

# Protecting Labour Rights in a Multi-polar Supply Chain and Mobile Global Economy

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*Axel Marx, Jan Wouters & Glenn Rayp*

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## CHAPTER 2

# Multi-layered Gaps between ILO Conventions and the Chinese Legal Protection for Migrant Women Workers as Domestic Helpers in China

*Peng Qinxuan\**

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### §2.01 INTRODUCTION

The economic prosperity of China poses questions to policy-makers regarding how to maintain the balance between development and social equality, especially how to improve domestic law to better safeguard the human dignity of the most vulnerable social groups under the guidance of international human rights standards. This study pays attention to a particular group of people – migrant women workers as domestic helpers in China. Through the analysis of their life-work difficulties and the social barriers lying ahead due to their lesser identity, this paper traces legal gaps in the current ILO conventions and Chinese legal system that call for improvement for the sake of these people's human rights protection.

This study first presents the multiple predicaments that migrant women workers as domestic helpers face due to their overlapping disadvantageous identity: being women, being migrants with rural Hukou and being domestic helpers exposes them to gender-based discrimination in the working field (see section §2.02[A][1]), insufficient accessibility to social welfare and public services due to their social origin (see section

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\* PhD researcher from Netherlands Institute of Human Rights (SIM), Utrecht University. The author appreciates all of the inputs and comments on the paper by: Professor Jenny Goldschmidt for her guidance; Professor Ronald Brown and Professor Frans Pennings for their reviews; Professor Wan E'xiang for his support; Mr. Arron Honniball for the language proof-reading. The author is also grateful for the support from the editorial board and the journal.

§2.02[A][2]), and exclusion from the labor law system because they are not “employees” (see section §2.02[A][3]). Using intersectionality as an analysis tool, this paper further analyzes the interconnectedness among these identities, and how they inseparably entangle with each other to depict a picture of triple predicament (see section §2.02[B]). According to the real-life experiences of this group of people, this paper identifies that there are three levels of gaps in the ILO standards and in the Chinese domestic legal systems, they are: normative gaps, ratification gaps and implementation gaps<sup>1</sup> (see section §2.03), regarding the comprehensive human rights protection for migrant women workers as domestic helpers in China despite the existing international standards set for women, migrants and domestic helpers.

The display of the real-life problems of these people can first draw attention to this intersectionally disadvantaged group and raise social awareness of the multiple barriers that make ILO instruments ineffective in China. Second, with the identified gaps, the paper offers a mind map for further legal improvement to strengthen the effectiveness of the labor standards for migrant women workers as domestic helpers in China.

## §2.02 PRESENTATION OF THE PROBLEM

### [A] Triple-Dilemma: Women Workers, Rural Migrants, and Domestic Helpers in China

In this section, the three identities of migrant women workers as domestic helpers will be analyzed according to the description of predicaments based on gender, social status and occupation respectively. Each holds particular characteristics in the Chinese context, forming a triple-story when viewed together. In the story of women workers, the liberal market economy works together with the traditional patriarchal culture, rendering women workers into evolved forms of oppressions: less working opportunities, vertical and horizontal occupational segregations,<sup>2</sup> life-work double burden and so on (section §2.02[A][1’]). In the story of migrant workers, numerous people holding an agricultural Hukou (Household Registration) migrant into urban areas for better opportunities, only to find themselves “second class citizens” in terms of public services and social security (section §2.02[A][2]). In the story of domestic workers, not

1. The concepts of normative gap, application gap, supervisory gap, ratification gap and implementation gap are elaborated in the International Council on Human Rights Policy, *Human Rights Standards: Learning from Experience*, 2006, Versoix, Switzerland, 7-9. Available at: [http://www.ichrp.org/files/reports/31/120b\\_report\\_en.pdf](http://www.ichrp.org/files/reports/31/120b_report_en.pdf).

2. Vertical occupational segregation means within a certain job, women and men are segregated hierarchically in different positions, more often than not, men are doing managerial work with great responsibility while women are not. Horizontal occupational segregation means women and men are doing different work across sectors, women are often allocated in female dominated jobs that extend her family caring roles. About vertical and horizontal occupational segregation, see Concluding comments of the Committee on the Elimination of Discrimination against Women, CEDAW/C/CHN/CO/6, Committee on the Elimination of Discrimination against Women, Thirty-sixth session, Aug. 25, 2006, para. 30. Available at: [http://www.un.org/womenwatch/daw/cedaw/cedaw36/cc/CHINA\\_advance%20unedited.pdf](http://www.un.org/womenwatch/daw/cedaw/cedaw36/cc/CHINA_advance%20unedited.pdf).

only are they looked down upon as they work in the service sector, which is constantly perceived to be dominantly done by the lower-class; but also they are excluded from the labor law protection system because they work for private households and thus are not “employees” (section §2.02[A][3]).

**[1] *Women Workers in China: Horizontal and Vertical Occupational Segregation***

The complexity of women workers’ situation is produced by a mixed story of the patriarchal tradition throughout the imperial dynasties in ancient China and the liberal spirit embedded from the newly adopted market economy in contemporary China. Nowadays, these two major story lines form an evolving story for the working women in a complicated context with elements stemming from both patriarchal ideology and liberalist spirit: women workers have less opportunities in finding jobs compared to their male counterparts; they are vertically and horizontally segregated into low-paid jobs and low-end positions; they have to burn at both ends for family and work, attributed to both tradition and competition.

With an increasing number of women joining the labor market all over the world, the low-payment and the instable working condition for women workers still pervades,<sup>3</sup> as with China. It is reported in the Global Gender Gap Report 2011 that the female-to-male ratio of estimated earned income is 0.65 compared to the ratio of 1 as total equality,<sup>4</sup> which means that China still faces a long road ahead to fill the gender wage gap. Underneath this unequal payment between male and female workers, lies the horizontal and vertical occupational segregation: the gender segregation among different vocations and among different levels of hierarchy within a vocation. To be specific, horizontally, women are mostly engaged in either the traditional female-dominated sectors such as service, education, clothing and textile industries that require simple and repetitive labor instead of specialized craft or expertise, or they are working in the informal sectors,<sup>5</sup> or as part-time workers.<sup>6</sup> Thus, women in these industries are paid less in general.<sup>7</sup> While vertically, women are more often than not

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3. Women in labor markets: Measuring progress and identifying challenges. March 2010. International Labor Office, Geneva. Available at: [http://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/---emp\\_elm/---trends/documents/publication/wcms\\_123835.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_elm/---trends/documents/publication/wcms_123835.pdf).

4. In this case, 1 = equality, 0 = inequality. See Ricardo Hausmann, Laura D. Tyson, Saadia Zahidi, The Global Gender Gap Report 2011, World Economic Forum, Geneva, Switzerland 2011, Country Profiles – China, 142.

5. Women in labour markets: Measuring progress and identifying challenges. March 2010. International Labour Office, Geneva, 43-50. Available at: [http://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/---emp\\_elm/---trends/documents/publication/wcms\\_123835.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_elm/---trends/documents/publication/wcms_123835.pdf).

6. UNRISD-United Nations Research Institute for Social Development, Gender Equality: Striving for Justice in an Unequal World, Policy Report on Gender and Development: 10 Years after Beijing, 70. Figure 5.2.

7. Wang Guoyin, On the Sexual Discrimination of Graduate Students’ Employment, Journal of Huaihai Institute of Technology, Social Sciences Edition, Education Forum, Vol. 9, Issue 22, 2011, November 36.

working in the low-end rather than the managerial work within a vocation.<sup>8</sup> As is reported in the Global Gender Gap Report 2011, the female-to-male ratio of being legislators, senior officials, and managers in China is 0.20, which is far away from the standard equality ratio of 1.<sup>9</sup>

[2] *Rural Migrants as “Second Class Citizens” in the Urban Areas*

The Chinese society has been split into an urban-rural dual socioeconomic structure by the Household Registration System (Hukou) officially established in 1958 in the command economy context. Since then, the whole population has been divided into agriculture Hukou holders in the rural areas and non-agricultural ones in the urban areas, while strict restrictions were placed on rural-urban migration and rural-urban Hukou transformation. Despite several decades of “opening up and reform” since 1978, the different treatment based on Hukou status still has remained a major challenge to social justice in China, given a rocketing increase of migrant workers.

People who migrate from rural areas with agricultural Hukou to urban areas for employment are known as “rural migrant workers” or “migrant workers” (*nongmingong/mingong*). In 2012, there were 262 million national migrant workers working in the cities without local urban Hukou, around 60% of whom were young people aged between 16 and 40.<sup>10</sup> During job hunting, migrant workers might face overt discrimination<sup>11</sup> and unreasonable demands from employers,<sup>12</sup> in addition to occupational restrictions and administration fees imposed by the local administrative departments from time to time.<sup>13</sup> They are nudged into labor dispatch works,<sup>14</sup> temporary or contract-less jobs with high risks and high physical demands, jobs

8. Bai Jing, Du Liantao, the Study on the Employment Sexual Discrimination of Graduate Students, *Journal of Jixi University*, Vol. 12, Issue 2, February 2012, 12-13.

9. See Ricardo Hausmann, Laura D. Tyson, Saadia Zahidi, the Global Gender Gap Report 2011, World Economic Forum, Geneva, Switzerland 2011, Country Profiles – China, 142.

10. See the 2013 Investigation and Survey Report on the National Migrant Workers by National Bureau of Statistics of China, issued on May 27, 2013. Available at: [http://www.stats.gov.cn/tjfx/fxbg/t20120427\\_402801903.htm](http://www.stats.gov.cn/tjfx/fxbg/t20120427_402801903.htm)

11. About 47.91% of college graduates were demanded to have a local Hukou when seeking jobs, let alone less-skilled migrant workers. See Constitutionalism Institute in China University of Political Science and Law, the Investigation Report on the Employment Discrimination against College Graduates in Contemporary China, 2010. in Cai Dingjian, *The Employment Discrimination in China, Current conditions and anti-Discrimination Strategies*, Jun. 1, 2007. China Social Science Press, 1 edition, 196-200.

12. For example, employers would charge some deposits or keep identity documents from those migrant workers. 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*, in *Journal of Sun Yat-sen University, Social Science Edition*, Vol.49, Issue No. 1, 2009. Full text is available in Chinese at: <http://www.pbgchina.cn/newsinfo.asp?newsid=9510>.

13. A summary table of all variety of administrative fees, see Liu Kaiming, *Discrimination on the Basis of Social Origin: Analyzing Residence Requirements and their Impact on Employment Discrimination*, in Liweiwei and Lisa Stearns, ed, *Employment Discrimination: International Standards and National Practice*, Law Press, 2006, 392.

14. Labor dispatch work is a particular working style under the Dispatch Labor System in China. It requires workers to sign a contract with labor dispatch agencies, but not the end-users themselves. Both agencies and end-users shrink responsibility on labor security or labor injuries.

shunned by urban dwellers. As a result, such a vertical vocational segregation intersects with sex-based horizontal segregation, in which male migrants are predominantly engaged in construction work whilst female migrants are in caring and cleaning jobs.

After finding a job, they are easily exploited by prolonged working hours with intensive physical labor,<sup>15</sup> sometimes overtime working compensation is not paid,<sup>16</sup> or even default of payment happens frequently.<sup>17</sup> They are generally not covered by social insurance, injury insurance or pension plans. Sometimes, although they are demanded to be involved in a commercial insurance scheme, a significant number of them are withdrawn after paying for a certain period of time.<sup>18</sup> Thus many of them are vulnerable in cases of work injuries and occupational diseases.<sup>19</sup> What is worse, most of them do not have old-age support when they are too old to work.

### **[3] Domestic Helpers: Outcast of the Chinese Labor Law System**

It has been estimated there are 15 million people working as domestic workers, mainly comprised of local laid-off workers, migrant workers and college school students.<sup>20</sup> Another fact sheet issued by the ILO illustrates that there are 600,000 agencies and 20 million domestics, among which 90% are female, including unreported juvenile females.<sup>21</sup> Both numbers do not count those who are not registered as domestic workers or those who perform without a contract, which is mostly the case when migrant women come into cities for a job through personal connections instead of registered agencies. As this informal hiring relationship is not an “employment

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More information about labor dispatch can be found at China Labor Watch report: <http://www.chinalaborwatch.org/news/new-428.html>.

15. See Wenran Jiang, *See Prosperity at the Expense of Equality: Migrant Workers are Falling Behind in Urban China's Rise*, in Mendes, Errol P.; Srighanthan, Sakunthala ed. *Confronting Discrimination and Inequality in China: Chinese and Canadian Perspectives*. University of Ottawa Press, 2009, 28-29.
16. According to Labor Law A36, the standard working time is 8/ day, 44/week, overtime payment has its escalating way of calculation. For example, according to A44, normally overtime, overtime payment should not be less than 150% of basic payment, weekend overtime, no less than 200%, national holiday overtime, 300%.
17. See Research Report on Migrant Workers' Payment Default, by Beijing Zhicheng law firm, Migrant Workers' Legal Aid Website. Available at: <http://www.zgnmg.org/t/nmggz/1476.html>.
18. Liu Kaiming, *Discrimination on the Basis of Social Origin: Analyzing Residence Requirements and their Impact on Employment Discrimination*, in Liweiwei and Lisa Stearns, ed., *Employment Discrimination: International Standards and National Practice*, Law Press, 2006, 385.
19. Only 22% of rural migrant workers are covered by work injury insurance, three obstacles remain for raising the participation rate, in *Legal Daily*, Beijing, Aug. 15, 2009. Available at: [http://www.legaldaily.com.cn/0801/2009-08/15/content\\_1138656.htm](http://www.legaldaily.com.cn/0801/2009-08/15/content_1138656.htm).
20. *Prospect of Domestic Service Industry and Governmental Support*, issued by the China Home Service Association (CHSA) on Apr. 13, 2012. Available at: <http://www.chsa.com.cn/xhjs2/hydt/2012/04/13/9852.html>.
21. See Fact Sheet : *Domestic Workers in China*, by ILO, Sep. 1, 2009 . Available at: [http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/publication/wcms\\_114256.pdf](http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/publication/wcms_114256.pdf).

relationship” per se according to the Labor Law,<sup>22</sup> and the Labor Contract Law of the People’s Republic of China,<sup>23</sup> it is thus not regulated by the labor law system, including the work-related injury insurance law, trade union law, employment promotion law and labor arbitration law, whatsoever.

More than 50% of domestic workers in Guangzhou and Chengdu are working without a contract.<sup>24</sup> 35% of domestic’s work is over 10 hours per day in Guangzhou and Beijing, whilst in Nanjing the percentage rises to 70%.<sup>25</sup> They are susceptible to various kinds of occupational hazards such as skin irritation, back injuries, muscle strain, joint pain or stiffness, high blood pressure, chronic fatigue syndrome, mental stress and so on.<sup>26</sup> Still, more than 60% of domestic workers in Beijing and Chengdu are not part of any social insurance system.<sup>27</sup> Furthermore, working in a private household without previously negotiated terms of employment may increase the risk of being physically or mentally abused.<sup>28</sup> All in all, any abuse or work-related injury without insurance, any arbitrary dismissal, or permanent disability or retirement can spell great life difficulties to these unprotected workers. Yet they often do not have a labor union to fall back on because they are not counted as “employees” according to Labor Law.

## [B] Intersectionality Analysis

This part analyzes the interconnectedness and overlapping relationship among the three identities assumed by migrant women workers as domestic helpers, using the

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22. Art. 2 reads: “This Law applies to enterprises, individually-owned economic organizations (hereinafter referred to as the employer) and laborers who form a labor relationship with them within the boundary of the People’s Republic of China.” Available at: <http://english.mofcom.gov.cn/aarticle/policyrelease/internationalpolicy/200703/20070304475283.html>.
  23. Art. 2 reads: “The establishment of employment relationship between enterprises, individual economic organizations, non-enterprise private entities and other entities (hereinafter referred to as the employers) and the workers thereof, as well as the conclusion, performance, alteration, discharge or termination of labor contracts there between shall be governed by this Law.” Available at: <http://en.cneci.gov.cn/Law/LawDetails.aspx?ID=6079&p=1>.
  24. See ILO Office for China and Mongolia, Fact Sheet : Domestic Workers in China, Project to Promote Equality and Decent Work for Women through Trafficking Prevention, Protection for Domestic Workers, and Gender. Available at: [http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/publication/wcms\\_114256.pdf](http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/publication/wcms_114256.pdf).
  25. See China News. Available at: <http://www.chinanews.com/gn/news/2010/01-12/2067331.shtml>.
  26. Housemaids are facing occupational hazards after prolonged working hours in Shanghai, news report from People.com. Available at: <http://sh.people.com.cn/GB/138654/8926669.html>.
  27. ILO Office for China and Mongolia, Fact Sheet : Domestic Workers in China, Project to Promote Equality and Decent Work for Women through Trafficking Prevention, Protection for Domestic Workers, and Gender. Available at: [http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/publication/wcms\\_114256.pdf](http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/publication/wcms_114256.pdf).
  28. A high profile case in China is the Zhuhai Home Maid Abuse Case in 2006. The host lady was sentenced to 12 years imprisonment after being charged with deliberate harm by Guangdong Provincial Higher People’s court. See news report from Xinhua News Agency. Available at: [http://gd.xinhuanet.com/newscenter/2007-08/19/content\\_10898959.htm](http://gd.xinhuanet.com/newscenter/2007-08/19/content_10898959.htm).

approach of intersectionality. Intersectionality is a concept derived from the postmodernist deconstruction of human knowledge around the 1970s. It has gained its momentum within the feminist theory by addressing the most fundamental feminist question: the differences among women. It claims that feminist enquiries are supposed to capture the complexity and multiplicity of axis of oppression in real life, including race, class, religious belief and so on,<sup>29</sup> and that these different dimensions of social life cannot be separated into discrete and pure strands.<sup>30</sup> Intersectionality views a multi-faceted identity compounded by different aspects of disadvantage as irreducible, inseparable and entangled, which contributes to the internationally recognized legal concept of “multiple discrimination.”<sup>31</sup> In this section, intersectionality helps to analyze the overlapping relationship among the three identities migrant women workers as domestic helpers assume (See 2.2.1). Furthermore, intersectionality assists with analyzing how these three identities intrinsically interconnect with each other to form the triple predicament faced by migrant women workers as domestic helpers (See 2.2.2.).

### [1] *Overlapping Identities*

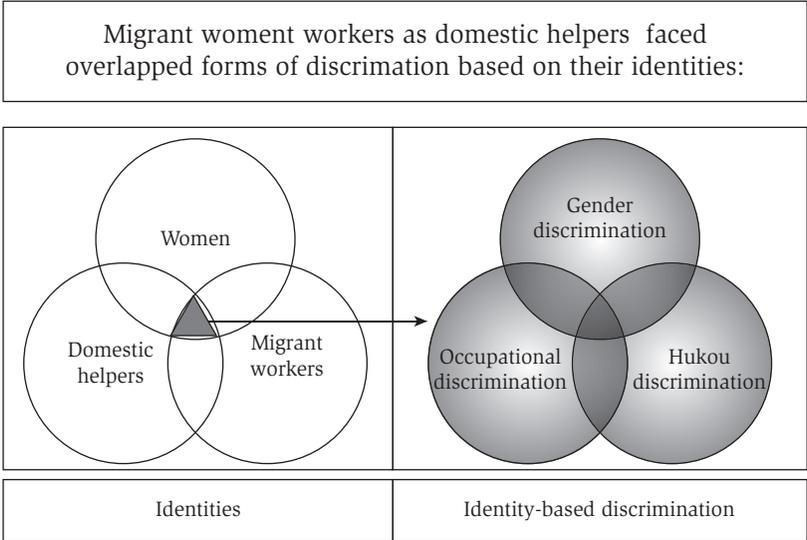
As is shown in the chart below, the subject of this paper is the overlapped area in shades on the left side: rural women who migrate into cities and work as domestic helpers. The predicament she faces in her working life is, on the one hand, foreseeable according to the composed three identities she assumes, that is, being a woman, a migrant, and a domestic worker as described respectively in section 2.1. . While, on the other hand, the dilemma is not predictable because of the overlapping part, things are complicated and blurred. She might suffer from difficulties not because she is “a woman and a migrant,” but possibly because she is a “migrant woman.” There are many more forms of social oppression given the complexity of her identities. To view it visually from the illustration below, the discrimination against these people might cover the whole surface of the three circles, including but not limited to the overlapped area in the middle. Thus intersectionality forms a non-corresponding and disproportionate relationship between the identities and the identity-based discrimination as shown in the chart below.

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29. Editorial: Celebrating intersectionality? Debates on a multi-faceted concept in gender studies, *European Journal of Women's Studies*, 2009, 16(3), 207.

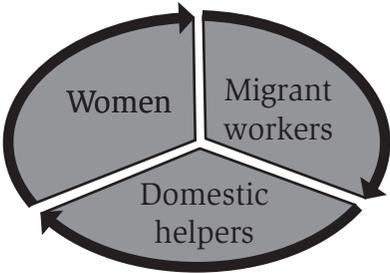
30. Avtar Brah and Ann Phoenix, Aint't a Woman? Revisiting Intersectionality, *Journal of International Women's Studies*, 5(3), 75-86, 76. Available at: <http://vc.bridgew.edu/jiws/vol5/iss3/8/>.

31. “Multiple discrimination” is adopted by A6 in CRPD and ILO CEACR General Survey 2012, 314 and 333, and “multiple forms of discrimination” is used by CEDAW GR25, para12. Similar concepts like “Intersectional discrimination” is explicitly referred by CEDAW GR28, para. 26, and “Cumulative discrimination” is referred by ICESCR GC20, para. 17.



**[2] Interconnected Identities**

Women, migrants and domestic workers are not randomly selected identities, but are so intrinsically interconnected with each other that it makes the permutation of these identities particularly complicated. Accordingly, intersectionality is not simply a way to address the additive effect of gender, social class and occupation combined together, but rather, it helps to demonstrate the transformative liaisons among the three. This is not hard to discover as is demonstrated in the diagram below:



Applying the lens of intersectionality, it is easy to witness a circular relation of the transformation among women, migrants, and home servants. With the overwhelming trend of modernization and urbanization in China, more and more rural women join the labor army into cities for better facilities and economic opportunities, thus form a

feminization of migration.<sup>32</sup> Yet as a rural woman with little skills and limited knowledge, she seems to have not much choice at hand but to do what she is stereotypically perceived to be “good at,” including being a home servant, restaurant servant, textile worker, anything extending her presupposed “caring character.” In the meantime, as a migrant with rural Hukou and limited local social connections, one is easily excluded from the lucrative job opportunities and is chosen for informal occupations with low-payment and low stability.<sup>33</sup> In sum, as the diagram suggested, there is witnessed a transformative loop among being a women, migration, and performing domestic works. To understand such multiple identities and the multifaceted disadvantage ensued, is the very beginning to identify the deficiency in the current legal system which fails to take into consideration such complexity.

### §2.03 GAP IDENTIFICATION

In this part, the normative gap, ratification gap and implementation gap<sup>34</sup> between the ILO conventions and Chinese legal system concerning the protection of migrant women workers will be introduced. The normative gap refers to the space for improvement in the current ILO codification system concerning the targeted people. The ratification gap indicates the unratified ILO core conventions in China and the following legal gap domestically. Finally, the implementation gap identifies the ratified ILO core conventions and the insufficient implementation in China that calls for enhancement.

#### [A] Normative Gap: Space for Improvement within ILO Standards

The normative gap focuses on three issues. First it is argued that the anachronistic idea within the current ILO codification concerning the “protection” of women workers calls for further deliberation (section §2.03[A][1]). Second, the limited definition of migrant workers that only applies to transnational migrant workers can also be considered for domestic migrant workers in China (section §2.03[A][2]). Finally, several missing practical points in the ILO 189 convention on domestic workers are worth paying attention to (section §2.03[A][3]).

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32. About feminization of migration, see for example, Economic and Social Council, *Feminization of Migration, Remittances, Migrants’ Rights, Brain Drain*, Commission on Population and Development, Thirty-ninth Session, 5th & 6th Meetings, Apr. 5, 2006. Available at: <http://www.un.org/News/Press/docs/2006/pop945.doc.htm>.

33. Informal economy, ILO Topics, See ILO website. Available at: <http://www.ilo.org/global/topics/employment-promotion/informal-economy/lang-en/index.htm>.

34. The concepts of normative gap, application gap, supervisory gap, ratification gap and implementation gap are elaborated in the International Council on Human Rights Policy, *Human Rights Standards: Learning from Experience*, 2006, Versoix, Switzerland, 7-9. Available at: [http://www.ichrp.org/files/reports/31/120b\\_report\\_en.pdf](http://www.ichrp.org/files/reports/31/120b_report_en.pdf).

[1] *On the “Protection” of Women Workers*

It is safe to say that from the general principles to specific concerns, ILO has formulated a comprehensive legal network for women workers at the standard-setting level, with its legion of conventions on equal protection including the 1958 Discrimination (Employment and Occupation) Convention (No. 111), the 1951 Equal Remuneration Convention (No. 100), the 1981 Workers with Family Responsibilities Convention, (No. 156) and 2000 Maternity Protection Convention (No. 183). However, there was a time when the level of protection of female workers within the ILO system amounted to the extent that it inclined to place undue restriction on women workers and hinder their competitiveness in the labor market. For example, the 1919 Night Work (Women) Convention (No. 4) prohibited women at any age to be employed to do night work in any public or private undertakings;<sup>35</sup> and the 1935 Underground Work (Women) Convention (No. 45) (interim status), which has been ratified by China and has been transferred into national laws, prohibited any women from working in mines.<sup>36</sup>

However, it has been recently made clear by the Committee of Experts on the Application of Conventions and Recommendations (CEACR) of ILO that “any protection beyond maternity protection can be seen as an inappropriate restriction on women and thus will be held contrary to the Convention No.111.”<sup>37</sup> Women shall have the right to choose any profession without being excluded simply because of their biological sex or socially constructed gender.<sup>38</sup> Still, some of the Chinese laws presume women workers to be “not suitable for certain works,”<sup>39</sup> which is now considered as an arbitrary exclusion of women workers based on sex. But at the same time, Chinese legislators could claim that these restrictive rules are out of observance of ILO No. 45. So it is suggested that ILO could take the initiative to clarify the contradictory ideas of

35. Art. 3 reads: Women without distinction of age shall not be employed during the night in any public or private industrial undertaking, or in any branch thereof, other than an undertaking in which only members of the same family are employed. See 1919 Convention concerning Employment of Women during the Night (No. 4). Available at: [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100\\_ILO\\_CODE:C004](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:C004).

36. See Convention concerning the Employment of Women on Underground Work in Mines of all Kinds, Art. 2 reads, No female, whatever her age, shall be employed on underground work in any mine. Available at: [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_INSTRUMENT\\_ID:312190](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312190).

37. ILO CEACR, Direct request, to China, on Discrimination (Employment and Occupation) Convention, 1958 (No. 111), adopted 2012, published 102nd ILC session, 2013, Art. 5. Special measures of protection and assistance. Available at: [http://www.ilo.org/dyn/normlex/en/f?p=1000:13101:0::NO:13101:P13101\\_COMMENT\\_ID:3081204](http://www.ilo.org/dyn/normlex/en/f?p=1000:13101:0::NO:13101:P13101_COMMENT_ID:3081204).

38. See International Labor Office, General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, on the 101st Session of International Labor Conference, Geneva, 2012, 330.

39. See for example, Art. 26 of the Law on the Protection of Women’s Rights and Interests prohibits women workers to be assigned to any work or physical labor not suited to them; Art. 59 of the Labor Law; the Special Provisions on Labor Protection of Female Workers of 2012; Art. 27 of the Employment Promotion Law; Art. 3 of the Regulation on the Administration of Human Resources Markets; and Art. 16 of the Regulation on Employment Service and Employment Administration all presume that women are not suitable for certain jobs.

“protection” of women workers in its own system including in the ILO Constitution,<sup>40</sup> and explicitly require member states to remove the outdated provisions despite them being coherent with the ILO standards in an earlier period.

## [2] *On Migrant Workers*

According to Article 11 of the 1949 Convention concerning Migration for Employment (No.97)<sup>41</sup> as well as Article 11 of 1975 Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (No.143),<sup>42</sup> the term “migrant for employment” (used in No.97)/ “migrant worker” (used in No. 143) means “a person who migrates or who has migrated from one country to another” to be employed. Plus, the attention brought by the ILO General Survey 2012 to migrant workers is also mainly about transnational migrant workers.<sup>43</sup> Such a definition of migrant workers seems only to refer to international migrant workers, instead of migrant workers within a country, whose number amounts to more than 250 million in China, facing no fewer dilemmas.

Additionally, many other ILO conventions like the 1962 Convention concerning Equality of Treatment of Nationals and Non-Nationals in Social Security (No.118) and the 1982 Convention concerning the Establishment of an International System for the Maintenance of Rights in Social Security (No.157) both rightly address the inequality of treatment for nationals and non-nationals in respect of social security. But neither of them paid attention to the fact that in terms of social security, there is also unequal treatment towards internal migrants based on their social status, as it is in China.

Admittedly, it has been brought to the concern of ILO that the discriminatory policy and practices against rural migrants is prohibited based on their “social origin”<sup>44</sup> instead of their “migration status.” But “social origin” as a prohibited ground is not paid sufficient attention, such as is the case with “migration status”; at least there are already several international conventions<sup>45</sup> regarding the prohibition of discrimination

40. The preamble of the ILO Constitution set women together with children as a subject of protection, which goes as “the protection of children, young persons and women.” ILO Constitution is available at: [http://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62\\_LIST\\_ENTRY\\_ID:2453907:NO](http://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRY_ID:2453907:NO).

41. ILO 97-Migration for Employment Convention (Revised), Geneva, 32nd ILC session, Jul. 1, 1949. Available at: [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100\\_ILO\\_CODE:C097](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:C097).

42. ILO 143-Migrant Workers (Supplementary Provisions) Convention, Geneva, 60th ILC session, Jun. 24, 1975. Available at: [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100\\_ILO\\_CODE:C143](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:C143).

43. See International Labor Office, General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, on the 101st Session of International Labor Conference, Geneva, 2012, 324-326.

44. CEACR, Direct request, to China, on Discrimination (Employment and Occupation) Convention, 1958 (No. 111), adopted 2012, published 102nd ILC session, 2013, Discrimination based on social origin. Available at: [http://www.ilo.org/dyn/normlex/en/f?p=1000:13101:0::NO:13101:P13101\\_COMMENT\\_ID:3081204](http://www.ilo.org/dyn/normlex/en/f?p=1000:13101:0::NO:13101:P13101_COMMENT_ID:3081204).

45. For example, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Dec. 18, 1990, A/RES/45/158. Available at: <http://www2.ohchr.org/english/bodies/cmw/cmw.htm>. Conventions regarding migrant workers see

based on “migration status” while none for the “social origin.” Consequently, those ILO standards set for the benefit of migrant workers are highly referable in offering guidelines for the human rights protection of internally migrant workers. After all, migration is not only a transnational phenomenon, but also intra-national. Thus internal migration issues deserve equal international attention and no less legal commitment. If domestic migrant workers, who remain a priority in the recent Chinese reform agenda,<sup>46</sup> would be included into the international mechanism, then it is fairly possible that these ILO standards regarding international migrant workers would be incorporated in the new policies concerning domestic migrant workers in China.

### [3] *On Domestic Helpers*

The ILO launched the concept of “informal sector” in the 1970s, right after the economic boom of the post-war period when numerous informal economy workers emerged.<sup>47</sup> Since then, people working in the informal sector have become visible, together with their slender incomes, compulsory overtime, arbitrary dismissal, filthy working conditions and the absence of social security. Though the gross value added (GVA) contribution by the informal sector is substantial and encompasses various categories including home servants, the legal protection for these people’s rights are in a time-lag.<sup>48</sup> It was only in the last two decades that the ILO came out with relevant conventions like the 1994 Part-Time Work Convention (No. 175) and the 1996 Home Work Convention (No. 177) addressing this group of long unrecognized workers.

Not until 2011 did the Convention concerning decent work for domestic workers (No. 189)<sup>49</sup> come into being, and just came into force on 5 September 2013. Even with this particular convention custom-made for domestic workers of all categories, those who work occasionally or sporadically are excluded as the subject of protection.<sup>50</sup> Such an exclusion can be problematic in application because in real life situations, a rural

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also ILO 97 -Migration for Employment Convention (Revised), Geneva, 32nd ILC session, Jul. 1, 1949 and ILO 143 – Migrant Workers (Supplementary Provisions) Convention, Geneva, 60th ILC session, Jun. 24, 1975.

46. Tackling Hukou related unfairness has been placed high on the reform agenda in the Decision on Major Issues Concerning Comprehensively Deepening Reforms of the Third Plenary Session of the 18th Communist Party of China Central Committee, which is considered as the most important meeting designing the Chinese development path and direction in the next ten years by the top leaders in the Communist Party of China. Available at: <http://cpc.people.com.cn/n/2013/1115/c64094-23559163.html>.

47. See Paul E. Bangasser, *The ILO and the informal sector: an institutional history*, employment paper 2000/9, ILO publications, 2. Full text available at: [http://www.ilo.int/wcmsp5/groups/public/---ed\\_emp/documents/publication/wcms\\_142295.pdf](http://www.ilo.int/wcmsp5/groups/public/---ed_emp/documents/publication/wcms_142295.pdf).

48. See *measuring informality: A statistical manual on the informal sector and informal employment*, 3-4. Available at: [http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms\\_222979.pdf](http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_222979.pdf).

49. ILO 189 Convention concerning decent work for domestic workers, Geneva, 100th ILC session, Jun. 16, 2011. Full text available at: [http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100\\_ILO\\_CODE:C189](http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_ILO_CODE:C189).

50. See Article1 (c): a person who performs domestic work only occasionally or sporadically and not on an occupational basis is not a domestic worker. Available at: [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C189](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C189).

migrant has only limited resources, so he or she might temporarily choose to be a home servant without taking it as a long-time occupation; and out of lack of choice he or she might be engaged in this job for several months, and then work for another. The instable working conditions and limited choice of performing a job render women migrants into the most vulnerable situation, yet the convention does not cover these people who can only work as domestic servants occasionally.

When it comes to the substantive contents prescribed in the ILO 189, it is comforting to see that a very inclusive package of rights is offered: core labor standards (Article 3-6, 11), working hours (Article 10), remuneration (Article 11, 12, 15), occupational safety and health (Article 13), social security (Article 14), standards concerning child/live-in/migrant domestic workers (Article 4,6,9,10,8,15), and other technical aspects (Article 15,17). However, there are still several points that worth mentioning. First, although intersectional conditions of migrant domestic workers have been brought under the convention, the definition of “migrant domestic workers” is closely linked to the aforementioned definition of “migrant workers” and thus too narrowly focused only on transnational migrants.<sup>51</sup> It fails to leave space for recognizing the intersectionally inferior condition of rural migrant domestic workers, as it is in China. Second, despite the fact that preventive measures to guarantee occupational safety and health are required to be taken into account, (Article 13) there is no instruction on who should bear the responsibility if those requirements on safety and health are not fulfilled and how to compensate the damage done.

### **[B] Ratification Gap: Unratified ILO Conventions and the Chinese Legislation Gap**

The Chinese government re-entered into the ILO system in 1983 and ratified its first ILO convention – the Convention concerning Vocational Rehabilitation and Employment (Disabled Persons) (No. 159) in 1988. Up until now, China has ratified 25 of the ILO conventions, including core conventions Nos 100 (Equal Remuneration Convention), 138 (Minimum Age Convention), 182 (Worst Forms of Child Labor Convention), and 111 (Employment and Occupation Discrimination Convention),<sup>52</sup> among which the two core conventions – Freedom of Association and Protection of the Right to Organize Convention (No. 87)<sup>53</sup> and Right to Organize and Collective Bargaining Convention (No. 98-modified into No. 154) – are not ratified. Nor did China ratify the two relevant

51. See Art. 8(1) of ILO 189 reads: National laws and regulations shall require that migrant domestic workers who are recruited in one country for domestic work in another receive a written job offer, or contract of employment that is enforceable in the country in which the work is to be performed, addressing the terms and conditions of employment referred to in Art. 7, prior to crossing national borders for the purpose of taking up the domestic work to which the offer or contract applies. Available at: [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C189](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C189).

52. See Normlex database for China. Available at: [http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200\\_COUNTRY\\_ID:103404](http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:103404).

53. Convention concerning Freedom of Association and Protection of the Right to Organize, 1948. Full text available at: [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_INSTRUMENT\\_ID:312232](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312232).

conventions, Nos. 143 and 189 respectively, focused on migrant workers and domestic workers. In this part, the paper introduces first the two unratified core conventions on freedom of association and collective bargaining – because China, due to its membership duty, would still have to observe the core labor standards even though it did not ratify the conventions;<sup>54</sup> and second the following Chinese legislation gap and its repercussion to migrant women workers.

Since China did not ratify the conventions on freedom of association and collective bargaining, the legislation and legal practice on these aspects remain loose. According to Article 2 and Article 9 of the ILO Convention No. 87, the scope of application of the freedom of association “of their own choosing” “without previous authorization” is to be applied to “all workers and employers,” “without distinction whatsoever,” with exceptions only for the armed forces and public servants to be prescribed by national laws.<sup>55</sup> This indicates that workers in the informal economy, migrants, and domestic workers and so on shall not be excluded from the aforementioned rights. But in China, domestic workers working in private families are not recognized by law as in “employment relationships” per se and are thus excluded from the Labor Law and Labor Contract Law. Therefore, they cannot get access to local labor unions despite the fact that they are undoubtedly laborers.<sup>56</sup>

With its overall membership of 280 million, including 109 million migrant workers from rural areas, and a participation rate of 81.1%,<sup>57</sup> All-China Federation of Trade Unions (ACFTU), which cooperates closely with the government under the leadership of the Chinese Communist Party,<sup>58</sup> is the most influential labor union in China. However, the diversity level of the membership would be seriously challenged if domestic workers and other workers in the informal sector are not included. Additionally, it is also a pity to realize that the exclusion of domestic workers as labor union members may also constitute indirect discrimination against women, due to the predominant number of women working as domestic helpers. Yet Chinese law says nothing about indirect discrimination, making it also very difficult to determine such exclusion through non-discrimination cases.

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54. According to the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up: “All Members, even if they have not ratified the [fundamental] Conventions in question, have an obligation arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights.”

55. See Convention concerning Freedom of Association and Protection of the Right to Organize, San Francisco, 31st ILC session, Jul. 9, 1948. Available at: [http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100\\_INSTRUMENT\\_ID:312232](http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_INSTRUMENT_ID:312232).

56. See Art. 3 of Trade Union Law of the People’s Republic of China “All manual and mental workers in enterprises, institutions and government departments within the territory of China who rely on wages or salaries as their main source of income, irrespective of their nationality, race, sex, occupation, religious belief or educational background, have the right to organize or join trade unions according to law. No organizations or individuals shall obstruct or restrict them.” Full text available at: [http://english.gov.cn/laws/2005-10/11/content\\_75948.htm](http://english.gov.cn/laws/2005-10/11/content_75948.htm).

57. See ACFTU news on Oct. 1, 2013. Available in Chinese at: <http://acftu.people.com.cn/n/2013/1011/c67502-23166727.html>.

58. See the Charter of the ACFTU at its official website. Available in Chinese at: <http://www.acftu.org/template/10001/file.jsp?cid=807&aid=42622>.

Being raised as a concern by the Committee on Economic, Social and Cultural Rights General Comment No. 16,<sup>59</sup> such an exclusion of membership of domestic workers has expanded its implication on the collective bargain. By virtue of Article 33-35 of the 1995 Labor Law, the employees “may conclude a collective contract with the enterprise on labor remunerations, working hours, rests and leaves, labor safety and sanitation, insurance, welfare treatment, and other matters.”<sup>60</sup> Accordingly, the ACFTU promoted the *Guiding Opinion Regarding Actively Launching Industrial Wage Collective Consultation Work*, and also helped formulate 24,000 tripartite consultation mechanisms and conclude 2.44 million collective contracts throughout the country.<sup>61</sup> But all these collective bargains and collective contracts do not apply to those workers who work in private houses or in the informal sector, as they are not “employees.”

### [C] Implementation Gap: Ratified ILO Conventions and the Chinese Legislation Gap

Since China has not ratified ILO No. 189 which is relevant to the protection of domestic workers, plus the only women worker related convention ratified – ILO No. 45 – has become outdated because it places undue restrictions on women workers, so this study chooses the two fundamental conventions ratified, Nos. 100 Equal Remuneration Convention<sup>62</sup> and 111 Convention concerning Discrimination in Respect of Employment and Occupation<sup>63</sup> to analyze the implementation gap on the protection of this particular group of people in China. According to the direct request and observations made by ILO CEACR about China on the two ratified conventions Nos 100 and 111, several points were raised about Chinese laws requiring improvement in order to fill the gaps between existing laws and the requirements set by the ILO conventions. This section displays several implementation gaps that may affect the right to equal treatment of migrant women workers as domestic helpers.

59. ICESCR General Comment 16, para. 25 states “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” (to join trade unions of his or her choice).

60. See Labor Law of the People’s Republic of China. Available at: <http://english.mofcom.gov.cn/aarticle/policyrelease/internationalpolicy/200703/20070304475283.html>.

61. See International Trade Union confederation (TIUC), Internationally recognized core labor standards in the People’s Republic of China, Report for the WTO general council review of the trade policies of the People’s Republic of China, Executive Summary, Geneva, May10 and 12, 2010, 3. Available at: [http://www.ituc-csi.org/IMG/pdf/Chinal\\_Final-2.pdf](http://www.ituc-csi.org/IMG/pdf/Chinal_Final-2.pdf).

62. See Equal Remuneration Convention, 1951(No.100), Geneva, 34th ILC session, Jun. 29, 1951. Available at: [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100\\_ILO\\_CODE:C100](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:C100).

63. See Discrimination (Employment and Occupation) Convention, 1958 (No. 111), Geneva, 42nd ILC session, Jun. 25, 1958. Available at: [http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100\\_ILO\\_CODE:C111](http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_ILO_CODE:C111).

**[1] *Equal Pay for Equal Work “of Equal Value”***

According to the ILO No. 100 (Equal Remuneration Convention), the prerequisite for examining whether the remuneration received is equal or not is whether the compared jobs are “of equal value.” This means the rate to examine the value of a certain job relies on objective criteria like the involved skills, labor intensity, responsibilities and working conditions<sup>64</sup> instead of gender bias, or social origin bias for that matter. Only when the benchmark for the jobs’ value is consistent, the remuneration based on the value of the jobs can be comparable. That said, the prohibition of sex-based wage discrimination is not sufficient enough if it does not capture the concept of “work of equal value.”<sup>65</sup>

However, despite the fact that Article 46 of the 1994 Labor Law and Article 11 of the 2007 Labor Contract Law refer to “equal pay for equal work,” they fail to incorporate the concept of “work of equal value,”<sup>66</sup> which is regarded as the cornerstone of the Convention No.100<sup>67</sup> and the primary condition of “equal remuneration.” It is highly suggested that the concept of “equal pay for work of equal value” is incorporated in the current Chinese labor law because it reframes the current remuneration determining system that based on social bias and it makes possible the comparisons between jobs of entirely different nature but of equal value. Only when the value of domestic work and other jobs in the informal sector are recognized as equal to other jobs, appropriate and equal remuneration for domestic works can be determined fairly.

**[2] *Universal Application of the Principle of Non-discrimination and Equality***

As discrimination in employment is a universal problem in all societies, it is thus requested by the Convention No.111 that the principle of non-discrimination be applied universally: to all people of any race, sex, religion, political opinion, national extraction, social origin, and others;<sup>68</sup> to all workers, whether in public or private sectors, in formal and informal economies; in all aspects of employment including

64. CEACR, Direct request, to China, on Equal Remuneration Convention, adopted 2012, published 102nd ILC session, 2013, Art. 2, Objective job evaluation. Available at: [http://www.ilo.org/dyn/normlex/en/f?p=1000:13101:0::NO:13101:P13101\\_COMMENT\\_ID:3081183](http://www.ilo.org/dyn/normlex/en/f?p=1000:13101:0::NO:13101:P13101_COMMENT_ID:3081183).

65. See International Labor Office, General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, on the 101st Session of International Labor Conference, Geneva, 2012, 283.

66. See CEACR, Observation on Equal Remuneration Convention (No.100), China, adopted 2012, published 102nd ILC session, 2013, Art. 1(b) of the Convention. Available at: [http://www.ilo.org/dyn/normlex/en/f?p=1000:13101:0::NO:13101:P13101\\_COMMENT\\_ID:3081183](http://www.ilo.org/dyn/normlex/en/f?p=1000:13101:0::NO:13101:P13101_COMMENT_ID:3081183).

67. See International Labor Office, General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, on the 101st Session of International Labor Conference, Geneva, 2012, 281.

68. See Art. 1(1)(a) and Art. 1(1)(b) of the Convention concerning Discrimination in Respect of Employment and Occupation (No.111). Available at: [http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100\\_ILO\\_CODE:C111](http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_ILO_CODE:C111).

vocational training, access to employment and to particular occupations, and terms and conditions of employment.<sup>69</sup>

Yet the Committee observed that though China explicitly prohibits discrimination in job seeking on the basis of “ethnicity, race, sex or religious belief” in Article 12 of the 1995 Labor Law and Article 3 of the Employment Promotion Law in China, the prohibited grounds of discrimination and the scope of application is too limited compared to the requirements of the Convention No.111 according to Article 1(1) and Article 1(3). In fact, the committee even noticed that the discrimination against inner migrant workers is based on their “social origin,”<sup>70</sup> which is not explicitly prescribed as one of the prohibited ground in any Chinese law.<sup>71</sup>

Furthermore, domestic workers, among other categories of workers, are most frequently excluded from non-discrimination law.<sup>72</sup> So it is in China: domestic workers employed by households are not considered as “employees” per se and are excluded from the Chinese labor law protection. This gives rise to a series of implications for these female migrant domestic workers: they are ruled out by labor standards, they are shunned from social welfare plans, and they are excluded from basic insurances for medical care, work-related injury, old-age and so on that are supported by the government. When their basic labor rights are intruded upon, labor arbitration is not an option, either. Their outcast position posts a great challenge to the universal application of the principle of non-discrimination and equality in China.

### **[3] Indirect Discrimination and Multiple Discrimination**

As is described above, women are easily nudged into certain jobs such as caring professions, including domestic work. Thus, an exclusion of domestic workers in the labor protection system and a denial of their deserved labor rights can constitute “indirect discrimination” against women. Moreover, it must be brought into greater attention the increased vulnerability of migrant domestic workers to “multiple forms of discrimination” flowing from their unrecognized employment status, the absence of relevant legal protection, gender-based discrimination and the under-evaluation of their occupation.

69. See Art. 1(3). *Ibid.*

70. CEACR, Direct request, to China, on Discrimination (Employment and Occupation) Convention, 1958 (No. 111), adopted 2012, published 102nd ILC session, 2013, Discrimination based on social origin. Available at: [http://www.ilo.org/dyn/normlex/en/f?p=1000:13101:0::NO:13101:P13101\\_COMMENT\\_ID:3081204](http://www.ilo.org/dyn/normlex/en/f?p=1000:13101:0::NO:13101:P13101_COMMENT_ID:3081204).

71. Though social origin is not a legal prohibited ground in Chinese law, Art. 31 in the Employment Promotion Law does provide that: “Rural workers who move to urban areas to seek employment shall enjoy equal labor rights to urban workers and shall not be subjected to discriminatory restrictions Rural workers who move to urban areas to seek employment shall enjoy equal labor rights to urban workers and shall not be subjected to discriminatory restrictions.” See Law of the People’s Republic of China on Promotion of Employment, full text available at: [http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content\\_1471590.htm](http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471590.htm).

72. See International Labor Office, General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, on the 101st Session of International Labor Conference, Geneva, 2012, 312.

However, neither of these two concepts can be found in the current Chinese law,<sup>73</sup> let alone detailed elaboration or determining procedures. In order to identify and cope with the continuously evolving new manifestations of discrimination, it is necessary and useful to develop in law a set of clear and comprehensive definitions of discrimination, including indirect discrimination and multiple discrimination. A set of clear and detailed definitions of discrimination can provide instruction on determining a situation and allocating burdens of proof, which are still absent in the current Chinese legal system.

## §2.04 CONCLUSION

Real life experiences are the essential elements in guiding the direction of any meaningful legal improvement. By describing the working conditions and the intersectional disadvantages of migrant women workers as domestic helpers in China, this paper displays the complexity of identity-based social oppression against these people. Accordingly, the paper identifies the existing normative gaps, ratification gaps and implementation gaps in the ILO system and Chinese labor law system regarding the human rights protection for migrant women workers as domestic helpers. The normative gap within the ILO system concerning the targeted vulnerable group of people manifested in its anachronistic idea of “protection” over women workers, its limited definition of “migrant workers” and its insufficient scheme for the protection of domestic workers. The ratification gap analyzed how the unratified, yet binding core convention, Nos 87 and 98 influence the relevant legislation gap on freedom of association and collective bargaining and its implication on migrant women workers in China. The implementation gap refers to the ratified core convention Nos 100 and 111 as the benchmark, by virtue of which it is found in the Chinese domestic legislation that the concept of equal work “of equal value” is missing, the application of the principle of non-discrimination and equality is not yet universal, and the definition of indirect discrimination and multiple discrimination calls for further clarification. All of these findings are of great importance to first raise the consciousness concerning migrant women workers as domestic helpers in China, and second to form a mind map to improve the effectiveness of ILO laws and its interaction with Chinese domestic laws – thereby enhancing labor standards for the sake of the most vulnerable group.

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73. This definition absence has also been addressed by the CEACR, in the Direct request, to China, on Discrimination (Employment and Occupation) Convention, 1958 (No. 111), adopted 2012, published 102nd ILC session, 2013, Definition of Discrimination. Available at: [http://www.ilo.org/dyn/normlex/en/f?p=1000:13101:0::NO:13101:P13101\\_COMMENT\\_ID:3081204](http://www.ilo.org/dyn/normlex/en/f?p=1000:13101:0::NO:13101:P13101_COMMENT_ID:3081204).