

社会性别与劳动权益

Gender and Labor Rights

西北工业大学妇女发展与权益研究中心

The Center for Women's Development and Rights of Northwestern
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社会性别视角下的劳动权益（代序）

1995年，在第四次世界妇女大会上，我国政府向世界庄严承诺：将性别平等纳入决策主流。1997年，联合国（UN）经济和社会理事会进一步确立了性别分析在决策中的重要性，提出性别平等主流化是一个过程。它对各领域的各个层面上的任何一个计划行动，包括立法、政策或项目计划等都将对女性和男性产生的影响进行分析；同时，它也是一个战略，把女性和男性的关注、经历作为在政治、经济和社会各领域中设计、执行、跟踪、评估政策和项目计划不可分割的一部分，使女性和男性能平等受益，不平等不再延续下去。它的最终目的是达到社会性别平等。将性别纳入决策主流首先是将性别纳入立法，但目前国内对性别与法律的研究还处于初级阶段，甚至在学界还存在对性别纳入法律的合理性的质疑。

为了推动将性别纳入立法的进程，增加社会对法律的性别敏感度，西北工业大学妇女发展与权益研究中心于2004年10月18日至20日在西安举办了“社会性别与劳动权益研讨会”。本论文集就是这次会议的部分研讨成果。会议的组织者——西北工业大学妇女发展与权益中心——自成立以来，一直致力于关注女性劳动权益，进行了大量的调查、研究并采取了法律援助行动，从研究与行动两方面进行女性劳动权益的保护与推动。本次会议对女性劳动权益的现状、女性劳动权益的救济、社会性别视角以及各国性别平等的法律比较进行代表发言与讨论，同时也就一些典型案例进行了专题讨论。参加研讨会的人员一部分来自于北京大学、中央党校、中国社会科学院法学研究所、香港亚洲资讯中心、中国劳动就业促进会、中国青年政治学院、天津师范大学、西安交通大学、陕西师范大学、西北政法学院、西安建筑科技大学、西安音乐学院、陕西警官职业学院、陕西省劳动学会、西安市委政策研究室、西安市中级人民法院政策研究室、西安市妇女研究会等15家高校及研究机构，其中有14位教授和6位副教授；一部分来自于陕西省总工会女工部、陕西省总工会困难职工帮助中心、陕西省及西安市妇联的权益部、西安市劳动与社会保障局、省市劳动保障部门的仲裁处、陕西省就业服务局、西安市中级人民法院、碑林及雁塔区法院等十几个单位，其中有13位正、副处长；还有来自于《中国妇女报》《中国妇女》杂志“法律帮助”专栏的编辑和记者。参加会议的人中共有52位专家、学者。会议还特别邀请了在国际劳工领域特别是国际妇女发展领域中具有重要影响的中国劳动就业促进会副会长，原国际劳工组织性别平等局局长张幼云女士。本次研讨会的资助者——美国福特基金会法律项目官员刘小堤女士——出席会议并讲了话。西安市副市长信长星同志在致辞中特别

肯定了研讨会的内容。

对法律的社会性别分析是在女性主义法学的基础上发展的立场和方法。雅格(Jaggar)指出,当今世界的女性问题与男性问题并非是截然分开的,因为在大多数情况下,男性的生活与女性的生活是密切地联系在一起的,不论在公共生活还是在私人生活中,男性与女性各自在道德上的选择都会影响对方。从“妇女”到“社会性别”的转变,社会性别涵盖女性和男性,以及他们的角色、需求、地位和相互间的关系。从妇女问题边缘化到性别平等纳入发展主流,将对性别平等的关注置于决策、战略规划、预算和过程的中心。目前“社会性别”已经与“阶级”“种族”一样被纳入研究人类社会与历史的一个基本的分析范畴,并在人文社科学术领域被广泛运用。社会性别对于不平等性别制度的积极变革意义在于:既然社会性别是指社会文化中形成的、属于女性或男性的群体特征和行为方式,对性别的社会认识不是自然的而是社会构成的产物,那么基于生理基础之上的性别压迫和不平等就是没有根据的,因而也是可以改变和消除的。将性别纳入法律,将会使我们更清楚在妇女的法律议题上法律的性别立场,以及再现以“中性”面目出现的性别不平等和法律本身带来的隐性的歧视,从而使法律真正起到保证社会公正、尤其是社会性别公正矫正器的任务,以实现从性别出发,最终能超越性别,达到法律上“去性别”的性别正义。

对劳动权益的分性别研究主要是对就业平等权的研究。这一专题的研究应该包括对劳动法律政策文本的性别分析和法律实施过程的分析。它最早来源于20世纪60年代美国民权运动和妇女权利运动,在一些研究中称为“两性平等工作权”。这些社会运动不仅要求对社会物质利益和政治权力进行新的分配和调整,而且对既有的常识及学科知识进行挑战。以社会性别视角观察中国劳动权益会发现,在经济全球化和国内市场化进程中的劳工权益中,不同性别所遭遇的问题的同质性和异质性。在整个劳资关系的劳权弱化中,女性的劳动权益比男性受到了更大冲击。就业的性别平等是劳动权益的重要方面,但同样的法律规定可能给两性带来不同的适用结果。中国的社会背景和西方社会有很大的不同。中国较早地形成了一个立法上形式的平等。我们已经初步建立了从宪法到妇女权益保障法,再到具体法规的妇女法体系,提出了从宪法到基本国策的“男女平等”。自1949年以来,尤其是改革开放以来,我国逐步建立了对妇女劳动权益保障的立法体系。该体系以宪法为根据,循两条线建立,一条是劳动保障,另一条是妇女权益保障。两条线在对妇女劳动权益的保障上虽有相互的补充,也曾某些方面促进了中国妇女的就业,然而不能否认的是,在现有的社会性别结构条件下又存在内在的冲突和矛盾,致使对妇女劳动立法的保障上出现了二重性功能。一方面,法律保护妇女平等的经济和劳动参与,但是这种平等的实现却是靠特殊保障为基础的,这是对平等参与的基础的校正,但平等的标准却是男性标准。而在事实不平等的条件下,这种平等的实现存在这样或那样的障碍,结果是背离男女平等的立法宗旨,使平等变成歧视。另一方面,对妇女特殊保护的特别强调,进一步弱化了妇女在



就业中原本不利的处境，使女性劳动保障的成本加大。

“劳动权益”不是一个单一的权利而是一个权利束，权利也是一个需要清理的概念。工作权不仅是劳动和获得报酬的权利，也包括涉及经济层面的附带权利，如自由选择工作权，以及要求国家提供充分就业之政策，经济参与（劳工参与公司决策），适当工作环境及工作条件（退休休假合理工资工时）的权利等，如果这些条件达不到，还可以有工业行动的权利及享有失业保险救济待遇。当国家将工作权（社会权）具体落实在宪法中时，除国家权力机关必须特别保障社会经济弱者外，更重要的是国家必须积极架构各种保障制度，以预防新弱者产生。只有就业权没有平等权就会产生新的性别隔离和女性就业非正规化和职业的边缘化。

本论文集共收录了参会代表的26篇论文。作者分别以经济学、法学、法律经济学、社会学等多学科或跨学科为背景，在研究方法上采用实证研究与规范性研究相结合的方式，尤其在法学方面，以法理学、宪法学、劳动法学、国际法学等多部法学为切入点，主要关切的领域是“三个问题”和“一个群体”。“三个问题”是就业歧视问题、生育怀孕歧视问题和性骚扰问题；“一个群体”是作为边缘劳工的家政工群体。

在研讨方法上，研讨会除了一般的主体发言之外，还增加了讨论与对话。为了加强学术批评并提高学术能力，本研讨会专门邀请了多位资深的性别研讨和法学研究专家对发言及讨论进行了点评，这些也一并放入了本论文集的单元讨论中。在此，我们对参会并进行学术评论的专家表示最诚挚的感谢。“法律与性别”尤其是“社会性别与劳动权益”的研究还有很长的路要走，本论文集所涉及的研究工作只是一个初步的尝试，希望它能有抛砖引玉之效。

同时还要感谢一直关注女性劳动权益研究项目和研讨会的支持者——美国福特基金会！

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西北工业大学妇女发展和权益研究中心

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Labor rights from the perspective of gender (as the preface)

The Chinese Government promised with dignity to take gender equality as the mainstream of decision-making in the Fourth World Conference on Women in Beijing in 1995. In 1997, the Economic and Social Council of the UN erected the importance of gender analysis in decision-making. It claims: it is a process to take the gender equality as the mainstream of decision-making. It takes any program, such as legislation, policy-making and program plan, belonging to all fields and layers into consideration to analyze influences of any program over men and women. It is also a strategy that regards perspectives and experiences of men and women as a necessary premise in designing, carrying out, tracking and checking policies and plans in political, economic and social fields in order to benefit men and women equally and put the inequality as an end. Its ultimate purpose is to realize gender equality. To list gender equality into the mainstream of decision-making means, at first, to list gender equality into the mainstream of legislation. But the study on law and gender is at the initial stage. What's more, there are raising of eyebrows as to the reasonableness of associating gender with law.

In order to promote the process of listing gender into legislation and raise the gender sensitivity of the society to law, the Center for Women's Development and Rights of NWPU held the Seminar on Gender and Labor Rights in Xi'an from 18 to 20 of October, 2004. The anthology is among the achievements of this seminar. The Center for Women's Development and Rights of NWPU has been devoting to study and maintenance of women's labor rights since its foundation. The speeches and discussions of the seminar touched the remedy and present situation of women's labor rights, the perspective of gender and comparison between legal systems on gender equality. Some typical cases were discussed as special topics as well. There were fifty two scholars, including fourteen professors and six associate professors, who took part in this seminar. They respectively came from: Peking University, Party School of the CPC, the Institution of Law of Chinese Academy of Social Sciences, Asia Monitor Resource Center of Hongkong, China Association for Promoting Labor and Employment, China Youth University for Political Sciences, Tianjin Normal University, Xi'an Jiaotong University, Shaanxi Normal University, Northwest University of Political Science and Law, Xi'an University of Arch & Tech, Xi'an

Conservatory of Music, Shaanxi Police Vocational Academy, the Shaanxi Association for Labor Studies, the Policy Research Department of Xi'an Municipal Committee of the CPC, the Policy Research Department of Xi'an Intermediate People's Court, the Xi'an Women Association. Some participants, including thirteen directors and deputy directors, came from the following organizations and media: Female-worker Department of Shaanxi Provincial Labor Union, the Aid Center for Poor Worker Rights of Shaanxi Provincial Labor Union, the Departments for Rights of Shaanxi and Xi'an, Xi'an Bureau of Labor and Social Security, the Employment Arbitration Departments of Labor and Social Security in Shaanxi and Xi'an, Shaanxi Bureau of Employment Service, Xi'an Intermediate Court and District Courts of Yanta and Beilin, China Women's News, the magazine for Legal Assistance of China Women's News. The seminar particularly invited Ms Zhang Youyun, the vice president of the Committee of Promotion for Labor Employment and the former director of the Bureau of Gender equality of the International Labor Organization. Ms Liu Xiaodi, an official of law program of Ford Foundation attended the seminar and made a speech. Mr. Xin Changxing, the vice mayor of Xi'an, spoke well of the speeches and discussions in the seminar when he addressed the seminar.

The gender analysis of law is the standpoint and method being developed after the law of feminism. Jaggar pointed out: there is not a clear line between male problems and female problems at present world. In most cases, life of men and life of women have a close relationship. No matter it is in public affairs or private, the moral choices made by men and women can influence each other. The transformation from "women" to "gender" embraces both women and men, their roles and needs, the relationship between men and women. The shift from the marginalization of women's problems to listing gender equality into the mainstream of development make gender equality the center of decision making, strategic planning and budgeting. Now, "gender", like "class" and "race", has become a basic concept when studying the human society and history and been widely used in the field of the humanities. The positive significance of the transformation from unfair systems between men and women to the gender is: since gender refers to men's and women's group character and pattern of behavior which are formed in the social culture, the social cognition of sex isn't out of the nature but the society. There is no ground for inequality and oppression based on physiology. So it can be changed and eliminated. To take gender into the consideration of law will make us clearly know the gender viewpoint of law in legal issues about women and reflect inequality of men and women in the form of being

neutral and potential gender discrimination caused by law itself. Furthermore, the law will the task of social justice, especially the task of the gender regulator so as to realize gender justice of "excelling gender" in law by starting from gender and ultimately surpassing gender.

Gender research of labor rights is mainly research of equal rights of employment. It should include textual analysis of labor law and policies and analysis of application of law. In addition, it derived from the movements of civil rights and women rights in America in 1960s and was called equal working right of men and women by some researchers. Those social movements not only appeal for a new distribution and adjustment of social materials and political power but challenge the existing common sense and knowledge of different branches. To view the rights of Chinese laborers from the perspective of gender, you will see homogeneity and heterogeneity of the problems of labor rights that men and women suffer from during economic globalization and the trend of market economy. The rights of women are suffering more impact, compared with that of men, during the fall of the laborers in the relationship between the capital and the labor. The gender equality of employment is an important aspect of labor rights. But the application of the same provision of law may produce different results to men and women. The social backgrounds in China are different from that of western societies. China established form equality in legislation earlier and has made a series of women legal system from the constitution to the law of women's rights and specific regulations. Equality between men and women is adhered by the constitution and the basic policy of the nation. China has gradually built up the legal system of protection on the rights and interests of women since 1949, especially the reform and opening to the outside world. The system takes the constitution as its basis and has two clues, one is protection on labor, the other, protection on rights and interests of women. The two clues, although, are complementary and have promoted the employment of women in China to some extent, their implicit conflicts can not be denied at present situations. First, the law equally protects women's economic position and labor opportunities but it relies on special protection and the standards of equality are characterized with men. There are all sorts of obscures in realizing the equality in law when there are facts of inequality in practice. As a result, the equal principle is violated and the so-called equality actually becomes a kind of discrimination. On the other side, the special emphasis upon the special protection of women further weakens their adverse situation in employment and increases the cost of labor protection.



The right of labor isn't a single right but a bundle of rights. Right is a concept to be specified. The working right includes not only right of labor and right of remuneration for work but also subordinate rights in the layer of economy such as right of working choice, requiring the government to make the policy of enough employment and to provide suitable working environment and conditions and so on. If those rights aren't satisfied, the female workers have the rights of action and that of receiving the unemployment insurance. When the nation makes the working right the provision of the constitution, in addition to the governmental protection of the weak, what is more important is that the government must actively construct all sorts of security systems to prevent the appearance from the new weak. Without equal right, only the working right can't prevent new sex segregation, irregularity of employment and vocational marginalization.

The anthology consists of twenty-six papers. The writers, who respectively have the backgrounds of economics, law, law economics and the sociology, take the way of combining empirical study with norm study to mainly explore the employment discrimination, the discrimination of women in pregnancy and sexual harassment and the group of home workers.

Apart from the usual speeches, this time increased discussion and dialogue about cases and invited several senior experts in law and gender study to give remarks on the speeches of the participants. The remarks have become part of the anthology. We are pleased to express our gratitude to those experts. There is a long way to go in the study of law and gender, gender and labor rights. We hope that our initial work could help to form wonderful ideas.

We acknowledge the contributions to this seminar and the programs of female labor rights made by Ford Foundation.

We express our thanks to the sponsor of the program for borderline labor self-help network and treatise—Oxfam Hongkong.

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Guo Huimin

The Center for Women's Development and Rights of NPU

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在“社会性别与劳动权益研讨会”上的致辞

信长星

（西安市委常委，副市长）

（2004年10月18日）

首先，我要真诚地感谢我一向十分尊敬的老大姐、在国际劳工领域特别是国际妇女发展领域具有重要影响的张幼云女士，以及这次会议的发起人和组织者郭慧敏女士热情邀请我出席这次会议。我对这一问题的关注与兴趣，部分原因是社会性别与劳动权益问题本身就属于政府应当高度关注的重点领域之一，部分原因则与我过去长期从事劳动政策研究和劳动行政工作有关。

在我看来，社会性别与劳动权益问题，的确是一个值得从理论与现实、经济与社会、浅层表象与深层原因、价值取向与实现路径等等诸多视角和层面进行深入研究、思考和探讨的话题。这既是一个沉重的话题，更是一个富有理论和现实意义的话题。

这一话题的意义首先决定于问题的长期性和普遍性。纵观历史，妇女作为人类社会的“半边天”，与男子共同创造了人类的物质财富和精神文明，都是社会发展和进步的推动者。然而，在人类社会的发展过程中，妇女却长期处于同男子不平等的地位。歧视妇女的陈腐观念由来已久、根深蒂固，总是在不同领域以不同形式表现出来。世界妇女为争取平等解放经历了艰难的历程。从1946年联合国妇女地位委员会的成立到1979年《消除对妇女一切形式歧视公约》这一“国际妇女权利法案”的诞生，从《内罗毕战略》到《北京宣言》，争取男女平等的发展进程在全球范围内加速推进，并取得了重大进步。然而，环顾当今世界，妇女受歧视、受压迫以致受摧残的现象并未绝迹，影响妇女地位的种种制度、政策和观念障碍远未消除。作为一个带有长期性、普遍性和复杂性的社会问题，也只有在社会进步与发展的基础上和过程中才能逐步得到解决。这种长期性不应成为影响我们信心的障碍，相反，应从中更充分地认识这一课题的巨大研究空间和潜力，更充分地认识这项研究的理论价值和实际意义，通过我们的努力加速推动这一过程。

这一话题的意义还在于其现实性。众所周知，作为一个人口众多、资源相对短缺的发展中国家，中国在推动妇女发展方面的成就举世公认，这一结论有大量的统计数据 and 事实支撑，这里无须列举。作为研讨会，特别是一个以劳动权益为中心话题的研讨会，与会者更为关注的是中国妇女发展进程中面临的困难和问题，特别是劳动权益方面的问题。比如女性就业难和下岗女工就业难的问题、妇女的贫困问题、非公有制

△

企业女职工劳动权益保护问题等等。研讨会列出的 22 个选题，非常全面，分类很细，这本身就说明这次会议对性别与劳动权益问题的研究已经远远超越了泛泛而论、大而化之的阶段，进入了专题性、实证性、政策性研究阶段。这种研究自然更具现实意义，其在实证基础上所得出的结论和提出的政策建议也更具借鉴和参考价值。

这次研讨会在西安召开，还有一个特殊的意义，那就是能够对西部地区的社会性别与劳动权益问题进行比较深入细致的研究。在我国这样一个地广人众的多民族国家，各地区的经济、文化发展存在较大差异，贫困地区，特别是西部农村贫困地区的妇女发展滞后是影响全国妇女发展的主要障碍。在西安这座城市，女性从业人员达 44 万人，同时还有 4.6 万下岗女工，其中 40 岁以上的下岗女工为 2.76 万人。多年来，我们在贯彻《妇女权益保障法》《劳动法》和实施《中国妇女发展纲要》，促进妇女就业和再就业、依法维护妇女劳动权益等方面做了一些工作，取得了一定成效。同时，我们也清醒地认识到，受经济社会发展水平和传统观念的制约，女性在就业、教育等方面的平等权利有待进一步落实，相关政策有待进一步完善，工作力度还有待进一步加大，社会各方面都需要为之付出长期的、艰苦的、坚持不懈的努力。真诚地期待与会代表对我们的工作提出批评和建议。

古都西安，历史文化源远流长，先后有十三个王朝在这里建都，是中华民族灿烂文化的发祥地，是世界闻名的四大古都之一。无论是城中的碑和塔、城外的陵和墓，还是连绵不断的城垣、成群的宫殿遗址，都记载着历史的沧桑巨变。改革开放以来，随着西部大开发步伐的加快，西安经济建设快速发展，城市面貌日新月异，一个集科技、旅游、商贸为一体的国际化大都市正在西部崛起。希望大家在西安多走走、多看看，愿大家在西安度过一段难忘的时光，留下一段美好的回忆！

最后，祝会议圆满成功！



中国会找到自己的一条道路

——在开幕式上的讲话

刘小堤

(美国福特基金会中国法律项目官员)

我谈一些现在正在思考的问题，我是四年前到的福特基金会，开始从事法律项目的工作。我到的时候发现我们资助的很多是妇女与法律的项目，这些项目主要是涉及婚姻家庭这方面的妇女问题。跟专家讨论后得出的共识是，在中国，要把妇女与法律推到一个性别平等的层面的话，不光要考虑婚姻家庭权利问题，也要考虑经济权利问题。所以我们才开始同郭慧敏谈这个项目。

但是从一个外国人的角度，我觉得在中国处理这个劳动权问题是一个特别值得研究的问题。因为这个问题不光是在中国，在全世界都是一个突出的问题。中国当然要寻找一条自己的道路，但另一方面也可以给别的国家提供一种新的、更好的经验，因为大部分国家在这方面做得并不是很好。其实中国的妇女就业率比起一些西方国家已经非常高了，可能一个原因就是计划经济条件下对妇女劳动权的保护是比较全面的，也达到了一个很好的效果。但现在面临的问题是，原来计划经济条件下的保护措施，在全球化市场化的新的条件下，就变成对妇女传统家庭角色的定位，这种角色的定位与政策和法律的支持有一定关系。

这个问题怎么解决？一方面改变法律对妇女传统家庭角色的定位，就是说现在很多法律当中都对妇女的家庭角色有一个明确的定位，这限制了妇女某些方面的劳动权利。妇女面对的就业歧视问题也经常是因为单位对妇女的家庭角色有一个定位，妇女在政策层面受到的保护，也使单位会认为影响自己的经济效益。另一方面可能需要政策的强烈支持来保护妇女在就业方面不受到歧视。这是需要考虑的两个方面，可是我认为这只是表面的措施。

我来自美国，美国较早就采取了这方面的措施，美国的劳动法当中一方面是淡化劳动中的性别因素，就是没有对妇女特别的保护，也没有对妇女工作的限制，没有说哪方面的工作妇女不可以做，也没有在法律中对妇女的怀孕期、经期上的特别保护；另一方面，美国有很强烈的消除对妇女就业歧视的法律，在这两方面都做到了，但美国没有根本解决对妇女劳动权的保护问题。造成一方面很多妇女根本不工作，因为工作的话就很难照顾家庭；另一方面，工作的妇女就真的很难照顾到家庭。美国的这样一种制度会对家庭和孩子造成一定的伤害。