

Gender discrimination in employment in China and Russia

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The paper researches the problem of gender equality in employment in Russia and China. Starting with the review of the general attitude on the role of the woman in the society in these countries (part 1) the authors proceed with the analysis of national norms and case law. They point that in spite of ratification by both countries of the main international instruments prohibiting gender discrimination in employment these norms did not fully penetrate to the legal system and to the legal culture of China and Russia. Part 2 focuses on the prohibition of employment of women in some occupations and the protection from gender discrimination in Russia. In the part 3 the relevant Chinese experience and legislation is investigated through the comparison with the Russian approach. In conclusions the main common traits of gender based discrimination in employment in both countries are formulated: even though they established anti-discrimination principles to ensure gender equality at the workplace, the lack of clarity in the definition of discrimination and the absence of a general provision on the shift of the burden of proof as well as the absence of norms protecting women who lodged a claim on discrimination against an employer from victimization. In both countries the authors evidence the lack of case law on discrimination and the difficulties in proving discrimination in the rare cases which were brought before the court. The authors also substantiate that the general attitude towards the division of roles between men and women is one of the main reasons of gender discrimination in both countries.

Keywords: Chinese law, Russian law, gender, pay gap, discrimination, employment, stereotypes, labour law, special protection.

Introduction

Brazil, Russia, India, China, South Africa (BRICS) proclaimed the field of employment protection and achieving social justice to be one of the significant spheres for the cooperation and affirmed the commitment to fully implement the 2030 Agenda for Sustainable Development¹. Gender equality is one of the main goals of this agenda. It is underlined that the nations seek to achieve the world in which every woman and girl enjoys full gender equality and all legal, social and economic barriers to their empowerment have been removed and the stated will end all forms of discrimination against all women and girls everywhere².

In both countries the percentage of working women is very significant even though lower than the percent of men's participation in the labour market. According to the International Labour Organization (ILO) research in 2019 54,5% of women participate in the

¹ BRICS Johannesburg Declaration, adopted on 26 July 2018. Available at: https://www.mea.gov.in/bilateral-documents.htm?dtl/30190/10th_BRICS_Summit_Johannesburg_Declaration (accessed: 20.03.2019).

² UNO 2030 Agenda for Sustainable Development. Available at: https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E (accessed: 20.03.2019).

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labour market in Russia, 60% — in China, while among men this indicator is equal to 70%, in China — 75%³.

In the present paper we will consider the general attitude on the role of the woman in the society in these countries (part 1), then proceed with the review of Russian approach to protection of women from discrimination (part 2) and conclude with the analysis of Chinese law and practice (part 3).

1. The role of women in Russian and Chinese societies

Both countries have ratified main international instruments aimed at ensuring gender equality: International Covenant on Economic, Social and Cultural Rights (ICESCR), the the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) Equal Remuneration Convention (No. 100, ILO), Elimination of Discrimination in Respect of Employment and Occupation (No. 111, ILO). However, the equality provisions, in our opinion, did not fully penetrate to the legal system and to the legal culture of China and Russia. Considering legal norms separately from the sociological aspects of the problem would be a huge simplification. Therefore, the legal research will be proceeded with the analysis of the general attitude to the role of women in Russia and China societies.

China and Russia share some common traits: the formation of labor law in the socialist period⁴, the paternalism of the state in the 20th century and the historical emphasis on collective rather than individual values, traditional perception of a man as a breadwinner, a low percentage of women in the key management and civil service positions and the significant gender pay gap.

Official recognition of the special role of a woman in the society is a common point of the state attitude towards women in employment. Russian Constitutional Court developed the idea of “the special, related to motherhood, social role of women in society”⁵. Russian researcher, Olga Podoplelova, having investigated the case law of the Constitutional court, came to the conclusion that the approaches of the Constitutional Court on discrimination cases, remain clamped by gender stereotypes, in particular those concerning the idea that procreation is the only viable mission in a woman’s life and the mother’s primary responsibilities for child care⁶.

The view on the “a universally accepted social role of women in procreation” is consonant with the opinion of Xi Jinping, expressed in 2013: “Special attention should be paid to women’s unique role in propagating Chinese family virtues and setting up a good family tradition. This relates to harmony in the family and in society and to the healthy development of children. Women should consciously shoulder the responsibilities of taking care of the old and young, as well as educating children”⁷.

We suppose that the general attitude towards the division of roles between men and women is one of the main reasons of gender discrimination in both countries. Men are

³ Available at: <https://data.worldbank.org/indicator/SL.TLF.CACT.MA.ZS?locations=CN> (accessed: 20.02.2020).

⁴ *Randall Akee, Liqiu Zhao, Zhong Zhao*. Unintended consequences of China’s new labor contract law on unemployment and welfare loss of the workers // *China Economic Review*. 2019. Vol. 53. P. 87–105.

⁵ Decision of the Constitutional Court No. 1085-O-O/2009, 13.10.2009, Decision adopted 22.03.2012 under the application of A. Klevetz; Decision adopted 06.07.2010 No. 937-O-O.

⁶ *Podoplelova O. G.* Gendernye stereotipy v konstitutsionnom prave Rossii: lovushka “osobogo otnosheniia”? [Gender stereotypes in the constitutional law of Russia: the trap of “special treatment”?] // *Comparative constitutional review*. 2018. No. 3. P. 73–91.

⁷ Cited from: *Wang, Zheng*. Finding women in the state: A socialist feminist revolution in the People’s Republic of China, 1949–1964. University of California Press, 2017. P. 260.

perceived as breadwinners, while women “have a special role on the society”⁸. This is the reflection of the persistent gender customs which, amongst other things, imply the centrality of marriage and non-market unpaid labour for women⁹.

In both China and Russia employers often have a prejudice against female employees and believe that women’s labour efficiency is not as good as men’s, especially after marriage and childbirth as women will pay more attention to the family¹⁰.

According to the recent research undertaken by Headhunters, the overwhelming majority of employers surveyed (96 %) purposefully searched for candidates of a certain gender in Russia. Job postings did not specify the gender of the potential employee as it is prohibited¹¹. In China, though the posting with the discriminatory requirements such as gender are prohibited as well, 19 % of the job postings at the national civil service job lists specified “men only”, “men preferred”, or “suitable for men”¹². There is evidence on the perception of “female” professions in both countries as lower-status, lower-paid jobs¹³.

The statistics demonstrates another common point — the persistence of gender pay gap in both countries. In Russia women receive only 72,6 % of men’s salary¹⁴. A widening gender pay gap was registered in the past two decades in China. Some scholars reported that women earned from 10 to 54 % less than men in urban China and from 20 to 45,7 % in rural China¹⁵.

Against the background of established gender stereotypes in the labour market in both countries we will consider the legislation and the case law on protection of women from discrimination in China and Russia. Each national part will include paragraphs on the notion of discrimination and on protection in case of discrimination.

2. Russian approach to protection of women from discrimination

The economic and political reforms of the 90s brought a lot of challenges to the Russian labour law. The Labour Code of the Russian Soviet Federal Socialist Republic (RSFSR) was amended in 1992 to incorporate rules prohibiting discrimination in employment and wages (Art. 2, p. 16). The new Labour Code of the Russian Federation adopted in 2002 prohibits discrimination in employment (the list of discriminatory grounds remains

⁸ Decision of the Constitutional Court No. 2914-O, 19.12.2017. Available at: <http://doc.ksrf.ru/decision/KSRFDecision308708.pdf>; Gao, Zhihong. Gender discrimination in Chinese recruitment advertisements: a content analysis // *Journal of Asia-Pacific business*. 2008. Vol. 9, No. 4. P.395–418.

⁹ *Sinha Mukherjee, Sucharita*. More educated and more equal? A comparative analysis of female education and employment in Japan, China and India // *Gender and Education*. 2015. Vol. 27, No. 7. P.846–870.

¹⁰ The Russian Constitutional court referred to this fact in its Ruling No. 28-P delivered 15.12.2011 (para. 4).

¹¹ Art. 25 of the Law of the Russian Federation of 04.19.1991 No. 1032-1 “On the employment of the population in the Russian Federation”.

¹² *Stauffer B*. “Only Men Need Apply”. Gender Discrimination in Job Advertisements in China. Available at: <https://www.hrw.org/report/2018/04/23/only-men-need-apply/gender-discrimination-job-advertisements-china> (accessed: 20.02.2020).

¹³ *Ashwin S*. Adapting to Russia’s New Labour Market: Gender and Employment Behaviour. Abingdon: Routledge, 2004. P.78; *Bohong Liu, Ling Li, Chunyu Yang*. Gender Equality in China’s Economic Transformation. United Nations System in China, 2015. Available at: www.un.org.cn/uploads/20180326/2063f2493b160cd25bb79ce54fe8dcc1.pdf (accessed: 20.06.2019).

¹⁴ Женщины и мужчины России. [Women and men in Russia] 2018: Стат. сб. Росстат. М., 2018. Available at: https://www.gks.ru/free_doc/doc_2018/wo-man18.pdf (accessed: 20.06.2019).

¹⁵ Cited from: *Gu Wei*. Explaining the Gender Wage Gap in Rural and Urban China (2017). Available at: <https://openprairie.sdstate.edu/cgi/viewcontent.cgi?article=2207&context=etd> (accessed: 20.11.2019).

open). It also allows for the possibility to claim for non-pecuniary damages in case of discrimination.

2.1. Definition of discrimination. Russian Labour Code defines discrimination as the restriction of employment rights and freedoms or the receiving of any advantage on any grounds not related to the professional qualities of an employee (article 3). It admits differentiation of labour regulation if it is required by the nature and conditions of the work, psycho-physiological characteristics of the organism, climatic conditions and the presence of family responsibilities, as well as other grounds established by law for the special care of people who need enhanced social and legal protection. These definitions show that the notions of discrimination and differentiation are closely related.

The Constitutional Court of the Russian Federation has repeatedly noted that the Constitution allows for differences in the rights of citizens in a particular area of legal regulation, if such differences are objectively justified and pursue constitutionally significant goals, and the legal means used to achieve these goals are proportionate to them; the criteria (features) underlying the establishment of special rules should be determined on the basis of the differentiation goal pursued in this case in legal regulation¹⁶.

Protection of maternity is such a generally recognized goal (at the international level as well: CEDAW, European Social Charter, UN CESC) which justifies the establishment of special rules for employment of women. The point is, however, in the scope of understanding of this goal. Russian authorities have an exceptionally broad vision of it: the restriction for employment of women in some professions is established irrespective of pregnancy or breastfeeding, even irrespective of the age.

These are the rules prohibiting certain (mostly well paid) jobs for women. The list of prohibited jobs and professions for women was initially adopted in 1932¹⁷, then reconsidered in 1978¹⁸, and finally approved by the Russian Government in 2000¹⁹. The last document forbids the employment of women in 456 professions and jobs. The Constitutional Court affirmed that the psychophysiological characteristics of the body of workers are taken into account when imposing certain restrictions on the use of women's labour, introduced due to the need for their special protection against harmful production factors that negatively affect the female body, especially the reproductive function²⁰.

The same reasoning was used by the Samara Regional Court considering the case of Svetlana Medvedeva, who was denied the employment for the job of a motorist²¹. This profession is also included to the list of prohibited jobs. This case was brought before the UN Committee on Elimination of All Forms of Discrimination against Women, which concluded in 2016 that the prohibition of employment constituted discrimination and recommended to ensure that legislation does not impede women's access to employment and remuneration due to gender stereotypes²². It is interesting to note that the same recommendation may be found in the concluding observations of the UN Committee on

¹⁶ Constitutional Court ruling No. 28-P adopted on 15.12.2011.

¹⁷ Decree of the People's Commissariat of Labor of the USSR, 10.04.1932, The list of particularly heavy and harmful jobs and occupations to which women are not allowed.

¹⁸ Decree of the USSR State Committee on Labor and Social Affairs and the Presidium of the All-Union Central Council of Trade Unions, 25.07.1978 No. P10-3 "On the approval of the list of industries, professions and work with heavy and harmful working conditions, where the use of women work is prohibited".

¹⁹ Decree of the Government of the Russian Federation 25.02.2000 No. 162 "On the approval of the list of heavy work and work with harmful or dangerous working conditions, in the performance of which the employment of women is prohibited".

²⁰ Decision No. 617-O-O/2012, 22.03.2012.

²¹ The ruling of Samara regional court in the case No. 33-10556, 19.11.2012.

²² Opinion of the UN CEDW No. 60/2013, 21.03.2016.

economic, social and cultural rights adopted in 2011, but left without any reaction by the Russian Government²³.

After that case has received a wide publicity in the press the Ministry of Labour adopted the new list which will come into force on the 1 January 2021, changed the title of the document from “prohibited jobs” to “jobs where the employment of women is limited”²⁴. It was publicized as the huge cut of professions where the women could not be employed. However, comparing the lists we can say that the new one changed the approach to defining the list of occupation, mentioning the fields of employment rather than the titles of the occupations. However, even though it might seem that the list has become shorter, the main problem remains — it is still relevant for all the women irrespective of the state of maternity or breastfeeding, or age²⁵. In the majority of jobs listed in this document women can be employed if the employer will create safe conditions for females. This rule also takes root in the previous regulation. Taking into account *the obligation of the employer* to create safe working conditions for all the workers (article 22 of the Labour Code) it remains very unclear how the constitutional goal of protecting maternity can justify the fact that the employer is not obliged to create safe working conditions for women in 456 jobs of the current list or in 100 works of the new one. In our opinion the legislator has to be consequent and follow the established logics: if special norms protect reproductive health, then men should be protected as well. Researches demonstrate that reproductive health of men is very vulnerable to the harmful working conditions²⁶. The lack of logics in the general protectionist approach to employment of women revealed itself in the recent case of a typographer.

The man who was working as a typographer changed his gender and was consequently dismissed because his (her) profession was one of those prohibited for women. The court which considered this claim on unfair dismissal had an uneasy choice: to apply logics and international law and to grant the reinstatement or to follow Russian labour law and refuse the claim. The first instance court chose the latter, but its judgment was cancelled by the appellate court and the case was send for a new trial. In a new trial, the court ordered a medical examination, which concluded that the applicant could do the job and he was reinstated²⁷.

This case urges the legislator to reconsider the grounds of the prohibition, it cannot and should not be justified by the only reference to the sex of a worker. It also reminds the general shift common for the developed countries to prohibiting dangerous, unhealthy, or arduous nature works only for pregnant women, women who have recently given birth

²³ Concluding observations E/C. 12/RUS/CO/5, 01.06.2011.

²⁴ Order of the Ministry of Labor and Social Protection of the Russian Federation of July 18, 2019 No. 512n “On approval of the list of productions, work and positions with harmful and (or) dangerous working conditions, on which the use of women’s labor is limited”.

²⁵ There is the only exception to this, for an unknown reason the works in crop production, animal husbandry, poultry farming and animal husbandry using pesticides, pesticides and disinfectants are prohibited only for women under the age of 35 years. See para 97 of the new list.

²⁶ *Latyshevskaya N.I., Bessarabov A.V., Novikova A.N., Grushko A.V.* Pokazateli Reprodukativnogo Zdorov’ia Muzhchin-Rabotnikov Promyshlennykh Predpriatii [Indicators Of Reproductive Health Of Men-Workers Of Industrial Enterprises] // The Bulletin of the Volgograd Research Center of RAMS. 2008. No. 2. P.7–10. Available at: <https://www.volgmed.ru/uploads/journals/articles/1257252546-bulletin-2008-2-489.pdf> (accessed: 15.05.2020).

²⁷ *Chirin V.* Peterburgskii sud priznal nezakonnyy uvol’nenie transgendernoi zhenshchiny [A St. Petersburg court declared the dismissal of a transgender woman illegal]. 25.04.2019. Available at: <https://paperpaper.ru/peterburgskij-sud-priznal-nezakonny/> (accessed: 20.06.2019).

and women nursing their infants²⁸. Such an approach can be justified as a necessary and proportionate measure aimed at the protection of pregnant or breastfeeding women²⁹.

2.2. Protection from discrimination. In order to ensure effective protection from discrimination several conditions should be granted: 2.2.1. the legal definition of discrimination should be clear and unambiguous; 2.2.2. the shift of the burden of prove should be possible; 2.2.3. there should be mechanisms for protection of women from possible victimization.

Let us consider the presence of these conditions in Russia.

2.2.1. Scholars who have held interviews with the leading Russian lawyers have established that the prohibition of discrimination seems an abstract or nonexistent to actors in the legal system. According to Dmitry Bartenev, a human rights lawyer interviews by a group of scholars: “Russian judges are not prepared to understand and analyse a discrimination framework so discrimination is considered to be something very abstract, existing somewhere in a different reality”³⁰. Indeed the research of about 50 case on discrimination in access to employment demonstrated that in their majority neither judges nor plaintiffs understand the notion of discrimination. The concept of discrimination is often used in lawsuits as a synonym for the unlawful actions of the employer, as well as to emphasize the illegality of the refusal to hire³¹. Very often the applicants challenge discriminatory decisions of the employer without mentioning what was the ground for the discrimination³².

2.2.2. The shift of the burden of proof is an important tool for ensuring an effective judicial protection in cases of discrimination in employment. It is a widely accepted approach permitting women, who are evidently in a weaker position compared with employers, to prove only some facts which might illustrate discrimination (prima-facie discrimination) while the employer has to demonstrate that there has been no breach of the principle of equal treatment³³. As it was noted above the European Committee of Social Rights has found that the Russian legislation does not provide for a shift in the burden of proof in cases of discrimination based on sex³⁴. Indeed in Russia there is no special rule for the shift of the burden of proof in discrimination cases. Therefore, it is up to the claimant to produce evidence of different treatment and its discriminatory grounds. Such an approach complicates anti-discrimination protection and obstructs its efficiency.

Up to date there are no won cases on gender based discrimination in employment³⁵. The research of 50 cases on discrimination in employment considered by Russian courts in different regions in the last two years evidence that proving discrimination at work was possible only in three cases. In these cases, the applicants provided the courts with the

²⁸ Official text is available at the site of the Council of Europe: <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168006b642> (accessed: 20.06.2019).

²⁹ See, for example, the provisions of the ILO Maternity protection Convention 2000 No. 183.

³⁰ *Sundstrom L., Sperling V., Sayoglu M.* What Gender Discrimination? Psychological and Sociocultural Barriers // *Courting gender justice: Russia, Turkey, and the European Court of Human Rights* / ed. by L. Sundstrom. Oxford University Press, 2019. P. 30–68.

³¹ Appellate Decision No. 33-14414/2016, 01.11.2016, Samara Regional Court (Samara Region); Decision in case No. 2-427/2016, 23.12.2016, Belinsky District Court (Penza region) No. 33-14414/2016, 01.11.2016.

³² Decision in case No. 2-3747/2017, 04.12.2017, Vasileostrovsky Court (St. Petersburg); Decision in case No. 2-4712/2017, 23.11.2017, Khimki City Court (Moscow region); Decision in case No. 2-188/2017, 50.09.2017, Okhotsk District Court (Khabarovsk Krai).

³³ Burden of Proof Directive 97/80/EC, Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

³⁴ ECSR, Conclusions 2016 — Russian Federation — Article 20 2016/def/RUS/20/, 09.12.2016.

³⁵ With the only exception of the mentioned case brought by Svetlana Medvedeva. The Judgment of Samara District Court of the city of Samara adopted on September 15, 2017 in the case of No. 33-15262 seems to be the only one where the court established the difference in treatment on the basis of gender.

written document where the employer stated the reason for non-hiring the claimant and these reasons were evidently discriminative.

As such they mentioned in these cases the disability of the applicant, the far place of living from job and the appearance of the applicant³⁶. This study clearly indicates the kind of evidence is needed to prove discrimination in Russia. However, it is evident that written proof is not generally available in the majority of gender discrimination claims.

The non-availability of official court statistics on the cases of discrimination makes it difficult to demonstrate the need for change³⁷.

2.2.3. According to international obligations the state has to create an effective framework for the protection from gender discrimination. Such a framework should provide guarantees for women who dared to speak out the problem of discrimination and appealed to the court for the redress. The legislation of developed countries recognizes the obligation of an employer to protect the victims of discrimination from victimization. It means that woman should be provided protection if they suffer adverse treatment as a result of bringing a complaint concerning discrimination, which might as well arise in respect of somebody else who has suffered or suspects that they have suffered discrimination³⁸.

In Russia such a rule does not exist. Having once brought a claim against an employer the woman will inevitably face the mistreatment in the question of wages, promotion, time shifts and so on. The employer will misuse his managerial power to harass such an employee and force her to quit “voluntarily” or declare such employees redundant. The research of cases demonstrates that the majority of the applicants suffering from a hostile work environment and discrimination failed to win their cases on unfair dismissal if their employers followed the due procedure for redundancy³⁹.

In one case the applicant argued that her choice for the redundancy was the result of the persecution from the part of employer, the Court stated that “the motives that guide the employer when deciding on the reduction of staff are not of legal importance and cannot be subject to judicial review”⁴⁰.

The situation is much worse if the woman is employed in the informal sector. According to Russian scholars about 40 % of all hours worked in the market sector are attributed to the informal segment of the economy⁴¹. In order to avoid paying the litany of payroll taxes and benefits required under Russian law, many employers, especially in the service sector, prefer to hire employees with verbal rather than official agreements and to pay them in cash. For many of the most vulnerable, low-skilled employees in the country, this means that there is no formal employment contract; and without such a contract, an employee cannot make a legal claim about discrimination or harassment⁴². Even though the

³⁶ Decision in case No. 2-4636/2017, Kirov District Court of Ekaterinburg (Sverdlovsk Region), 08.08.2017; Decision in case No. 2-2132/2017, Moscow District Court of Tver (Tver Region), 01.11.2017; Decision in the case No. 2-1893/2017, Pervomaisky District Court of Omsk (Omsk Region), 04.08.2017.

³⁷ The data of judicial statistics. Judicial Department of the Supreme Court. Available at: <http://www.cdep.ru/index.php?id=79&item=5083> (accessed: 20.02.2020).

³⁸ Article 9 of the Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, implemented in all 28 EU states.

³⁹ Decision of the Seventh cassation court of general jurisdiction of 01.30.2020 No. 88-1364/2020; Cassation ruling No. 33-4995 of the Perm Regional Court, adopted on 23 May 2011; Decision No. 2-112/2017, 23 January 2017, Leninsky District Court of Nizhny Tagil (Sverdlovsk Region); Decision No. 2-614/2016 July 4, 2016, Tsimlyansky District Court (Rostov Region).

⁴⁰ Decision No. 2-638/2016 of December 8, 2016, the Kirov District Court of Yaroslavl (Yaroslavl Region).

⁴¹ *Gimpelson V. E., Kapelyushnikov R. I.* Mobil'nost' i stabil'nost' na rossiyskom rynke truda [Mobility and stability in the Russian labour market]. Moscow: Higher School of Economics, 2017.

⁴² *Sundstrom L., Sperling V., Sayoglu M.* What Gender Discrimination? P.67.

administrative law provide a severe punishment for the employers using informal work, such types of verbal contract are still prevalent among individual entrepreneurs. The research undertaken in 2006 demonstrated that women constitute 48 % of the informal sector workforce⁴³.

The arguments provided above make us conclude that the effective protection from gender discrimination in employment is absent in Russia. Much should be done for that in the future: the amendments to the rules on the distribution of the burden of prove in cases of discrimination, the introduction of norms on protection from victimization, the dissemination of legal knowledge between working woman and special courses for judges and law enforcement bodies.

3. China's approach to protection of women from discrimination

3.1. Definition of discrimination. In the past 40 years of reform and opening up, China has not only included the provisions of the international law into domestic laws, but also made efforts in safeguarding and promoting gender equality in employment through special legislation.

The Provisions on Labour Protection for Female Employees (amended in 2012 and renamed The Special Provisions on Labour Protection for Female Employees) establish special norms for the protection of female labour in China. For the first time, gender discrimination in employment was forbidden⁴⁴. The Law of the People's Republic of China on the Protection of Women's Rights and Interests (short title "Women's Rights and Interests Protection Law"), enacted in 1992, puts "the implementation of gender equality as the basic national policy of the country". It reflects the focus of China's policy in protecting women in the labour market⁴⁵. The Labour Law of the People's Republic of China (1994, referred to as the "Labour Law"), the Employment Promotion Law of the People's Republic of China (2007, referred to as "the Employment Promotion Law") and the Labour Contract Law of the People's Republic of China (2007, referred to as the "Labour Contract Law") further stipulate the special employment protection for female employees during pregnancy, maternity and lactation.

Although the government continues to increase policy support for anti-discrimination in employment, such as regulating the system of recruiting and employing, eliminating all urban and rural, industry, identity, gender and other institutional barriers affecting equal employment and employment discrimination⁴⁶, and prohibition of various employment discrimination behaviors against college graduates, etc., but China's current labour law does not have a clear definition of "employment discrimination", and there is no complete anti-employment discrimination law. There's still a gap between the national regulations

⁴³ *Varshavskaya E. Ya. Zaniatost' v neformal'nom sektore kak fenomen sovremennogo rossiiskogo rynka truda* [Employment in the informal sector as a phenomenon of the modern Russian labour market] // Bulletin of Kuzbass State Technical University. 2006. No. 3. P. 123–128. Available at: <https://cyberleninka.ru/article/n/zanyatost-v-neformalnom-sektore-kak-fenomen-sovremennogo-rossiyskogo-rynka-truda> (accessed: 07.08.2019).

⁴⁴ Provisions on Labour Protection for Female Employees (enacted in 1988): any unit that is suitable for women to work may not refuse to recruit women workers. (Article 3) In 2012, The Special Provisions on Labour Protection for Female Employees was promulgated, and Provisions on Labour Protection for Female Employees was abolished on April 28, 2012.

⁴⁵ 刘明辉: 《在女性就业领域的法制里程碑——回国40年间的得与失》 // 《中华女子学院学报》, 2018年12月第6期 P.39 [Liu Minghui. Legal Milestones in the Field of Female Employment — Reviewing the Gains and Losses in the Past 40 years // Journal of China Women's University. 2018. Vol. 12, no. 6. P. 39–44].

⁴⁶ "The Decision of the Central Committee of the Communist Party of China on Several Major Issues Concerning the Deepening of the Reform of the Whole People" was promulgated on November 15, 2013.

and the provisions of the United Nations (UN) and the International Labour Organization (ILO) in anti-discrimination.

The Labour Law stipulates four kinds of prohibition of discrimination on the basis of nationality, race, gender and religious belief (arts. 12, 13)⁴⁷. The Employment Promotion Law only provides seven kinds of prohibition of discrimination on the basis of nationality, race, gender, religious belief, disability, carrier of the virus and identity (arts. 3, 29, 30, 31).

The Constitution of the People's Republic of China gives women and men equal rights in the field of labour, equal pay for equal work for men and women, and the training and selection of women cadres (art. 48)⁴⁸. In order to solve the problem of gender discrimination in employment, China guarantees women's equal employment rights through the prohibition of gender discrimination in employment, and through establishing special labour protection for women during menstruation, pregnancy, maternity and lactation.

Thus, in contrast with the Russian law China does not acknowledge the gender as such as a ground for special treatment in labour law.

The Women's Rights and Interests Protection Law makes specific provisions for "no discrimination against women" in employment opportunities, employment standards, freedom of marriage, reproductive rights (art. 23)⁴⁹, equal pay for equal work, welfare benefits (art. 24)⁵⁰, promotion standards (art. 25)⁵¹ and other aspects. Both The Labour Law and the Employment Promotion Law explicitly use "gender" as a ground of employment discrimination, emphasizing the need to ensure equal employment rights of men and women.

Legislative protection for women in employment is constantly expanding and deepening. The main legislative purpose is to solve the special difficulties caused by women's physical characteristics in the workplace, to prevent human reproduction from failing through the protection of maternal functions, and to ensure the quality of the reserve army and the nation⁵². However, excessive protection standards exacerbate gender discrimination in employment, and impact gender discrimination in employment in China.

⁴⁷ The Labour Law: Labourers shall not be discriminated against in employment, regardless of their ethnic community, race, sex, or religious belief (art. 12); Females shall enjoy equal rights as males in employment. It shall not be allowed, in the recruitment of staff and workers, to use sex as a pretext for excluding females from employment or to raise recruitment standards for the females, except for the types of work or posts that are not suitable for females as stipulated by the State. (art. 13) Particular emphasis is placed on women's equal employment rights with men.

⁴⁸ The Constitution of the People's Republic of China: 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 (art. 48).

⁴⁹ The Law on the Protection of Women's Rights and Interests: The State shall ensure that women enjoy equal rights relating to labour and social security with men (art. 22). Where an entity employs staff and workers, with the exception of special types of work or posts unsuitable to women, it shall not refuse to employ women for the reason of gender or raise the employment standards for women... a labour (employment) contract or service agreement with her, which shall not contain restrictions on her matrimony and procreation.

⁵⁰ Article 24: Equal pay for equal work shall be applied to men and women alike. Women shall enjoy equal rights with men in the enjoyment of welfare benefits.

⁵¹ Article 25: In such aspects as promotion in post or rise in rank, evaluation and determination of professional and technical posts, the principle of equality between men and women shall be adhered to and discrimination against women shall not be allowed.

⁵² 刘明辉:《在女性就业领域的法制里程碑——回国40年间的得与失》//《中华女子学院学报》,2018年12月第6期,P.43 [Liu Minghui. Legal Milestones in the Field of Female Employment — Reviewing the Gains and Losses in the Past 40 years // Journal of China Women's University. 2018. Vol. 12, no. 6. P.39–44].

According to the World Bank's report in *Women, Business and Law (2018)*⁵³, 104 of the world's 189 economies have laws that prohibit women from engaging in specific occupations, limiting women's right to work. Russia and China are also in this list. Compared to Russia, China's relevant legislation is fairer as provides the limitations which are justified by pregnancy, maternity, breastfeeding and menstruation and do not prohibit jobs for all the women. In order to ensure that this particular protection is fair, three obvious prerequisites are required: 1. employers must create safe and healthy working conditions for all employees regardless of their gender; 2. harmful factors in the production process directly or indirectly cause irreversible damage to the reproductive function; 3. special protection is term and temporary. On these bases, the special labour protection for female employees will not constitute "sexism" for male employees.

In China as well as in Russia there are jobs prohibited for women, which are defined by the Labour Law, the Law on the Protection of Women's Rights and Interests and the Special Provisions on Labour Protection for Female Workers. Such jobs are divided into five categories: 1. work in mine pits; 2. logging, bank up and exile operations in the forest industry; 3. engage in the work with the level IV physical labour intensity (the average energy consumption of 8-hour working day is 11304.4 kJ/person, and the working time rate is 77%, that is, the actual working time is 370 minutes, which is equivalent to "very heavy" intensive labour) in the Grade in Physical Labour Intensity as stipulated by the State; 4. assembly and demolition of scaffolding in construction industry, and the overhead line work and high-rise wiring operation in the power and telecommunications industries; 5. continuous load-bearing (referring to the load-bearing frequency is in 6 times hourly above) exceeds 20 kg at every turn, and intermittent load-bearing exceeds 25 kg at a time. (Article 3 of the Provisions on the Scope of Prohibited Jobs for Women which is promulgated by the former Ministry of Labour in 1990.) It can be seen that the types of prohibited jobs for women in China are not as detailed and specific as those prescribed by Russia. It is only a limitation of the work scope, not a certain type of job.

It is interesting to note that the norms of the permitted loads to be lifted by women are much more favourable for women in Russia than in China⁵⁴.

In contrast to Russian regulations in China there certain types of work that are prohibited for women during menstruation (relevant norms do not exist in Russia), such as, for example, work under low temperatures or in cold water, high above the ground, etc.⁵⁵

The Chinese labour law as well as Russian labour law prohibits employers from dismissing women workers or unilaterally cancelling labour contracts on the grounds of marriage, pregnancy, maternity leave, breastfeeding, etc.⁵⁶ However in China the dismissal is still possible if the woman meets one of the conditions set out in Article 25 of the Labour Law and Article 39 of the Labour Contract Law (2008)⁵⁷. We have to note here that in Rus-

⁵³ World Bank's report in *Women, Business and Law (2018)*. Available at: <http://jandan.net/2018/06/08/restrict-womens.html> (accessed: 07.12.2019).

⁵⁴ In China women cannot lift loads more than 25 kg, while in Russia more than 10 (if the lifting operations are rare). See the Special Provisions on Labour Protection for Female Employees: Article 4 (China) and Resolution of the Council of Ministers — Government of the Russian Federation of February 6, 1993 No. 105 "On the new norms of maximum permissible loads for women when lifting and moving weights by hand" (Russia).

⁵⁵ The Labour Law: Article 60.

⁵⁶ According to Article 42 (4) of the Labour Contract Law and Article 27 of the Law on the Protection of Women's Rights and Interests.

⁵⁷ The contents of the two articles are basically the same; they prescribe conditions for immediate dismissal of employee. An Employer may terminate an employment contract if the employee: is proved during the probation period not to satisfy the conditions for employment; materially breaches the employer's rules and regulations; commits serious dereliction of duty or practices graft, causing substantial damage to the Employer; has additionally established an employment relationship with another employer which

sia the dismissal of a pregnant women is possible only in case of the liquidation of the enterprise. In all other cases (even in cases of a severe misconduct) a pregnant employee cannot be dismissed (article 261 of the Russian Labour Code).

The special dismissal protection measure in China, which is called the “safety valve of stable employment”, has achieved significant positive results in protecting women workers from gender discrimination due to marriage, pregnancy and breastfeeding in the work process. However, with the implementation of China’s “two-child policy”, the special dismissal protection has increased the burden on employers. In response to that they invent various methods of avoiding the special dismissal protection⁵⁸.

3.2. Protection from gender discrimination in China. In the paragraph 2.2 of the present paper we have considered the efficiency of Russian protection from discrimination in the light of three factors: 2.2.1. the clear and unambiguous definition of discrimination; 2.2.2. the shift of the burden of prove; 2.2.3. Provision of protection from victimization.

It was already noted that there is no definition of discrimination in the Chinese labour law. Chinese courts do not play an active role in defining and creating law⁵⁹. The lack of a statutory definition may lead to the absence of a common approach to the issue and the evolvement of controversial case law as it was demonstrated in the part about Russia. In China there is no law, regulation, or interpretation that permits a plaintiff in an employment discrimination lawsuit to reverse the burden of proof⁶⁰. As well as in Russia there are no provisions on protection from victimization. Thus, the situation is very similar to the one in Russia, where the anti-discriminatory provision remains mostly on paper not being referred to before the courts.

In the absence of recent Chinese official statistics on gender equality in employment we can refer only to the researched undertaken 5–10 years ago. Researches

materially affects the completion of his tasks with the first-mentioned employer, or he refuses to rectify the matter after the same is brought to his attention by the employer; causes the employment contract to be invalid due to the circumstance specified in item (1) of the first paragraph of Article 26 hereof; or has his criminal liability pursued in accordance with the law.

⁵⁸ See: 冯彦君:《劳动权的多重意蕴》//《当代法学》,2004年第2期,P.40–45.[Feng Yanjun. The Multiple Denotations of Labour Rights // Contemporary Law Review. 2004. No. 2. P.40–45];贾伊娜:《妇女就业中遭受“隐性歧视”问题的成因及对策分析》//《中华女子学院学报》,2004年第2期,P.20–23.[Jia Yi-Na. Causes of and Solution to the Recessive Discrimination against Women in Employment // Journal of China Women’s University. 2004. No. 2. P.20–23];郭慧敏、丁宁:《就业性别平等立法模式选择》//《中国青年政治学院学报》,2006年第3期,P.116–122.[Guo Hui-min, Ding Ning. Legislation Patterns of Sexual Equality in Employment // Journal of China Youth University for Political Sciences. 2006. No. 3. P.116–122];郭慧敏、王慧芳:《女性特殊劳动权益保护的负效应分析及消解》//《河北大学学报(哲学社会科学版)》,2009年01期,P.38–41.[Guo Hui-min, Wang Hui-fang. Negative Effect Analysis and the Resolution of Special Protection for Women’s Labour Rights // Journal of Hebei University (Philosophy and Social Science). 2009. No. 4. P.38–41];刘明辉:《关注女职工职业禁忌的负面影响》//《妇女研究论丛》,2009年02期,P.43–45.[Liu Ming-hui. Negative Effects of Restriction of Women in Certain Professions // Collection of Women’s Studies. 2009. No. 2. P.43–45];马忆南:《“女性禁忌从事的劳动”再思考》//《妇女研究论丛》,2009年02期,P.41–43.[Ma Yi-nan. Rethinking Women’s Forbidden Labour // Collection of Women’s Studies. 2009. No. 2. P.41–43];刘明辉:《论女职工特殊保护立法的新理念》//《中华女子学院学报》,2011年05期,P.5–10.[Liu Ming-hui. On the New Ideas of Legislation on Special Protection for Female Workers // Journal of China’s Women’s University. 2011. No. 5. P.5–10];景春兰:《中国女性工作权立法的性别本质主义检讨》//《河北法学》,2011年06期,P.146–150.[Jing Chun-lan. A Review of Gender Essentialism in Female Labour Legislation in China // Hebei Law Science. 2011. No. 6. P.146–150];林艳琴:《女职工特殊劳动保护制度的困境及对策研究》//《法学杂志》,2011年第11期,P.59–63.[Lin Yan-qin. Research about The Plight of the Protection System for Special Labour of the Female Workers and Countermeasures // Law Science Magazine. 2011. No. 11. P.59–63];郭延军:《我国女性就业权平等保护制度反思》//《法商研究》,2013年02期,P.97–104.[Guo Yan-jun. Reflection on the Equal Protection System for Women’s Employment in China // Studies in Law and Business. 2013. No. 2. P.97–104].

⁵⁹ Webster T. Ambivalence and activism: Employment discrimination in China // Vanderbilt Journal of Transnational Law. 2011. No. 44. P.699.

⁶⁰ Ibid.

demonstrated that 49,7% of women faced age and gender based discrimination in re-employment, which was 18,9% higher than that of their male counterparts⁶¹. However case law on gender discrimination is almost absent (the same phenomena was revealed in Russia as well).

In China there are only two representative cases in which female employees sued employers for gender discrimination in the recruitment stage and won the cases. In *Cao Ju v. Beijing Giant Global Education Technology Co., Ltd. Employment Gender Discrimination Case*, on the Zhilian recruitment website, Cao Ju saw the recruitment notice of the administrative assistant post issued by Giant Education. She believed that she met the job description and delivered the resume but did not receive any reply. When Cao Ju once again logged into the Zhilian website, she found that the recruitment requirements for the recruitment notice was added with the “male only” condition. Therefore, Cao Ju believed that Giant Education’s refusal to hire her for gender reasons constitutes gender discrimination and required the court to order the Giant Education an apologize and the payment of ¥ 50 000 for non-pecuniary damage. In the course of the trial, the two sides reached a settlement, the Giant Education paid Cao Ju ¥ 30 000 as a special compensation for anti-discrimination in employment. The case was called “the first gender discrimination case in employment in China” and received wide public attention⁶².

In the case of “*Guo Jingjing v. Hangzhou West Lake District Oriental Culinary Skills Training School General Personality Rights Dispute Case*”, the Chinese court made the first judgment on the gender discrimination in the recruitment stage. In 2014, Guo Jingjing delivered a resume to the Oriental Cooking School. The cooking school refused to hire Guo Jingjing. The reason is that the copywriter must travel frequently with the male principal and have a long business trip, so only men are recruited. The court held that the staff of the work in question did not constitute the “work or position that is not suitable for women” as prescribed by law, therefore, the Oriental Cooking School’s behavior infringed Guo Jingjing’s right to equal employment. In accordance with the Tort Liability Law (art. 15), the court ordered the Oriental Cooking School to compensate Guo Jingjing for a non-pecuniary damage in the sum of ¥ 2000⁶³.

Concluding the part about the gender discrimination in employment in China we would like to propose certain measures which, in our opinion, might increase the efficiency of protection: 1. unification of scattered anti-discrimination provisions in one act, clearly defining the legal definitions of gender discrimination; 2. applying the principle

⁶¹ 全国妇联和国家统计局编：《中国妇女社会地位调查》//中国妇女出版社，2006年版，P.875。[All-China Women’s Federation & National Bureau of Statistics. *Women’s Status in China’s Social Transition*, China Women Publishing House, 2006].

⁶² 卢杰锋：《就业性别歧视例外审查规则：美国实践及启示》//《妇女研究论丛》，2017年02期，P.112–119。[Lu Jie-feng. *Examining the Exception of Gender Discrimination in Employment: American Experience and Lessons to China* // *Collection of Women’s Studies*. 2017. No. 2. P.112–119]; 刘明辉：《首例就业机会性别歧视案折射的立法缺失》//《妇女研究论丛》，2014年02期，P.44–48。[Liu Ming-hui. *Lack of Legislation Reflected in the First Legal Case of Gender-based Employment Discrimination* // *Collection of Women’s Studies*. 2014. No. 2. P.44–48]; 社康：《大学生就业过程中性别歧视现象研究——以“中国就业性别歧视第一案”为例》//《广东技术师范学院学报（社科科学）》，2014年第5期，P.56–64。[Du Kang. *On Sexism Phenomenon in Graduate Employment—Take “The First Case Employment Sexism in China” as an Example* // *Journal of Guangdong Polytechnic Normal University*. 2014. No. 5. P.56–64]; 管毅楠：《性别隔离视域下女性就业权的平等保护——女性就业权救济的社会负担思路》//《人才资源开发》，2014年第4期，P.21–24。[Guan Yi-nan. *The Equal Protection of Women’s Employment Rights from the Perspective of Gender Segregation: Thoughts on the Social Burden of the Relief of the Women’s Employment Rights* // *Human Resources Development (RenCai Ziyuan Kaifa)*. 2014. No. 4. P.21–24].

⁶³ *Wei Wei. Guo Jingjing v. Hangzhou West Lake District Oriental Culinary Skills Training School Personality Rights Dispute Case* — the boundary between women’s equal employment rights and employment autonomy of employers, “People’s Court Case Selection”, 201504/94:84. The cooking school directly refused Guo’s application on the grounds that Guo was a woman and that they needed to recruit men.

of the shift of the burden of proof in gender discrimination cases; 3. clearly stipulating the specific obligations of the employers in anti-discrimination, and the employer's responsibility for failing to meet legal obligations.

Let us consider these proposals in more detail.

3.2.1. According to international obligations, we should establish a special legal framework to prevent gender discrimination in employment. Article 11 of the CEDAW: States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights. As one of the first countries to join the Convention, China's legislation on employment discrimination and gender discrimination is still too fragmented. It is scattered in the Law on the Protection of Women's Rights and Interests, the Labour Law, the Labour Contract Law, The Special Provisions on Labour Protection for Female Employees, Employment Promotion Act, etc. There are too many principles in these laws which neither define the concepts such as gender discrimination and sexual harassment in employment, nor do they distinguish similar concepts such as gender discrimination and sexual harassment, and lack specific standards and procedural norms of the gender discrimination⁶⁴. Fragmented legal provisions and lack of definitions weakened the preventive effect of the law on gender discrimination, making "the prohibition of gender discrimination in employment" tend to be abstract in the legal system.

China should not rely on local regulations but establish a scientific definition and term interpretation which, in the opinion of prof. Liu Minghui, is one of the criteria for measuring the quality of law⁶⁵. Only when the "gender discrimination in employment" clearly defined in law, all the legislators, judges and parties can understand discrimination, avoid misunderstandings, and set the standards of judicial and administrative enforcement. Formulating specialized law on anti-discrimination in employment is a possible "cure for employment discrimination"⁶⁶.

3.2.2. Multiple methods to protect the right for lawsuit of women who are discriminated against. At present, the trial procedure for labour disputes in China is "mediation, arbitration, two-trial-for-final review" and "pre-arbitration procedures", which objectively prolongs the time for personal rights protection, resulting in individuals needing to spend more time and more energy to participate in the judicial process. The lengthy judicial procedure is not conducive to women workers to get employment opportunities and the real employment.

According to the survey, more than half of the gender discrimination cases in employment that entered the legal process from 2000 to 2010 were terminated, or lost or the applications were found inadmissible⁶⁷. The Cao Ju v. Beijing Giant Global Education Technology Co., Ltd. gender discrimination case is a typical representative of the case but was settled by reconciliation between the two parties, granting an applicant only a small amount of compensation.

⁶⁴ 刘晓楠：《港台性别平等立法及案例研究》//北京：法律出版社，2013年版。[Liu Xiaonan. Hong Kong and Taiwan Gender Equality Legislation and Case Studies. Beijing: Law Press, 2013].

⁶⁵ 刘明辉：《在女性就业领域的法制里程碑——回国40年间的得与失》//《中华女子学院学报》，2018年12月第6期，P.39。[Liu Minghui. Legal Milestones in the Field of Female Employment — Reviewing the Gains and Losses in the Past 40 years // Journal of China Women's University. 2018. Vol. 12, no. 6. P.39].

⁶⁶ 蒋云龙：“消除一切就业歧视”//载《人民日报》2013年11月22日。[Jiang Yunlong. Eliminating all employment discrimination // The People's Daily. 2013. Nov. 22].

⁶⁷ 孙悦：《浅谈就业性别歧视领域的法律问题》//《法制博览》，2017年第15期，P.150。[Sun Yue. The Legal Issues in the Field of Employment Sex Discrimination // Legality Vision. 2017. No. 15. P.150–151].

Therefore, in practice, it is recommended that such cases of gender discrimination in employment directly enter the lawsuit, cross pre-arbitration procedures. The court may decide that the employer hires or compensates her, which may be more conducive to women's protection of their equal employment rights.

The burden of proof is directly related to the realization of the litigant rights of the parties. According to the provisions of the Civil Procedure Law, the party claiming the right bears the burden of proof. In reality, however, the female workers who are weaker in the employment relationship have difficulty in obtaining strong evidence of litigation. In the majority of gender discrimination cases there is very little documentary evidence. In a labour dispute case, labour law stipulates that if the employer makes a labour dispute due to decisions such as dismissal, delisting, termination of labour contract, reduction of labour remuneration, calculating service age, etc., the employer shall bear the burden of proof, that is "inversion of burden of proof"⁶⁸. In the employment relationship, the worker is subordinate to the employer both in the management process and economically, and the employer as an actual manager directly formulates, establishes and maintains the reasons, standards and evidence for various differential treatments. Therefore, in the case of gender discrimination in employment, it would be more fair for employers to bear the main burden of proof, making the trial simpler and more efficient.

The anti-gender discrimination case in employment seems to involve the disputes between the individual worker and the employer only. Such cases focus on social equity, gender equality and have a strong public interest. We suppose that the introduction of public interest litigation might be one of the effective ways to solve the issue of gender equality⁶⁹. At the same time, it can effectively stimulate employers to prevent gender discrimination in employment.

3.2.3. China's current labour law does not contain explicit provisions on employer liability forms, compensation standards and its calculation methods in gender discrimination cases. The lack of employer's responsibility and punishment clauses makes it impossible for discriminated women workers to obtain compensation and relief they deserve, even if they win the case. And the court also has no legal basis to directly order an employer to hire discriminated women workers or to compensate a specific amount in a case. As a consequence, the gender discrimination in employment is still going on, and the relevant legal provisions on anti-discrimination cannot be effective and lack of provisions on employer's responsibility. We suppose that there is an urgent need to stipulate clearly the specific obligations of the employers in anti-discrimination, and the employer's responsibility for failing to meet legal obligations.

Dickson CJ, Chief Justice of the Supreme Court of Canada, said: "Individual employment is indispensable for person's identity, self-realization and spiritual prosperity"⁷⁰. The author proposes to stipulate the employer's legal liability form and the compensation standard from two stages — the stage before the conclusion of the labour contract and the stage of performance of the labour contract. At the conclusion of the labour

⁶⁸ Interpretation 1 of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Labour Dispute Cases (Article 13); Interpretation 3 of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Labour Dispute Cases (Article 9), Supreme People's Court Several Provisions on Evidence in Civil Litigation (Article 6), Law of the People's Republic of China on Labour-dispute Mediation and Arbitration (Articles 6, 19), Regulation on Work-Related Injury Insurances (Article 19), etc.

⁶⁹ 李宝诚: 《浅析我国就业性别歧视法律问题》//《法制与社会》, 2018年32期, P.245-246. [Li Baocheng. Analysis of the Legal Issues of Gender Discrimination in Employment in China // Legal System and Society. 2018. No. 32. P.245-246].

⁷⁰ Reference Re Public Service Employee Relations Act (Alta.) [1987] 1 SCR 313, 368.

contract, if the reason for the failure to conclude the contract is the employer's gender discrimination, the employer shall bear the liability for negligence in contracting, and the women worker who is gender-discriminated against has the right to continue to establish a labour relation with the employer or obtain financial compensation from the employer. The sum of financial compensation shall include the necessary expenses for contracting and preparing for performance paid by the women worker, the mental damages. At the performance of the labour contract, if the women worker is dismissed, forced to resign or unable to renew the contract etc. because of the gender discrimination, the employer should bear the liability for breach of contract. According to the principle of good faith, the scope of financial compensation shall include the actual loss caused by the discriminatory act, the mental damages, the expected benefit in indirect losses.

In the future, there are still many important issues that China's labour law needs to address in dealing with gender discrimination in employment: gender discrimination implies age discrimination, appearance discrimination, and geographical discrimination, resulting in multiple discrimination against women workers; different retirement age for men and women; the implementation of the delayed retirement system and the "second child" policy will inevitably make women's age discrimination more widespread, making it difficult for young and middle-aged female workers in the 35–45 age group to obtain employment.

Conclusions

The present research demonstrated that both China and Russia, even though they established anti-discrimination principles to ensure gender equality at the workplace, have a number of common problems. These are the lack of clarity in the definition of discrimination, the lack of case law on gender discrimination, and the absence of a general provision on the shift of the burden of proof as well as the lack of protection from victimization.

In Russia we have determined the remaining from the Soviet times approach to the prohibition of a vast list of professions for women based on the gender only. In China such restrictions are justified by the state of pregnancy, breastfeeding or menstruation. Therefore, it is more in line with the international approach to special conditions for women's labour.

The lack of case law on gender discrimination in these countries, in our opinion, is another evidence of the persistence of gender stereotypes in the societies and of the inefficient framework for the protection. Women rather get employed in the lower paid job than struggle for the better place, rather follow the stereotypical view and dedicate their time to family than pursue a successful career. These problems can only partly be solved through the legislative measures. The shift in the people's thinking is needed in order to ensure the true gender equality.

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Гендерная дискриминация в Китае и России

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В статье исследуется проблема гендерного равенства в трудовых отношениях в России и Китае. Авторы указывают на то, что, несмотря на ратификацию обеими странами основных международных документов, запрещающих дискриминацию по признаку пола в сфере труда, нельзя сказать, что эти нормы должным образом имплементированы в национальном праве. Первая часть исследования посвящена анализу социальной роли женщины в обществе в двух странах. Во второй части исследуются проблемы защиты женщин от дискриминации в России. В третьей части соответствующий китайский опыт и законодательство сравниваются с российским подходом. В заключении сформулированы основные общие проблемы в этой сфере в Китае и России: отсутствует ясность в определении понятия дискриминации, нет общего положения о возможности переноса бремени доказывания на работодателя в таких делах, а также нет системы защиты женщин, заявивших о дискриминации, от виктимизации. Авторы отмечают, что в обеих странах судебные дела о защите женщин от дискриминации встречаются чрезвычайно редко, а также указывают на трудности доказывания дискриминации в тех редких делах, которые рассматривались судами. По мнению авторов, стереотипное представление о разделении ролей между мужчинами и женщинами — одна из основных причин гендерной дискриминации в обеих странах.

Ключевые слова: китайское право, российское право, пол, разрыв в оплате труда, дискриминация, занятость, стереотип, трудовое право, особая защита.

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