO, accessed 11 February 2017,

<http://www.ilo.org/beijing/areas-of-work/informal-economy/lang--en/index.htm>

doors. Fourth, the host family usually enjoys a great margin of discretion in matters such as their understanding of discriminatory actions, working conditions, ways of punishing misbehaviour, respect for the individual rights of domestic helpers and channels of dispute settlement. The macro social and micro social fields that migrant women working as domestic helpers are in only makes their situation increasingly complex to dealt with.

With the intersectionality analysis of the multiple levels of disadvantage faced by migrant women working as domestic helpers, the study identifies, beneath the surface of the status quo of women workers, rural migrants and domestic helpers, their difficulties and needs. Because this group of people is subjected to more than one basis of inferior treatment due to their intersectional social categories, their primary need is to be entitled to equal treatment with their counterparts. In addition to that, their working conditions need to be improved with a legal guarantee that sets decent working standards for them giving due consideration to their specific situation.

### **6.3. Identified gaps and guiding recommendations to the Chinese government**

To answer the central research question as to what improvements in the Chinese domestic legal system can be made to safeguard human rights and decent working conditions for migrant women working as domestic helpers, the study uses standards derived from the international human rights treaties and international labour conventions. By “standards”, it means a collection of both explicit provisions provided in the conventions and also treaty bodies’ interpretations, whether in the form of general comments or state observations. Since the object and purpose of this study is to generate from the existing IHRL/ILO standards a set of guidelines that can be used to improve the domestic laws for the benefit of migrant women working as domestic helpers, so the study prioritizes the standards that are most relevant to the needs of this group of people, namely the need to be treated equally in general terms, the need to be ensured of decent working conditions and the need to get access to justice. At the same time, the study also pays attention first and foremost to those conventions that are ratified by China rather than to those which are not based on the IHRL/ILO’s position in China, because the ratified conventions generate state obligations unlike the unratified ones. This does not mean that the study ignores those pertinent conventions such as CMW on the rights of migrant workers and their families, and ILO No. 189 on decent work for domestic helpers, which are of high relevance to the topic.

To be specific, the examined international legal documents are selected from the UN normative system and the ILO normative system. Most attention is paid to: (1) International Covenant of Economic, Social and Cultural Rights, as this convention is topic related and China is a member state; (2) International Convention on Elimination of All Forms of Discrimination against Women, as this convention is topic related and China is a member state; (3) Treaty bodies’ General Comments and country-specific observations made by ICESCR Committee and CEDAW Committee; (4) ILO Constitution, as it is the foundation of the ILO normative framework; (5) ILO Convention No. 100 on equal remuneration and (6) ILO Convention No. 111 on non-discrimination in employment and occupation, as they are two of the eight ILO core conventions and both are ratified by China; (7) General Survey, Direct Request and Observation to China issued by the Committee of Experts on the Application of Conventions and Recommendations (CEACR).

According to the problems faced by migrant women working as domestic helpers and their need to be treated equally, to be guaranteed decent working conditions and to be ensured access to justice, the study searched in the pool of standards for provisions and recommendations on the afore-mentioned aspects. After examining the relevant standards, a series of guidelines on anti-discrimination and decent work are summarized. Based on these derived guidelines, the study has identified the implementation gaps between the requirements of the IHRL/ILO standards and the current Chinese laws. With the help of the treaty bodies’ opinions and observations, the study has offered several recommendations for the state to fulfil its obligations to improve the domestic laws for the benefit of migrant women working as domestic helpers.

The study has gone through details as to how the Chinese legal system is constructed and how international law is implemented via such a system. With this background information, the study has been able to identify the implementation gaps between the ratified international human rights/labour conventions and the existing Chinese legal system regarding the needs of migrant women working as domestic helpers. First and foremost, despite the fact that “the State protects human rights” has been written into the Constitution and the principle of non-discrimination and equal treatment has been enshrined in many Chinese laws and policies,<sup>19</sup> there are still many aspects to be improved in this regard. In general, a comprehensive set of rules regarding the

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<sup>19</sup> For more details, see Section 5.2.

promotion of equality and the elimination of discrimination is still lacking in China. Hence the definitions of direct/indirect/multiple discrimination are not articulated in law, nor are the procedural matters clarified concerning onus of proof, evidence rules, remedies and punitive rules. Additionally, some Chinese laws still presume women to be as vulnerable and fragile as children, and even set restrictions on the type of work that can be performed by women simply based on their gender. Such exclusive provisions, no matter how well intended, may nevertheless be counter-productive and harm women workers' freedom of choice and their competitiveness in the labour market.

Secondly, China places great emphasis on the protection of citizens' economic, social and cultural rights<sup>20</sup> and has established numerous sets of national/local labour laws and policies in this regard.<sup>21</sup> Despite the established systematic set of rules and regulations safeguarding decent working conditions, there are still implementation gaps in comparison with the existing international labour standards that ensure decent working conditions, for the workers who suffer from multiple disadvantages. To start with, there are many provisions to safeguard equal remuneration in the Chinese legal system, but they fail to reach the core of the issue by not further clarifying the concept of "work of equal value", which is the primary condition of equal remuneration<sup>22</sup> and the cornerstone of the ILO Convention No.100.<sup>23</sup> Then, for domestic helpers, their benefits and interests are not sufficiently represented in terms of freedom of association required by ILO No.87, which obliges all ILO member states, including China, regardless of ratification status. There is also no legal guarantee for access to social security and for safeguarding decent working conditions for migrant workers and domestic helpers, given those workers' specific characteristics.

Thirdly, one important way to ensure, in China, effective supervision and enforcement of the non-discrimination provisions and labour standards prescribed in the international human rights/labour conventions, is to make sure that workers can bring court cases or make requests for mediation/arbitration of relevant labour disputes and get the necessary attention from the authoritative organs. According to labour law, domestic servants hired by private families are not in an employment relationship per se, and thus are not regulated by the labour law system, which only regulates employment relationships in "enterprises and individual economic organizations" or "state organs, institutional organizations and societies".<sup>24</sup> Hence, the labour inspection and labour arbitration institutions prescribed in the labour law system are not applicable to privately hired domestic helpers, which naturally limits their choices when they want to seek justice. Additionally, going to court is expensive and time-consuming, with a possible negative effect on future possibilities of finding another host family. Thus, there is still no specific social mechanism for seeking justice that is affordable, accessible and appropriate for migrant women working as domestic helpers.

The guiding recommendations are proposed to address the problems described in the previously mentioned three main aspects, that is: to improve Chinese legislation in eliminating discrimination and promoting equality; to improve Chinese labour law in safeguarding decent working conditions; to ensure access to justice in practice for the marginalized people, with reference to the ratified IHRL/ILO conventions and treaty bodies' opinions, giving due consideration to the specific needs of migrant women working as domestic helpers. In this vein, the study recommends that the Chinese government should consider the following suggestions.

- 1) **It is suggested that the stated four categories (72 types) of work that are "not suitable" for women to do, prescribed in the Appendix of the Special Rules on the Labour Protection of Female Employees, be abolished.** This is because such a list of prohibited work restricts a female worker's freedom of choice of work simply due to her biological traits, and such a prohibited list may well also be used by employers as an excuse for not hiring women workers. The list of work prohibited from being performed by women is

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<sup>20</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *Implementation of the International Covenant on Economic, Social and Cultural Rights: Second periodic reports submitted by States parties under articles 16 and 17 of the Covenant: China*, 6 July 2012, E/C.12/CHN/2.

<sup>21</sup> For more details, see Chapter 5, Section 5.2.3.

<sup>22</sup> ILO CEACR, *Observation to China, on Equal Remuneration Convention, 1951 (No. 100)*, adopted 2012, published 102nd ILC session, 2013.

<sup>23</sup> International Labour Office, *General Survey concerning fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* (Geneva: ILO, 2012), 281.

<sup>24</sup> Article 2, *Labour Law of the People's Republic of China*, 1994.

<sup>25</sup> *Regulations Concerning the Labour Protection of Female Staff and Workers*, adopted by the 200<sup>th</sup> Regular Session of the State Council of People's Republic of China, went into effect on 18 April 2012.

contrary to the object and purpose of ILO Convention No.111 on non-discrimination in employment and occupation.<sup>26</sup>

- 2) **It is suggested that “discrimination” itself could be further clarified by Chinese law** as a situation when a person is treated less favourably than another in a comparable case, based on a certain prohibited ground. Additionally, as is recommended by the CEDAW, ILO No.111 and ILO CEACR Direct Request, the prohibited grounds for discrimination must include at least gender, race, colour, religion, political opinion, national extraction, and social origin.<sup>27</sup> This inclusive list of prohibited grounds is very important for protecting those people who suffer from inferior treatment based on various forms of discrimination. A principle needs to be set up to eliminate all forms of discrimination de jure and de facto in all aspects of life including those in the private sphere.<sup>28</sup>
- 3) **It is suggested that clear definitions and procedural rules concerning discrimination are established by law.** For example, direct discrimination, indirect discrimination and multiple discrimination should be clearly defined by law as is suggested in many human rights treaty bodies’ opinions and recommendations. Additionally, for the sake of court trials or other adjudication processes, instructions on how to determine a case of discrimination and how to remedy such a case must be made clear either by statutory provisions or guiding cases.
- 4) **It is suggested that discrimination based on social origin be expressly prohibited de jure and eliminated de facto by Chinese domestic laws and regulations.** In the context of China, discrimination on the basis of “social origin” is closely linked to the unequal treatment of internal migrant workers to which the ILO CEACR has paid attention. To prohibit discrimination based on social origin in the national laws is the very legal pre-requisite needed to combat de facto discrimination against rural migrant workers.
- 5) To tackle these special types of discrimination that particularly affect women and domestic helpers, **it is suggested that “laws against family violence and abuse, rape, sexual assault and other gender-based violence give adequate protection to all women, and respect their integrity and dignity,”**<sup>29</sup> and that “effective legal measures, including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence, including inter alia violence and abuse in the family, sexual assault and sexual harassment in the workplace”<sup>30</sup> should be adopted. Such legislative measures require legal intervention in the private sphere, too.
- 6) **It is suggested that China give full legislative expression to the objective job evaluation system and the principle of “equal pay for work of equal value”,** so that it covers not only situations where men and women do the same job but also includes work that is different yet of equal value.<sup>31</sup> The legal recognition of these principles is essential to address “the horizontal and vertical gender segregation” in the labour market and the subsequent gender income gap.<sup>32</sup> The principle of “equal pay for work of equal value” is of significance to domestic helpers as their work is often under-valued by society and thus their decent working conditions are put at risk.
- 7) **It is suggested that a Domestic Workers Observatory be established in order to enhance the representation of the interests of domestic helpers** and that domestic helpers must be granted the right to freedom of association and collective bargaining by law and in practice like other types of workers.<sup>33</sup> The ACFTU can act as a cooperative or supervisory organization of such observatory and invite its members into the local and national ACFTU meetings. A Domestic Workers Observatory should be consulted about working hours, rest hours, standard salary, working conditions and so on, in order to have an effect on

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<sup>26</sup> International Labour Office, *General Survey concerning fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* (Geneva: ILO, 2012), para.838.

<sup>27</sup> ILO CEACR, *Direct Request to China, on Discrimination (Employment and Occupation) Convention, 1958 (No. 111)*, adopted 2012, published 102nd ILC session, 2013, para.1.

<sup>28</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (Article 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20, para.37.

<sup>29</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 19: Violence against women*, 1992, para.24(b).

<sup>30</sup> *Ibid*, para.24(i).

<sup>31</sup> ILO CEACR, *Observation to China, on Equal Remuneration Convention, 1951(No. 100)*, adopted 2012, published 102nd ILC session, 2013.

<sup>32</sup> ILO CEACR, *Direct Request to China, on Discrimination (Employment and Occupation) Convention, 1958 (No. 111)*, adopted 2012, published 102nd ILC session, 2013, para.8.

<sup>33</sup> Article 3, ILO, *Convention Concerning Decent Work for Domestic Workers*, C189, 16 June 2011.

bargaining between workers and employers. This could be the very first step to giving full recognition of “employee” status to domestic helpers.

- 8) **It is suggested that a compulsory and inclusive social insurance system should be established** that covers “retirement, unemployment, sickness, invalidity and old age and other incapacity to work”,<sup>34</sup> and especially “maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances”,<sup>35</sup> including for those working in the informal sector,<sup>36</sup> with due consideration of the specific nature of domestic service.
- 9) **In order to ensure decent working conditions for rural migrant workers, several conditions have to be guaranteed by law.** It has to be explicitly expressed by labour law that rural migrant workers are to enjoy equal remuneration and equal working conditions with local workers.<sup>37</sup> The right to join and form labour associations must also be granted to migrant workers by law and in practice.<sup>38</sup>
- 10) **Special protection must be guaranteed to the children of migrant workers by the State and steps must be taken to eliminate discrimination against them.**<sup>39</sup> The right to be accepted by local schools and the right to take national college examinations must be guaranteed for the children of rural migrant workers to reduce dropout rates in education.<sup>40</sup>
- 11) **It is suggested that national labour legislation must grant labour protection to domestic helpers just as it does to other types of workers** in terms of minimum wages, working hours, rest periods, freedom of association and collective bargaining, access to social security, including with respect to maternity, pension rights and health insurance, as well as additional provisions taking into account the specific characteristics of domestic work.<sup>41</sup> The law must make sure that the right to privacy, and individual liberty over residence, leave and personal belongings is granted to domestic workers.<sup>42</sup> The law must make sure that 24 consecutive hours weekly rest is explicitly stated by any relevant contract to make sure that domestic workers have sufficient rest, and that stand-by hours should be counted as working hours.<sup>43</sup> If necessary, sexual harassment in the workplace should be incorporated in China’s domestic criminal legislation.<sup>44</sup>
- 12) Specifically speaking, given the prevailing lack of contracts in the domestic service business, **it is suggested that the state must ensure that all domestic service is performed under explicit written terms of employment, outlining all necessary details of working conditions.**
- 13) **It is suggested that the law should recognize the intersectional disadvantage suffered by female domestic servants,** who have usually migrated from a rural area and have a limited educational background, and should offer them an adequate remedy when their fundamental rights are violated.<sup>45</sup>
- 14) **It is suggested that Local Residents’ Committees should be used as a daily supervisory body to protect domestic workers from all forms of abuse, harassment and violence, when labour inspection is not yet an option for such cases.** This is because the legal standards for human rights and labour rights are best realized through a social mechanism that people at grass-roots level have a reason to use, and through a social mechanism acting as a legal resource to truly solve these People’s problems instead of escalating them. A Local Residents’ Committee is physically accessible and situated in the neighbourhood, so it can

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<sup>34</sup> Article 11 (1) (e), UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations Treaty Series, vol. 1249, p. 13.

<sup>35</sup> Article 11(2) (b), *ibid.*

<sup>36</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *Concluding observations on the second periodic report of China, including Hong Kong, China, and Macao, China*, 13 June 2014, E/C.12/CHN/CO/2, para.20.

<sup>37</sup> Article 25, UN General Assembly, *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, 18 December 1990, A/RES/45/158.

<sup>38</sup> Article 26, *ibid.*

<sup>39</sup> UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), *General Comment No. 1 on Migrant Domestic Workers*, 23 February 2011, CMW/C/GC/1, paras. 56-59.

<sup>40</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *Concluding observations on the second periodic report of China, including Hong Kong, China, and Macao, China*, 13 June 2014, E/C.12/CHN/CO/2, para.35.

<sup>41</sup> UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), *General Comment No. 1 on Migrant Domestic Workers*, 23 February 2011, CMW/C/GC/1, para.38.

<sup>42</sup> Article 9, ILO, *Convention Concerning Decent Work for Domestic Workers*, C189, 16 June 2011.

<sup>43</sup> Article 10(2) and 10(3), *ibid.*

<sup>44</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *Concluding observations on the second periodic report of China, including Hong Kong, China, and Macao, China*, 13 June 2014, E/C.12/CHN/CO/2, para.21.

<sup>45</sup> Article 8, ILO, *Convention Concerning Decent Work for Domestic Workers*, C189, 16 June 2011.

quickly notice and intervene when there is friction, and it can report the situation to an appropriate authority when things start to escalate.

- 15) After comparing the various social mechanisms that guarantee enforcement and remedy such as formal courts, labour arbitration, petition, and mediation, **it is suggested that the fullest use be made of People's mediation under the Local Residents' Committee to ensure affordable and expedient access to justice for migrant women working as domestic helpers** given the specific social fields they are in. In the daily life of Chinese people, going to court for dispute settlement is not normal, but going to a Local Residents' Committee for mediation has a long cultural tradition. In particular, for the relationship between host families and domestic helpers, settling disputes quietly and amicably is beneficial to both sides in a community full of acquaintances. Such suggestion by no means excludes the use of courts as a last resort for seeking justice.



## Samenvatting

### 1. Feitelijke achtergrond voor het onderzoek

China heeft in de turbulente jaren na 1949 toen hier een nieuwe regering aan de macht kwam grote veranderingen ondergaan. De verstrengeling van nieuwe praktijken met oude tradities heeft geleid tot een complexe sociale achtergrond. Dit heeft vele consequenties, o.a. voor de huidige status in China van vrouwelijke arbeidsmigranten die werken als huishoudhulp. In de eerste plaats is er het hukou-systeem, dat alle Chinese burgers indeelt in zij die zijn geboren op het platteland en zij die zijn geboren in de stad. Diegenen die met een plattelandshukou werken in stedelijke gebieden, d.w.z. de arbeidsmigranten van het platteland, worden uitgesloten van vele door de plaatselijke stedelijke overheid gesubsidieerde sociale voorzieningen en publieke dienstverlening. Ook in cultureel opzicht kan de aansluiting aan de stedelijke samenleving voor hen erg moeilijk zijn, gezien hun beperkte opleidingsniveau en lage sociaaleconomische status. Onderwijsvoorzieningen zijn voor hun kinderen in het algemeen veel minder toegankelijk dan voor plaatselijke stadshukouhouders en hun gezinnen. In de tweede plaats kenmerkt de Chinese arbeidsmarkt zich door een uitgesproken voorkeur voor mannelijke boven vrouwelijke werknemers, door horizontale en verticale gendersegregatie en een inkomens kloof op basis van geslacht in diverse industrieën en beroepen. Conform hun stereotiepe rol in het gezin, belanden vrouwen vaak ongewild in de relatief laagbetaalde zorgende en dienende sectoren. Deze traditionele stereotypes weerhouden veel Chinese vrouwen ervan om hun eigen carrière te volgen en dwingen hen in hun rol van huisvrouw en moeder. Zo worden vrouwen tijdens het sollicitatieproces gediscrimineerd, en kunnen zij ook na een periode van afwezigheid op de Chinese arbeidsmarkt vanwege de geboorte van een kind of borstvoeding eenvoudig worden uitgerangeerd. In de derde plaats werken huishoudhulpen, als gevolg van diverse juridische en economische factoren, vaak onder minder goede omstandigheden, zoals daar zijn: lange uren, onvoldoende pauzes, werk zonder een arbeidsovereenkomst en gebrek aan toegang tot sociale voorzieningen. Behalve een klein aantal huishoudhulpen, dat in dienst is van bedrijven en daarom wordt beschermd door het Chinese arbeidsrechtssysteem, heeft het merendeel van de huishoudhulpen die zelfstandig of via een bemiddelingsbureau werken, vaak geen toegang tot het Chinese arbeidsrechtssysteem, omdat zij, aangezien zij worden gehuurd door particuliere gezinnen, niet worden beschouwd als "werknemers". Dit houdt in, dat zij niet alleen geen aanspraak kunnen maken op de in het Chinese arbeidsrecht opgenomen rechten, maar dat hun arbeidsomstandigheden ook niet worden gecontroleerd door enige vorm van arbeidsinspectie, en zij geschillen met hun gastgezinnen niet kunnen oplossen via arbeidsarbitrage. Indien de gastgezinnen verantwoordelijk zijn voor de arbeidsomstandigheden van de huishoudhulpen zonder toezicht van een bevoegde arbeidsinspectie, kunnen arbeidsrechtelijke schendingen, zoals te lange werkuren zonder een passende vergoeding voor overuren en fysiek of verbaal misbruik, voorkomen zonder dat de buitenwereld dit in de gaten heeft. Bij een geschil tussen een huishoudhulp en een gastgezin kan de eerstgenoemde dikwijls geen beroep doen op arbitrage in arbeidsrechtelijke geschillen, aangezien deze er is voor gewone dienstbetrekkingen. Het komt geregeld voor, dat deze huishoudhulpen over onvoldoende juridische kennis beschikken om hun rechten te verdedigen, zij zich geen advocaat kunnen veroorloven, en evenmin wensen te worden betrokken bij een langdurige juridische procedure, als zij de situatie eenvoudigweg achter zich kunnen laten door voor een nieuw gastgezin te gaan werken. Huishoudhulpen willen immers hun gastgezin niet kwetsen, omdat zij dit gezin nog nodig kunnen hebben om hen te introduceren bij potentiële nieuwe werkgevers, of zij willen gewoon hun goede reputatie behouden om aantrekkelijk te zijn voor andere werkgevers in de buurt. Als zij via bemiddelingsbureaus of via bekenden zijn ingehuurd, zijn ze zelfs nog terughoudender, om geen problemen te veroorzaken voor hun bureaus of bekenden. Daarbij wordt het in de traditionele Chinese cultuur als provocatie beschouwd, indien men iemand voor de rechter daagt en daarom probeert men dit te vermijden. Nieuws kan snel rondgaan binnen een gemeenschap en een rechtszaak wordt door de bureaus vaak beschouwd als beschamend voor beide partijen, aangezien er een oud Chinees gezegde is dat luidt: 'waar twee partijen vechten, hebben er twee schuld'. Er zijn dus verschillende redenen waarom huishoudhulpen, m.n. arbeidsmigranten van het platteland, zich niet graag tot de rechter wenden om hun geschillen te beslechten. Dit betekent echter niet dat zij geen gerechtigheid zouden willen of verdienen, maar veeleer dat zij geen keuze hebben. Daarom dient er voor hen naast het rechtsgeding een betaalbaar, efficiënt en niet op confrontatie gericht kanaal of instituut te zijn, waar zij op terug kunnen vallen. Samenvattend kan worden gesteld dat vrouwelijke arbeidsmigranten die in heel China werken als huishoudhulpen in stedelijke omgevingen, vaak last hebben van verschillende vormen van benadeling tegelijkertijd, hetgeen betekent dat de inferieure werkomstandigheden ten gevolge van hun informele tewerkstelling worden versterkt door hun geslacht en hun sociale afkomst als plattelandshukouhouder.

De sociale categorieën, waarin deze vrouwelijke arbeidsmigranten vallen, zorgen niet alleen voor gelijktijdige problemen in het dagelijks leven, maar kunnen elkaar onder bepaalde omstandigheden ook onderling beïnvloeden. Zo manifesteren zich hun problemen op grond van diverse combinaties van hun sociale categorieën: het probleem om een goede baan in een stedelijk gebied te vinden kan voortkomen uit een sociaal vooroordeel in de stad tegen arbeidsmigranten van het platteland en tegen vrouwen; de uitsluiting van bepaalde sociale voorzieningen of uitkeringen kan het gevolg zijn van hun plattelands hukou-status en hun tewerkstelling in de informele sector; de seksuele intimidatie of het seksuele geweld, waarmee ze worden geconfronteerd kan worden toegeschreven aan hun sekse en hun niet-openbare werkplekken. Soms is het niet eenvoudig om hun benadeelde positie vast te stellen door enkel te vergelijken met mannelijke arbeiders, bewoners van steden en formele werknemers. In dit onderzoek zijn daarom met name de in China geldende internationale mensenrechtenverdragen en internationale arbeidsrechtelijke normen bestudeerd om criteria te vinden die richtinggevend moeten zijn voor het huidige Chinese juridische systeem ten behoeve van deze in meerdere opzichten benadeelde personen.

## 2. De onderzoeksvraag en structuur van het boek

Met het oog op de situatie van de in China als huishoudhulp werkende vrouwelijke arbeidsmigranten is de centrale onderzoeksvraag: Welke is de huidige status van de sociale en economische rechten van vrouwelijke arbeidsmigranten van het platteland die werken als huishoudhulp conform het bestaande Chinese juridische systeem, en welke verbeteringen dienen er in het Chinese juridische systeem te worden doorgevoerd om hun fundamentele mensenrechten en passende arbeidsomstandigheden te realiseren en hen toegang tot het recht te geven op basis van naar de geratificeerde, internationale mensenrechten- en arbeidsrechtelijke verdragen?

Om de onderzoeksvraag uit te werken zijn de hoofdstukken van het boek als volgt ingedeeld. Hoofdstuk 1 en hoofdstuk 6 vormen het inleidende -, resp. het slothoofdstuk. Hoofdstuk 2 beschrijft de situatie van de in China als huishoudhulp werkende vrouwelijke arbeidsmigranten en het juridische niemandsland waarin zij zich bevinden, door een schets te geven van de situatie van vrouwen op de Chinese arbeidsmarkt, resp. het hukou-systeem en de ontwikkeling ervan in de jaren na 1945, en de situatie van huishoudhulpen op de markt voor huishoudhulpen in China. Dit hoofdstuk schetst tevens het huidige Chinese juridische systeem, de structuur ervan en de concrete wet- en regelgeving met betrekking tot de volgende onderwerpen: de rechten en belangen van vrouwen, het hukou-systeem en huishoudelijke hulp. In dit hoofdstuk wordt de positie van de in China als huishoudhulp werkende vrouwelijke arbeidsmigranten in detail beschreven, de facto en de jure.

Hoofdstuk 3 geeft een introductie en een rechtvaardiging van de ter begrip van de situatie gehanteerde theorieën, namelijk de gender-analyse en de benadering van de intersectionaliteit. In dit onderzoek wordt gender gebruikt als een analytisch middel, bijv. om de transformatieve sociale categorieën van arbeidsmigranten, vrouwen en huishoudhulpen te analyseren, waarbij het vrouw-zijn de verbindende factor tussen deze sociale categorieën is bij de feminisering van migratietrends in China en bij de vrouwelijke dominantie op het gebied van het verlenen van huishoudelijke diensten. De intersectionele benadering wordt gehanteerd bij het analyseren van de elkaar overlappende nadelen die de als huishoudhulp werkende vrouwelijke arbeidsmigranten ervaren, door het presenteren van de tweevoudige minderheidspositie van vrouwelijke arbeidsmigranten en de ermee verweven oppressie als gevolg van de onderling verbonden sociale categorieën. In dit hoofdstuk wordt voorts ingegaan op de concrete problemen die deze mensen het hoofd moeten bieden, zoals hun discriminatie op de arbeidsmarkt, de uitsluiting van plaatselijke vakbonden, de slechte arbeidsomstandigheden, vraagstukken van arbeidsveiligheid, beperkte toegang tot sociale voorzieningen, een beperkte keuze bij de toegang tot het recht, etc.

In hoofdstuk 4 wordt, op basis van een analyse van de desbetreffende internationale mensenrechten- en arbeidsrechtelijke verdragen en de interpretatie hiervan door de verdragsorganen, een overzicht gemaakt van verplichtingen conform de verschillende soorten behoeften van als huishoudhulp werkende vrouwelijke arbeidsmigranten, namelijk, de behoefte aan een gelijke behandeling als de andere werkenden, de behoefte aan gegarandeerde goede arbeidsomstandigheden en de behoefte aan een gegarandeerde toegang tot de rechtspleging. Op basis van deze gecategoriseerde behoeften zijn de relevante internationale mensenrechtenverdragen en internationale arbeidsrechtelijke normen geanalyseerd met name de door China geratificeerde en enkele andere relevante verdragen en normen, . Zo werden in het kader van de behoefte aan gelijke behandeling de volgende documenten geraadpleegd: het Handvest van de Verenigde Naties, de Universele Verklaring van de Rechten van de Mens, het

Internationaal Verdrag inzake Economische, Sociale en Culturele rechten, het Verdrag inzake de Uitbanning van alle Vormen van Discriminatie van Vrouwen, de Internationale Arbeidsverdragen nr. 100 over Gelijke Beloning en nr. 111 over Discriminatie met betrekking tot Dienstverband en Beroep, met het oog op relevante bepalingen en interpretaties van verdragsorganen terzake non-discriminatie en het bevorderen van gelijkheid. Conform de gevonden bepalingen en interpretaties, presenteert de studie een overzicht van verplichtingen op nationaal niveau, op basis waarvan China de nationale wetgeving en het beleid zou kunnen verbeteren ten behoeve van als huishoudhulp werkzame vrouwelijke arbeidsmigranten.

In hoofdstuk 5 worden de in hoofdstuk 4 opgestelde richtnormen vergeleken met de bepalingen van het Chinese juridische systeem en wordt geconstateerd dat er een implementatiekloof bestaat tussen de relevante internationale mensenrechten/arbeidsrechtelijke normen en de Chinese nationale wetgeving. Op basis van de vastgestelde lacunes worden er in het hoofdstuk voorts enkele aanbevelingen gedaan ter verbetering van de actuele Chinese wetgeving in termen van gelijkheid, non-discriminatie en passende arbeidsrechtelijke normen voor de als huishoudhulp werkzame vrouwelijke arbeidsmigranten, ter bescherming van de elementaire mensenrechten en passende arbeidsvoorwaarden, en tevens ter waarborging voor hen van toegang tot de rechtspleging met een passend sociaal mechanisme, waarbij rekening wordt gehouden met de specifieke sociale situatie waarin zij zich bevinden.

### 3. Onderzoeksmethodes

Om antwoorden te vinden op de bovengenoemde onderzoeksvraag, werden in deze studie diverse methodes gehanteerd om informatie te verzamelen en de onderzoeksresultaten te presenteren. De gehanteerde methodes zijn vooral gebaseerd op traditioneel juridisch onderzoek, bureauwerk, zoals het samenvoegen van grafieken en onderzoeken, het analyseren van juridische documenten en literatuur, het vergelijken van internationale juridische normen en gemeentelijke wetgeving, gecombineerd met het putten uit algemene kennis over de situatie in China. De methode die werd gehanteerd voor het beschrijven van de sociale en juridische situatie van de als huishoudhulp werkzame vrouwelijke arbeidsmigranten, bestaat uit het bestuderen en analyseren van onderzoeksrapporten, door onderzoeksinstituten uitgevoerde onderzoeken en enquêtes, wetenschappelijke literatuur, nationale statistische rapporten, China's aan internationale verdragsorganen overlegde landenrapportages, commentaren van de verdragsorganen op deze rapportages gericht tot China, thematische rapporten van de IAO, door de Commissie van Deskundigen voor de Toepassing van Verdragen en Aanbevelingen van de IAO uitgegeven algemene overzichten en waarnemingen, en nieuwsberichten van massamedia. De belangrijkste in deze studie gehanteerde onderzoeksmethode is de analyse van juridische teksten; deze wordt gehanteerd om Chinese gemeentelijke wetgeving inzake de belangen van vrouwen, hukou-wetgeving, regelgeving inzake de huishoudhulpbranche, het internationale mensenrechten- en arbeidsrechtelijke systeem en de juridische positie hiervan in China te begrijpen. Voor alle duidelijkheid, de bestudeerde internationale juridische documenten werden gekozen op basis van de vastgestelde behoeften van de als huishoudhulp werkzame vrouwelijke arbeidsmigranten aan een gelijke behandeling met passende arbeidsvoorwaarden en een geschikte en betaalbare gang naar de rechter, uit de normatieve systemen van de UN en de IAO, waarbij rekening is gehouden met de stand van de ratificatie ervan in China.

### 4. Bevindingen: vastgestelde lacunes en belangrijkste aanbevelingen

Ondanks het feit dat het adagium "de staat beschermt de mensenrechten" is opgenomen in de constitutie en dat het beginsel van non-discriminatie en gelijke behandeling is verankerd in een groot deel van de Chinese wetgeving en het beleid, zijn er op dit vlak vanuit het oogpunt van de gender - en intersectionaliteitsanalyse nog veel aspecten voor verbetering vatbaar. In het onderzoek zijn de vastgestelde leidende beginselen en normen van het internationaal humanitair recht en van de IAO vergeleken met de actuele juridische situatie van de als huishoudhulp werkzame vrouwelijke arbeidsmigranten in China, en is er geconcludeerd dat China nog geen allesomvattend geheel van regels kent ter bevordering van de gelijkheid en ter opheffing van de discriminatie; er zijn nog geen geschikte arbeidsrechtelijke normen om fatsoenlijke werkomstandigheden te garanderen voor die werkenden die te maken hebben met een diversiteit aan nadelen; de als huishoudhulp werkzame vrouwelijke arbeidsmigranten hebben nog steeds betaalbare, toegankelijke en geschikte sociale mechanismen nodig voor het toezicht op arbeidsrechtelijke normen en om hun toegang tot de rechtspleging te waarborgen.

Deze studie brengt daarom de volgende suggesties onder de aandacht van de Chinese regering ter verbetering van het nationale juridische systeem ten behoeve van als huishoudhulp werkzame

vrouwelijke arbeidsmigranten, waarbij wordt verwezen naar de vastgestelde internationale juridische normen en de vastgestelde lacunes bij de implementatie ervan. Voorgesteld wordt om de genoemde vier categorieën (72 types) werk, als vermeld in de Appendix van de Speciale Regels terzake de Arbeidsrechtelijke Bescherming van Vrouwelijke Werknemers, die volgens het Chinese recht "niet geschikt" zouden zijn voor vrouwelijke werkenden, af te schaffen, omdat een dergelijke uitsluiting van kansen op werk op basis van geslacht van nature discriminatoir is. Voorgesteld wordt om het begrip "discriminatie" zelf in het Chinese recht verder uit te werken in overeenstemming met de internationale juridische normen. Voorgesteld wordt om discriminatie vanwege "sociale afkomst" expliciet de jure te verbieden en de facto te elimineren door Chinese nationale wet- en regelgeving, zodat diegenen met een plattelandshukou door de wet worden beschermd tegen discriminatie.

Om de specifieke vormen van discriminatie aan te pakken, die in het bijzonder vrouwen en huishoudhulpen betreffen, wordt voorgesteld dat "wetten tegen geweld en misbruik in het gezin, verkrachting, aanranding en ander seksegerelateerd geweld voldoende bescherming bieden aan alle vrouwen en hun integriteit en waardigheid respecteren". Voorgesteld wordt dat China zowel het objectieve functiewaarderingssysteem als het beginsel van "gelijke beloning voor gelijk werk" in volle omvang opneemt in de wet, zodat de beloning van huishoudhulpen kan worden geherwaardeerd in overeenstemming met de werkelijke waarde van het werk in plaats van het hanteren van een kunstmatig lage waardering als gevolg van de gendersamenstelling van de binnenlandse beroepsbevolking.

Voorgesteld wordt om een Observatorium voor Huishoudhulpen op te richten ter bevordering van de belangenbehartiging van huishoudhulpen. Voorgesteld wordt om een verplicht en alomvattend systeem van sociale verzekeringen in te voeren voor alle werkenden. De kinderen van arbeidsmigranten dienen speciale bescherming van de overheid te krijgen en er dienen stappen te worden genomen om discriminatie van hen uit te bannen. Voorgesteld wordt dat nationale arbeidswetgeving dezelfde arbeidsrechtelijke bescherming dient te bieden aan huishoudhulpen als aan andere typen werkenden. Voorgesteld wordt dat de overheid ervoor dient te zorgen dat alle huishoudelijke dienstverlening wordt uitgevoerd op basis van uitdrukkelijke, schriftelijke arbeidsvoorwaarden, die alle noodzakelijke details inzake de arbeidsomstandigheden bevatten. Voorgesteld wordt, dat de wet het door vrouwelijke huishoudhulpen ondervonden intersectioneel nadeel erkent en dienovereenkomstig genoegdoening aanbiedt.

Na een vergelijking van de diverse sociale mechanismen ter waarborging van handhaving en verhaal, zoals de gewone rechter, arbitrage, verzoekschrift en mediation, wordt voorgesteld om optimaal gebruik te maken van de mediation door het volk via de Commissie van Plaatselijke Bewoners (Local Residents' Committee), om ervoor te zorgen dat de als huishoudhulpen werkzame vrouwelijke arbeidsmigranten een betaalbare en snelle toegang tot de rechtspleging hebben. Voorgesteld wordt tevens om de Commissies van Plaatselijke Bewoners in te zetten als dagelijks toezien orgaan om huishoudhulpen te beschermen tegen alle vormen van misbruik, intimidatie en geweld, wanneer een arbeidsinspectie voor dergelijke gevallen nog niet een optie is.

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## Curriculum Vitae

Qinxuan Peng is a PhD researcher at the Netherlands Institute of Human Rights Research (SIM) of Utrecht University under the scholarship of Chinese Scholar Council, a research fellow of National High-Level Think Tank at the Institute of International Law of Wuhan University and an associate at DeHeng Civil Code N.V. in the Netherlands. As part of her PhD research, Qinxuan has been a visiting scholar at Research Center for Human Rights and Humanitarian Law of Peking University. Alongside her research, Qinxuan was Chair of the Association of Chinese Students and Scholars in the Netherlands–CSC branch, a member of the REBO PhD Council at Utrecht University and an editor of the Newsletter School of Human Rights Research in the Netherlands. She is active in organizing and presenting at international and national conferences, she has been frequently invited to universities in China to give lectures. Her article “Multi-layered Gaps between ILO Conventions and Chinese Legal Protection on Migrant Women Workers as Domestic Helpers in China” was published by Kluwer Law International in 2015. She has been a law school student since 2005 and has got a bachelor degree of law (cum laude) in 2009 from Jishou University and a master degree in international law (cum laude) in 2011 from Wuhan University, she went on a one-year taught course program at the Hopkins-Nanjing Center for Chinese and American Studies (HNC) to study international law and international relations. She had been a practiced lawyer with Chinese bar certificate before she came to the Netherlands.