

Study on the Constitutional Provisions on Gender Equality in China under the Background of Practical Inequalities

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Abstract: Gender equality is a fundamental citizens' right and a core constitutional value of the People's Republic of China. Article 48 of the Constitution provides its most fundamental legal footing. However, persistent issues such as gender discrimination in employment, inadequate safeguarding of reproductive rights, and hindrances to property inheritance reveal a stark gap between the constitutional promise of equality and societal reality. After reviewing the legal development of gender equality in China through comparative law perspectives, this article looks at the current constitutional norms on gender equality. These norms reflect a conceptual orientation toward "gender protection" rather than "gender equality". They also have both "difference-egalitarian" and "difference-maternalist" characteristics. The maternalist-oriented clauses are not beneficial to eliminating the gender inequality's power disparity problems. And it also impedes later legal and judicial practices for gender equality. According to the above analysis, the author puts forward three ways of legal adjustment: changing the institutional foundation to the "idea of gender equality", creating a "China-specific" Gender Equality Law centered around equal rights, and making existing laws like the Law on the Protection of Women's Rights and Interests more operational. The purpose is to turn constitutional principles on gender equality into real, tangible rights protections that can be acted upon; to close the gap between values and actions; and to promote actual substantive equality for women.

Keywords: Constitution; Gender Equality; Legislative Protection; Women's Rights and Interests

1. Introduction

The issue of gender equality has always been a topic of concern in the global legal community. Marx once pointed out: "The progress of society can be accurately measured by the social status of women."^[1] This statement shows the inherent link between gender equality and social progress. At the global level, it was the implementation of the United Nations Convention on eliminating all forms of discrimination against women in 1979. This made the protection of gender equality global. As one of the state parties China has similarly made the push for gender equality part of its own domestic legal structure.

In China, the Constitution is the basic law that provides the highest standard of norm for gender equality. Article 48 of the current Constitution clearly states; women in the People's Republic of China enjoy equal rights with men in all fields of politics, economy, culture, social life and family life. At the same time as setting the basic principle of gender equality; it has also set the basic foundation for establishing supporting laws. However, equality in legal texts does not always translate into equal outcomes in social reality. Legal system has constantly improved in spite of gender based discrimination and inequalities persisting stubbornly on different fields like employment, reproductive security and property inheriting which shows there's a gap that needs to be filled by constitutional obligations and social practice.

Academically, there are arguments being held on how best can we use a Constitution towards improving a better Gender Equality. The central question is which conceptual approach to gender the constitution should adopt, formal equality without regard to difference, egalitarianism that recognizes the differences between individuals, or protectionism that puts a premium on women's specialness (motherhood). Different concepts orientation have an immediate bearing on the direction and power of subsequent legislative, judicature, and judiciary.

In light of the preceding context, this article attempts to carry out an analysis on the essence, effects and limits of women rights and gender equality stipulations in China's constitution. The paper will first review the development of constitution in China, then see the discrepancies between the law and real life scenario. Its core part will employ analytical tools from comparative constitutional law to focus on the so-called hybrid elements within China's constitutional provisions, which are not merely "difference-egalitarian" but also "difference-maternalist.", and consider whether these characteristics constrain the realization of substantive gender equality. Finally, this paper hopes to explore how constitutional equality in the future can be changed by way of renewal, specialized legislation and institutional improvement from future legal reform. From a set of abstract normative statements into a real set of enforceable rights practices.

2. Legal Evolution, Practical Gap, and Analysis of the Limitations of Constitutional Provisions on Gender Equality in China

2.1 Establishment and Evolution of the Principle of Gender Equality in the Constitution after the Founding of the People's Republic of China

The history of feminism has its beginnings in the French bourgeois revolution, the Enlightenment in the late 18th and early 19th century. From the late 19th - early 20th century, women's right to vote started to "thaw" in European countries. The Common Program of 1949 stipulates: women should enjoy equal rights with men in all aspects of politics, economy, culture, education, family and society; the free marriage between men and women will be carried out. China has taken a real step toward women's "liberation in every way". In 1954, the first constitution of new China clearly put forward the principle of gender equality, it stated: "women should enjoy equal rights with men in political, economic, cultural, social and family life". It also said that "marriage, family, mother and children would be protected by the state". At last, it said that "women could vote and run for election equally with men". In all the other modifications that were made on the constitution, the principle of gender equality has always been taken as a principle. In the constitution, which was amended in 1982, there is a provision about "the country protects the legal rights and interests of women, implements the system of equal pay for equal work between men and women, and trains and selects women cadres". In 2004 "The state respects and guarantees human rights" was written into the Constitutional amendment, setting up the foundation for protecting people's human rights.

Today's China has established a distinctive legal protection system for women centered around the Constitution, the main body being the Law on the Protection of Women's Rights and Interests, along with the Civil Code and all sorts of special laws and regulations, local laws, and departmental administrative regulations, to create a complete-rights state for women. Regarding its content and order of rights, they are political rights and rights and interests, personal and personality rights and interests, cultural and education rights and interests, labor and social security rights and interests, property and personal interests, marriage and family rights and interests. It's also necessary to point out that the Law on Protecting the Rights and Interests of Women, which was revised and promulgated on October 30, 2022, can be called the latest achievement of China's gender legislation during the post-Civil Code era. It regulates and adjusts the law-abiding, enforcement, and judicial activities of all kinds of relevant subjects involved in women's protection, as well as guides the introduction of a new wave of support for local legislation.

2.2 Practical Dilemmas of Gender Equality in China: The Gap between Legal Framework and Social Practice

However, regarding social reality, although multi-level progress has been achieved in women's empowerment from the establishment of the People's Republic of China to the present, we can also admit that compared with the state of full rights established by the whole set of laws protecting women's rights, there is an obvious gap in the protection of women's rights and interests. For example, on the issue of imbalanced birth gender ratios, 'China is the country with the longest duration, largest outbreak area, and highest peak of gender imbalance in the world.' That's how they described China's gender ratio issue in the book *Research on the Evolution Mechanism of Gender Imbalance in China* published in 2018. When we look at the seventh national population census data for the gender ratio of newborns in different parts of the country according to the number of births, we will find that the gender ratio of newborn boys and girls is abnormal in most areas, and it is also more abnormal after the third birth. The "tendency towards men" shows that we still have a long road ahead to get rid of

people's prejudice and discrimination towards girls.

The World Economic Forum recently published the Global Gender Gap Report 2024, stating that women have approximately two-thirds of the rights enjoyed by men; in every quantifiable aspect, there is nowhere in the world that grants women equal legal rights to men. The table of the degree of legal gender equality among 190 economies, China ranks 113th, which is only 16 places ahead of India; in the comprehensive gender equality ranking table, China ranks 106th^[2]. To see that China's legal framework for the protection of gender equality can be better designed is no difficult task.

Next, this paper will talk about the defects and adjustment of adjustment channels for Constitution on women's empowerment and gender equality from the view of "gender communication" on equal rights concept.

2.3 Limitations of China's Constitutional Provisions on Gender Equality: Attribute Orientation and Practical Impact

Is it reasonable for there to be stipulations concerning gender in the national constitution? That is, is making an constitution beneficial for women's equality? the constitution's provisions bring equality to women politically, economically, and socially? Gender constitutionalization is an analysis about whether or not women should fight for political equality (equal politics) and push for policy changes based on equality with men, or if women should accept their differences from men and push for policy based on difference (difference politics). Any effort to achieve gender equality through law cannot escape these kinds of issues.

Behind all these questions is the question: what kind of GED does one think of? Based on combining the existing theoretical research and provisions of international human rights laws, I believe that the core content of gender equality prohibits unreasonable differentiations, and it has to incorporate two different levels - women as citizens and as specific persons. former, that is, all women as ordinary beings; from the latter's perspective, women's own physiological experiences are different, so they need to be specially protected, so women's equal rights are also the equal rights of specific people^[3]; only if we can protect gender diversity can we achieve true gender equality. When fighting for gender equality, what should the law make of men's and women's difference?

This question is about constitutions, and the design of its gendered related provisions. There are scholars who conduct an analysis of the use of gender in the Constitutional structures of 74 countries^[4], and compare countries that focus on Constitutional protection based on gender to those who emphasize equality or gender neutrality, and further analyze how significant such a difference would be for women's political representation and economic status.

The paper classifies countries into exactly three different constitutional types: gender-neutral, difference-egalitarian, and difference-maternalist. Gender-neutral constitutions consist of constitutional provisions intending for it to be neutral toward gender (as well as other classes or classifications of people). The US is included, with the entire constitution failing to mention "men", "women", or "gender"; no explicit reference to gender issues is made; and it adopts a neutral or silent stance regarding gender equality or inequality. In difference-egalitarian constitutions, the structure acknowledges gender as an independent category at a constitutional level, and it pursues equal distribution, i.e., equalization within political, economic, and social competitive environments. In order for a constitution to be considered to be difference-egalitarian, it must get affirmative answers for two or more egalitarian questions. Difference-egalitarian constitutions assert and actively advance women's equality. The difference-maternalist constitutions have constitutional structures that place significant emphasis on the different needs and status of a woman as mother and wife, and provide gender-based protections, exceptions, and restrictions. Difference-maternalist constitutions tend to enforce traditional gender roles and have a large number of constitutional language and provisions which protect and advance mothers, linking women's citizenship to maternal roles.

Research indicates that countries with egalitarian constitutions perform better on indices like the Gender Gap Index, particularly in the component of political participation. This suggests that the positive impact of such constitutional provisions may be more pronounced in the political realm than in the economic sphere. in every single economic indicator, countries with gender neutral constitutions do the best. If we recognize the differences constitutionally, this will be more conducive to achieving gender equality, compared with pursuing the approach of gender neutrality, the approach of maternalism and equality are more conducive to achieving gender equality. Based on egalitarianism or positive action politics is opposed to difference-based politics, which is more in favor of gender

equality. In the book *Gender, Constitutions and Equality*, the author team ran a cross-national study and established a unique database containing more than 100 country's gender provisions across 3 waves (1995, 2005 & 2015) to test whether "genderings" constitutions lead to more women's equality. The mixed-methods method had been adopted, with the objective of examining the effect of constitutive gender rights on political processes and strategy formulation, legislative and court decisions, and female equality as an outcome. Cross national research results: Egalitarian provisions - more gender equality Maternalist provisions - less gender equality With egalitarian constitutional provisions in place, women's rights advocates are able to take advantage of such provisions, and fight against gender-based discrimination, and actively demand policy reforms to address the differences in power as a result of the difference in gender.

In China's 2018 Constitution, there is only "woman" for the seventh time. By studying Article 48, it can be seen that China's constitution is a form of difference and egalitarianism: It states that women have equal rights as men from a political, economic, cultural, social, and family life, stating "equal pay for equal work for men and women". But apart from that, "equality" is not reflected in the comparison with men, but rather only discusses how the women protect their rights and interests, from the perspective of women. Such as: "the state protects the rights and interests of women", "the state actively trains and absorbs women Cadres". Article 49, which states: "Protection of marriage, families, mothers, and children by the state" and "Abuse of the elderly, women, and children is forbidden", defines women as a vulnerable group and associates women's citizenship with motherhood. Through the above analysis it is found that Chinese Constitution cannot be categorized in Difference egalitarian type constitution and also it cannot be defined completely as difference maternal type constitution. In other words, China's Constitution is a combination of the two, with the characteristics of both types. The part that leans towards maternalist clauses of the contents written by law is not conducive to tackling the power differences between genders, and is not conducive to future legislative and judicial design for gender equality, thus ultimately failing to realize women's equal political participation and economic income.

3. Legal Adjustment Paths

3.1 Replacing the "Concept of Gender Protection" with the "Concept of Gender Equality"

The Constitution is known as the fundamental law of the country and the basis and premise of the state's legislation, law enforcement, and institution establishment. Therefore, when the gap between gender equality is artificially created by the development of the market economy, restoring traditional customs, etc., the realization of women's human rights will naturally need strong support from the most important legal institutions. Constitutionalization of gender rights has a great influence on the construction of laws for gender equality protection and the orientation of judicial practices. China, when amending the constitution in future, can also revise the clauses that tend to support difference-maternalist constitutions into equality clauses, and adopt the "concept of gender equality" instead of the "concept of gender protection". It is imperative to integrate "gender equality" into the constitutional framework and specific provisions, thereby rebuilding the legal system in this regard. This integration will exclude gender discrimination arising from prejudice in the constitutional and legal vision and establish an authentic representation of gender equality^[5].

3.2 Formulating a Gender Equality Law Conforming to China's National Conditions with Equal Rights as the Value Pursuit

In view of the fact that China's Constitution cannot be applied in practice and in fact, the constitutional review organs of the National People's Congress and its Standing Committee only deal with a very small number of cases of reviewing constitutional normative legal documents, more rarely lead to unconstitutional judgments^[6]. When it comes to the practical role of the constitutional provisions on gender equality, the *Law on the Protection of Women's Rights and Interests*, which is an important starting point for implementing constitutional gender equality, must recognize its constitutional status and value from the point of view of the constitution. And so, to "give a substantial picture and description of how one can achieve equality and equity", must be directed towards the Law on the Protection of Women's Rights & Interests.

From the viewpoint of conceptual innovation, the newly revised *Law on the Protection of Women's Rights and Interests* has gradually formed the concept of gender equality while continuously bestowing

women with legal rights. In Article 1 of the new Law, the legislative purpose is added to "promote the comprehensive development of women", which means protecting women's rights and interests not only means "supporting the underdog", but also helping women coordinate their overall social life in private aspects like marriage and family, employment, and public aspects, such as politics and education to achieve all-round and high-level development. New law maintains the empowerment of "female perspective", but adds local measures like gender assessment into the law. However, it is called "women's law" and the logical premise of such laws is that women are generally in an inferior condition compared to men because they are born biologically different and later in life are affected socially. Gender equality is not equal to women's rights promotion, and traditional laws on women's protection cannot be simply regarded as and thus directly substitute for newly enacted laws on gender equality. China still needs to formulate a Gender Equality Law compatible with its national conditions and equal rights as the value pursuit.

3.3 Enhancing the Operability of the Law on the Protection of Women's Rights and Interests

As for the current new *Law on the Protection of Women's Rights and Interests*, regarding the protection of political rights, Article 15 not only repeats "the state actively cultivates and selects women cadres, and pay attention to cultivating and selecting ethnic minority women cadres", but also stipulates "the state provides support for the cultivation and development of female talent." To boost the recommendation of women cadres as much as possible, it is stated in clear terms: "Women's federations and their members shall recommend female cadres to state organs, mass organizations, enterprises, and institutions." However, Women's political empowerment still have room for improvement. The New Law continues to use vague expressions such as 'a certain number', 'gradually increasing', 'for the statutory proportion of female representatives in people's congresses at various levels and female members in residents' committees and villagers' committees, without quantitative provisions, and the special protection of women's rights to participate in national affairs and political deliberations is not rigid enough, "the participation of women in legislative activities is the acquisition of the right to legislative participation. In order to make women gain the power to participate in legislation and the right to express legislative will equally"^[7]. But women remain a minority as NPC deputies, the situation of women's participation in the process of legislation in China is also not optimistic. In 2023, female deputies make up 26.54% of the representatives of the 14th National People's Congress. There have been relevant studies that show that the comparative legislation for the statutory benchmarks of women's status in important positions of political rights is both comparative law experiences for reference and beneficial local laws. Such as in the Gender Equality Act of Norway, it states: "when a public body is appointed or elected committees, boards of directors, councils, management departments, etc., each sex shall be represented as follows: 1) If the committee has 2 or 3 members, it must have members of different genders; 2) If the committee has 4 or 5 members, each gender needs to be represented by at least 2 members; 3) If there are 6 or 8 people in the committee, then there should be at least 3 men and 3 women"^[8]." Recently, some of Local Legislative Rules and Regulations in China, such as the Tianjin Regulations on the Protection of Women's Rights and Interests and the Jiangsu Regulations on the Protection of Women's Rights and Interests, have increased the proportion of women among official candidates for deputies to people's congresses at all levels to 30%; the Jiangsu Regulations on the Protection of Women's Rights and Interests stipulate two different proportions of women among candidates for provincial and prefecture-level municipal deputies to people's congresses and candidates for deputies to the county (city, district) and township (town) people's congresses, namely, not lower than 25% of the total number of candidates for deputies to provincial and prefecture-level municipal people's congresses and gradually increasing to 30%, and not less than 25% of the total number of candidates for deputies to the county (city, district) and township (town) people's congresses. Drawing on the relevant initiatives of the Platform for Action of the 1995 World Conference on Women^[9], it is suggested that the benchmark proportion of female delegate representatives at national, provincial, prefectural, county, district, urban township, township, and village levels should be no less than 30% of the total representative quota for each level. Residents' committees and villagers' committees: Concerning the statutory proportion of women members in residents' committees and villagers' committees, given that the statutory numbers of the two committee membership are 3-9, 3-7, respectively, they could be provided for based on the number range, taking into account the gender parity policy in Norway's Gender Equality Act.

In terms of equal rights mechanisms, article 8 of the new protection *Law on the Protection of Women's Rights and Interests* explicitly requires "when relevant organs formulate and amend laws, regulations, rules and other normative documents related to women's rights and interests, they shall listen to the opinions of women's federations; take into account the special interests of women; and

conduct a gender equality assessment when appropriate", marking the official formation of the gender equality assessment system, a big step in forming an equal rights compatible *Protection Law on the Protection of Women's Rights and Interests* Under Article 9 of the new Law, it is stipulated that the 'state establishes and improves the statistical survey system for women's development, improve the gender statistics monitoring indicator system, and regularly carry out statistical surveys and analysis on the development of women and the protection of their rights and interests, and publish relevant information.' This provision recognized the gender statistics system as one of the important equal rights mechanisms, and this is reflected in the country's laws for the first time. But when we look at the two systems and how they work, there's a problem with how easy or hard it is to use them.

With regards to the gender equality assessment system, it would be good to learn from the "Gender Mainstreaming Checklist" in Hong Kong, China, so that government staff can take full account of gender and its needs when devising laws, policies and plans by means of multiple choice questions. Secondly, at the same time as clarifying standards, give these standards to local governments in the form of a menu; that is, some standards are mandatory items, and some are optional items that can be adjusted by local governments according to their own actual conditions, thereby ensuring basic consistency in the standardization of assessment standards across the country while also preserving a certain local flavor in local evaluations.

In terms of the gender statistics system, it was suggested that before the revision of the Statistics Law, the National Bureau of Statistics, women's federations and women and children's work committees could lead to issue preliminary guidance on the basic indicators and releases for the establishment of the system. First, designing a gender statistical indicator system is the basic requirement. Without a scientific and systematic gender indicator system, then the data is all a mess and it's hard to tell what it means. Use an indexed indicator that reflects not just the difference and ratio among men and women, but rather reflects the differences and similarities of the contribution and gain, need, restriction, and opportunity among men and women with regard to advantages and disadvantages. With the indicator system, we promote all kinds of functional departments to integrate gender statistics into their line statistical work, establish and improve mechanisms for collecting, analyzing, and submitting sex-disaggregated data, and ensure timely and efficient data. Second, to start, it is a gender statistic release. It is suggested that the Shenzhen case be taken as a reference, encouraging the statistical departments, women's federations, and women and children working committee of different regions, to regularly release to the public annual gender statistical monitoring reports or special reports through data platform for the sake of improving the degree of sharing of gender statistical data and women's development monitoring results^[10].

4. Conclusion

The global gender gap is closed 68.5 percent, yet at the current rate of improvement, it will take 134 additional years or five more generations, as measured here, to have achieved full gender equality^[2]. Substantial gender parity is not simply constitutionally protected; it also needs unique legislation for safeguarding and carrying out. In the future, we should first incorporate the concept of gender equality into the discipline in the constitution, and then incorporate it into the constitution itself. We should also promptly formulate a Gender Equality Law with equal rights as its value that is in line with China's national conditions.

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