

女性劳动权益研究

郭慧敏 主編 · 来自陕西的报告

段燕华 刘咏芳 副主编



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凡购买中国社会科学出版社图书,如有质量问题请与本社发行部联系调换 版权所有 侵权必究 本书是美国福特基金会支持西北工业大学妇女发展与权益研究中心"社会性别与女性劳动权益研究与促进"项目的成果之一。

西北工业大学妇女发展与权益研究中心成立于 2000 年,是专门以女性 劳动权益为行动研究对象的高校公益性研究机构。该中心由陕西多所高校教师、律师、工会及妇女工作者组成。本中心的工作宗旨为:特别关注女性发展与女劳工权益问题,研究与行动一体,促进劳动权利的性别平等。特别注意探讨在中国语境下的法学、社会学、经济学等多学科和跨学科行动研究。本中心多数成员是国内较早以行动研究方式关注法律与性别问题的专业人士,在中心成立前曾广泛参与妇女法律服务,部分成员有十余年从事妇女法律服务与研究的经历。中心全部成员为兼职人员,大家各自在本职工作中都是骨干,项目多利用休息日进行,个中艰辛可想而知。但这是一个团结且能战斗的群体,多少个休息日,大家放下家务和孩子在办公室加班或外出调查,以至于大家开玩笑说:"我们还维权呢,连自己的休息权都维没了!"或者这也是中国兼职妇女 NGO 的现实状况……无论如何,历时五年,继《社会性别与劳动权益》(西北工业大学出版社 2005 年 2 月出版)之后,这本《女劳权研究——来自陕西的报告》面世,对我们是一件幸事,也是对中国性别与法律研究做的一点贡献。

"社会性别与女性劳动权益研究与促进"项目以陕西省作为一个地方性的探索目标,探讨妇女劳动就业性别平等的政策法律行动的干预模式。项目假设中国劳动法律和政策存在盲点,这种盲点是产生结构性就业性别歧视的原因之一,而在原有计划经济时代建立的以国家福利保护为特征的女性特殊劳动权益保障立法模式已不能矫正市场经济条件下男女就业的不平等,需要妇女发出自己的声音,在立法、执法和司法多个层面改善之。项目的主要内容包括四个版块:一是调查研究。包括劳动法律、法规政策的文本清理,女性劳动权益状况调查(定性、定量),维权程序障碍的调查与分析(协商、调解、仲裁、诉讼),法律与政策的改善与促进。二是网络建构。包括社会与法律支持网络(工会、妇联、劳动保障、法律援助、法院、律师、志愿

者等)和边缘劳工自助网络(以边缘女劳工为主体,如家政工等)。三是权 益培训。包括维权者培训(如工会、妇联干部、劳动部门官员)和女劳工 教育(女工教育培训和专门群体参与性支持小组)。四是劳动与性别案件的 法律援助。包括独立代理及与省法律援助中心、省总工会困难职工援助中心 及妇联法律服务中心合作代理与协助诉讼、仲裁、调解并指导工会小律师工 作。通过项目研究,我们发现:①中国劳动法律与政策文本存在主流和专门 两个系统,一个是"女"字系统,也称特殊系统,一个是不带"女"字的 主流系统,两个系统在劳动法律政策的执行尤其是权利的可诉性方面存在较 大差异。有关女性劳动立法与政策处于较边缘的位置。②妇女工作权与生育 权存在较大冲突, 社会支持女性劳动平等就业的资源稀缺, 少量资源也在市 场竞争实践中消解,法律和政策的男女平等就业目标难以实现。③女性劳动 就业权利救济中性别问题很难彰显,以西方女权主义的妇女法律议题的诉讼 在本土存在较大文化障碍,如工作场所性骚扰。中国本土女性权利议题更难 进入诉讼,如家政工、家属工及"随夫工"带来的职业问题还有待于在本 十进行社会问题和法律问题的建构。④女性劳动权益较差的可诉性(能够 诉讼)使劳动法律援助面临较大困难。

行动研究的目的在于影响决策,社会科学研究成果的政策、法律转化应是社科研究的目的之一。项目主要的挑战是来自于传统法律中男性思维对女性经验的忽略和妇女意志在法律表达上的缺失。在项目过程中,我们尝试进行妇女立法干预,中心成员先后参与国家层面的立法,如妇女权益保障法、就业促进法、劳动合同法、物权法等立法讨论。在地方,则得到陕西省人大授权,与妇女儿童工作委员和妇联权益部一起工作,起草《陕西〈妇女权益保障法〉实施办法》,在全国率先将性别歧视和性骚扰定义写进地方法,受到联合国性别小组和全国人大的好评。在制定《陕西省劳动监察条例》过程中影响立法,将女性劳动保护和女性监察员的要求写进法律。对多起政策中性别问题提出建议并被采纳,项目支持并推出了国内第一个边缘女劳工自助团体——西安市家政工会。本中心的网站——社会性别与劳动权益网(www. genderandlaborright. com)也已引起公众对性别与劳动权利的关注。

本书的结构分为三个部分:第一部分为项目实践。我们将项目的部分调查、培训和其他的活动尽可能完整地展现给读者,以期保留一种历史感,保留妇女民间法律项目探索的足迹。第二部分是问题研究。内容涉及与女性就业及性别歧视相关的诸多问题。第三部分是陕西省有关女性就业的地方立法的法律文本及介绍。从冯玉祥将军在陕西的地方劳动立法开始,其中关于家庭雇工和女性劳动保护之立法当是中国最早的相关立法,到陕甘宁边区劳动

保护条例,再到现行立法,其中有些内容是本项目推动的成果。反映出陕西省在妇女劳动立法方面的历史传统和成果。本书三部分的内在逻辑是行动—研究—立法,这是一种女性主义立法的推动进路。

性别与劳权的问题在中国过于复杂,跨国女权主义作为抵制资本全球化的策略,在国际间进行跨文化女权实践,社会性别话语进行了全球旅行,跨国女权主义话语和实践的"跨"与"被跨","外来"与"本土"的协调和冲突呈现出复杂的态势。我们不能单向地强调外来文化对所谓"本土"的影响,而忽视"本土"的能动性及"本土"的历史建构。性别与法律的行动研究只是一个开始的尝试,很多妇女的就业权益问题用单一的性别分析方法不能解决问题,须与阶级、身份等其他分层方法交叉进行。由于项目本身的难度及我们的水平和工作时间的限制,这些研究仍不成熟,我们需要提升理论和实践的能力。我们也期待更多人参与到性别与法律研究中来,不仅为了法律和现实中的性别平等,也为了改变跨国女权主义在目前情况下的单向流动。

本书的作者主要为本中心成员,在写作的过程中大家充分发挥了团队协作精神,很多署名只是一种大概的分工。为了在性别与法律研究方面后继有人,有一些学生也参与了项目活动,并将其内容写成毕业论文,其中蕴含着指导老师和项目其他老师的心血。

最后我们要特别感谢美国福特基金会及前任和现任法律项目官员:刘晓 堤女士,没有她的信任和支持,项目就不能开展和进行;柏恩敬先生,没有 他的支持和理解,项目也难以完成。

> 郭慧敏 2009年1月于西安

Preface

The book is one of the achievements of the Center for Women's Development and Rights of NWPU by the Project on Gender and Labor Rights of Women under support of the Ford Foundation.

The Center for Women's Development and Rights of NWPU, founded in 2000, is a non-profit research institution taking labor rights of women as its concern. The principles of the Center are; to concentrate on problems about development and labor rights of women; to promote gender equality of labor rights by integration of action and research; to attach importance to the action research of law, sociology and economics and that of multidiscipline under the background of China. Its members are part-time and consist of teachers in universities, lawyers, women workers and workers from labor unions. Most members are among the experts who are earlier in caring for gender and law problems by action research in China. Some of them have carried out legal service and research more than ten years. Because all of the members are part-time, it is usual for them to do projects of the Center by making use of holidays and weekends without taking caring care of their families and children. And this is the real life of part-time workers of NGOs in China.

After publishing of Gender and Labor Rights by the Publishing House of NW-PU in February, 2005, we are very glad to see the birth of Research on Labor Rights of Women: Report from Shaanxi and regard it as our little effort to research on gender and law in China.

The project on gender and labor rights of women, lasting for five years, was undertaken by the Center for Women's Development and Rights of NWPU. Its purpose was, by taking Shaanxi Province as an example, to explore the intervention mode by policy and law on employment equality in China. The project took it as the premise that gender was a blind spot of labor law. The blind spot was one of the reasons resulting in employment discrimination. The original mode of legislation,

coming from the era of planned economy and characterized with national welfare protection, has not dealt with employment inequality between men and women under market economy. It is necessary for women to express their own voice and improve the situation legislatively, judicially and administratively. The project was made up of four parts. The first was general investigation including analysis of legal text on labor, situation of woman-labor rights and procedural obstacles against right protection. The second was about construction of network on including the network of social and legal support consisting of labor unions, women federations, courts, agencies of social security, lawyers and volunteers and the self-help network consisting of the disadvantaged women workers. The third was about trainings including training of people touching woman career and educational training of women. The forth was about legal aid of cases involving labor rights including to work dependently or to corporate with relevant departments of the center of legal aid, the provincial labor union and local women federations. The followings are the conclusions from the project. First, there are two branches in Chinese law and policy. One is special, mainly about women. One is the mainstream, about general situations. Second, although there are social resources to promote equal employment, market competition make them not play well. Third, it's hard to make gender problem on woman employment stand out. There are cultural obstacles against Chinese women to sue for their rights and interests. Forth, the lawyers face challengers when giving legal aid to woman litigants because labor right cases are difficult to be sued.

The purpose of action research lies in influencing policymaking. In is one of the tasks to make the research result of social science have access to policymaking and legislation. The challenges of the project were mainly from ignorance of women experience in traditional law caused by logic of men. During the project, the research members tried to influencing legislation by taking part in legislative discussion of laws such as national laws on women rights, employment promotion, labor contract and property. The research members also got a chance to draft the implementation measures for national law on women rights in Shaanxi Province together with the Women and Children Committee of Shaanxi People's Congress and the Women Federation of Shaanxi. And the definitions of gender discrimination and sexual harassment were put into the implementation measures. It was the first time in local legislation of China. The project played a role in making labor security of

women and women staff of labor supervision becomes articles of the Regulations on Labor Supervision of Shaanxi Province. The Household Workers' Union of Xi'an, the first self-help group of disadvantaged women in China, was founded with the care of the project. The website of the center (www. genderandlaborright. com) has become a platform of publicize women's rights and interests.

The book is made up of three parts. The first is practice of the project including investigations, trainings and other activities in order to show readers the activities as much as possible and write down the process of non-governmental project about women rights. The second is problem research involving such problems as women employment and gender discrimination. The third is an introduction of local laws on women employment ranging from 1920s to today, which reflects the development and achievements of Shaanxi Province in women legislation. The three parts of the book follows the order of action—research—legislation.

Problems about gender and labor rights are very complicated in China. As the strategy of resisting capital globalization, transnational feminism is carrying out trans-cultural practice. Gender becomes a term worldwide. The influence, coordination and conflicts between transnational feminism and local culture show complicated tendency. It's not suitable to emphasize only impact of foreign culture on a certain place and ignore the active side of that place. It is the beginning of action research on gender and law. Naturally, many problems about women employment can not be settled only by gender analysis and should consider other point of views at the same. Because of time and the challengers from the project, what we did have much room to improve. In order to realize gender equality in law and reality, more researchers are hoped to take part in researches on gender and law.

The authors of the articles in the book are mainly the members of the Center for Women's Development and Rights of NWPU. In order to make the research of law and gender sustainable, some students join in the project. The book is a production of team spirit.

Finally, I want to express my sincere gratitude to Ford Foundation, Ms Titi M. Liu and Mr. Ira Belkin. Their support and understanding are necessary for us to fulfill the project.

Guo Huimin

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第一部分 项目实践

Part I Project Practice

回顾与反思: 劳权、性别与行动研究

多少年过去了,想想当年我们这个团队通过讨论将妇女权益从婚姻家庭 领域向劳权拓展时,还是有点过于胆大。当时有关"家庭暴力"的研究活 动正在全国掀起,放弃一个熟悉的领域去垦荒,只是认为将女性的权利集中 于婚姻、家庭领域有点不够,妇女权利需要向更广阔的领域进军,对妇女的 社会经济权利应该投入更多的关注。当时项目成员中没有一个人是搞劳动法 的,我们边学边干,多少个休息日,大家集中学习,研讨西方女权主义法学 理论和有关劳动的多学科理论,到基层进行调查,组织小组和培训。今天回 过头来看,这些年的探索是在苦苦寻觅一条立足于本土的性别与劳权的行动 研究之路。

一、地方与全球:选一个时空交叉点

中国太大,全球更看不过来,作为"老陕",我们以陕西为根基,在妇女劳动者权利上切一个面,观察转型期的女性劳权变化是项目的初衷。观察对象是一个位于西部的排列于老"劳工"(劳动者,或工人阶级^①)队伍中的女性群体,包括主流言说中的"女职工"和"边缘女工"群体(从女职工队伍出来,如下岗,或没有办法进去,如协议工,临时工,家属工),以未来可以区别和对照东部渐起的以农民工为主体的新劳工群体。

在1995年世界妇女大会上,中国政府向世界承诺,将"性别观念"纳入决策主流,是妇女权益发展的一个重要契机,性别理念在中国开始传播。"九五世妇会"之后,妇女界开始以性别视角审视法律,先从反家庭暴力活动开始。我们这个团队也加入其中,后来发现,家庭暴力产生的原因之一是

① 本文认为劳工、劳动者、工人阶级是言说者在不同时期、从不同角度、在不同语境下对同一个群体的称谓。本文采用广义工人阶级概念,包括知识分子。周恩来早在1956年就提出知识分子是工人阶级的一部分的主张,但由于各种情况被中断,直到邓小平1978年在全国科学大会上再一次明确肯定知识分子是工人阶级和劳动人民的一部分。参阅龚育之《知识分子也是工人阶级一部分》,《人民日报》2001年7月12日第11版。

男女经济地位的不平等,女性如果只在家庭领域与丈夫争取平等是远远不够的,必须向社会争取经济权利,而工作权是妇女经济权的重要组成部分,在某种意义上也是妇女实现政治权利的基础。另外一个重要的事件是中国加入WTO,世贸组织关于社会条款及国际劳工公约的八个核心公约成为中国必须遵守的内容,"劳权"作为人权的重要组成部分的理念得到较广泛的认可。有关国际劳工公约的国内执行情况受到国际社会更有力的监督,中国劳动转型中出现的多种形式的歧视渐渐引起人们的关注。就业性别歧视的事件浮出水面。很多妇女就业的案子在现有法律的框架下很难得到处理。

选点陕西, 一方面是因为我们地处陕西, 另一方面陕西集传统与现代于 一身, 带着 13 朝古都和陕甘宁老革命根据地的荣耀与浓厚的计划经济时代 意识,背着历史大包袱行进在现代化的行列中。它是在社会转型中矛盾与冲 突较为典型的省份,以至于被总结成为"陕西现象"。^① 它是全国有名的科 技大省、教育大省、人才大省、文化大省、军工大省、资源大省、文物大省 和旅游大省。按理说,有这么雄厚的基础、得天独厚的优势、庞大的人才队 伍和强大的支撑力, 也自然而然应是一个经济大省。但陕西却是经济上的弱 省,财政收入的小省,居民收入的穷省。② 我国首部《区域新经济指数报 告》中、运用五大类(知识职业、全球化、经济动态和竞争、向数字经济 转型、创新能力)15个指标进行评价,其中新经济是以知识化和网络技术 为基础的, 所占权重较大。评价结果表明, 陕西新经济指数仅次于北京、上 海、广东、天津、福建、浙江、居全国第7位,在五大类指标中,知识工作 岗位和创新能力居前5位之内,在15个细分指标中,研发民间投资额比例、 科学院和工程师占总从业人员的比重、办公室职位比重居前4位以内。但反 映经济发展的关键指标——人均 GDP, 却仅高于广西、云南、贵州、甘肃 4 省区,居全国第27位,居西部地区第8位,反差十分明显。③ 计划经济发 展落后,给陕西带来很大的就业压力。陕西 2005 年底总人口为 3720 万人,

① "陕西现象" 2003 年由陕西省统计局总统计师杨永善首先提出,并归结为"陕西经济十大怪"。与陕西民俗十大怪对应。"陕西现象",即在全省社会经济发展的过程中,出现了本应协调发展但实际却不协调发展的现象。即高新科技与比较滞后的经济并存,先进的文化与保守的思想观念并存,蓬勃发展的高等教育与落后的基础教育并存,经济发达的关中地区与贫穷的陕南、陕北并存,实力雄厚的国防工业与薄弱的中小工业并存,大量引进人才与某些方面又浪费人才并存,一些实事虚于与某些虚事又实干并存,千方百计招商引资与屡屡发生闭门宰客并存,部分高收入阶层与广大城乡居民的低收入并存,全国综合竞争力评价中,知识化、网络化的高名次与经济发展指标的低名次并存等。

② 杨永善:《解读陕西经济"十大怪"》,《中国改革》2004年第9期。

③ 同上。