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The Policy Subject of Women in Labor Law and Jurisprudence,

A Case in the Project for Critical Policy Studies

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This essay addresses three more-or-less factual questions: who are “stakeholders” in emerging policy debates on women and work in the PRC?<sup>1</sup> What role do the international labor and NGO movements play in this policy environment? And since women is always a difficult category to define legally or theoretically, what historical legacies might be conditioning PRC policy culture and expectations with respect to women and labor regulation? These three questions and my preliminary efforts to address them endorse the project organizer’s view that “policy” is “the outcome of governmental decision-making” and that policy is “grown, implemented, contradicted, or debated” in a medium called a “policy environment.” (“A Matter of Choice: Critical Policy Studies of China”).<sup>2</sup> Yet, concern about “policy” is potentially also a way of reconfiguring debates in social theory over the relation of neoliberal economic trends, global politics, ideology and personhood.<sup>3</sup> A positive outcome for Critical Policy Studies, in my view, would be to reground generalizations about subject making, internationalism (“boundary making”), and emancipatory projects (preoccupations of cultural theorists like Étienne Balibar) in PRC political exigencies. This would not only address what Balibar has recently termed “politics and the other scene” from within an intimate understanding of Chinese political conditions. It would also contribute to the project that Gayatri Spivak is now calling “teleopoesis” or the reimagining of universality outside Hegel-theory, presumptive masculinity and Western European norms.<sup>4</sup>

Because this workshop's joining of cultural studies and policy studies is intended to provoke rethinking of standard scholarly approaches in several domains, I therefore chose apparently simple questions that obviously do not have easy answers. The format of the essay emphasizes the less simple aspects of what Wang and Saich are calling "policy." Part one raises the problem of stakeholding. It does so in relation to a specific project, the Center for Women and Social Enterprise Services of Peking University (CWLSLS) ~~北京女性研究中心~~ whose lawyers, advisors and investors are committed to a vision of jurisprudence related to women. Particularly the Center's focus on female labor in relation to the Labor Law and labor regulations is an excellent example of how complex policy stakeholding is when "policy environment" and processes are at issue. Part two, on the role of international or global governance organizations, introduces several examples of policy advisory organizations that have established stakes in the PRC handling of female labor and labor markets. How these agencies organize their interests, how and what they contribute, the logic of their embedded relation inside PRC decision making organizations are all matters that will require further research, but I think that the example of the Rural Development Institute, is sufficiently emblematic for the moment. RDI, however, is just one of a range of semi-state and semi-corporate or bureaucratic interests in the current environment. In section three I will suggest some ways that writing and thinking about women in relation to the PRC Labor Law and labor regulations open up ways of thinking about feminism and feminism's subject, women. Of the three discussions this one is the most indebted to debates in international feminism and consequently the most heavily indebted to what the organizers are calling the cultural studies side of the Critical Policy Studies initiative.

## I. Stakeholding

Who counts as a stakeholder in what Tanner calls a highly ambiguous law making environment such as the PRC today is already a difficult question, since stakeholding claims are cumulative and stakeholders have a vested interest in institutionalization at the subcommittee and bureaucratic levels of the government (Tanner, 1999).<sup>5</sup> Who would consider themselves to have a stake in emergent debates on women, work and law is still more complex. The traditional government ~~advocate~~ mass organization All-China Women's Federation or ACWF ( ~~中國婦女聯合會~~ ) which is along with the All-China Federation of Trade Union ( ~~中國工會聯合會~~ ) the traditional advocate of women workers, remains administratively central despite the fact that the Federation's organizational status has changed in the 1990s, and it no longer holds a monopoly on the means of representation. Nonetheless, ACWF is perceived as a stakeholder and harbors a reflexive, internal perception of its own changing identity as administrative advocate. ACWF officials remain acknowledged advisors at the level of the State Council and National People's Congress in most policy and legal decisions involving women, though now almost always in relation to activist social organizations ( ~~民間組織~~ ) outside the ACWF strictly speaking. (Howell, 2003a; Gao, 2001; Jin, 2001; Judd, 2002) While it is not actually possible to strictly distinguish ACWF affiliated media from non-affiliated media, affiliated activists from non-affiliated, it is safe to suppose that media like ~~新華~~ and think tanks like CWLSLS are more or less independent stakeholders in policy formulation regarding female labor.

All these organizations contribute to what Tanner calls the “stream of possible solutions” as it pertains to policy lawfully regulating female labor in a non-market. In the broader sense feminist social scientists (e.g., 北京社会法理论研究会, 1991), academic and official women’s studies centers with research projects on social justice (e.g., Beijing ACWF’s Women’s Studies Institute of China, 全国妇联, provincial advocacy and social service providers (e.g. development agencies) as well as global governance organizations (e.g. Rural Development Institute) and so on are all contributing to the stream of possible solutions in various ways. As Jude Howell notes, “Fathoming processes of policy change is inexorably complex” in the new women’s movement environment, “not least because change can rarely be reduced to a single agent,” but also because the relation of formal and informal institutions or sites of address are, if anything, more ambiguous in women’s labor affairs than in other domains (Howell, 2003a, 198). As a way of managing this relentless complexity and pay particular attention to the problem of stakeholding as such, I focus here on the Center for Women’s Law Studies & Legal Services of Peking University (北京大学妇女法律服务中心, CWLSLS) whose recent publication *Directory of Legal Cases of the Center for Women’s Legal Services* ( 女法案例集, 2000, hereafter *Directory*) offers a useful window into both the political world of government decisions and its “other scenes.”<sup>7</sup>

Established in December, 1995, the Center for Women’s Law Studies and Legal Services of Peking University is a consulting service, think tank and publication center focusing on forwarding women’s rights and privileges under law including labor rights and protections. Because its mission is to spread knowledge about processes of legal

protections the emphasis of its primary publication *Directory* is a series of studies that outline the plaintiff's cases, the legal principles that her case raises, the procedural methods which her case involved (e.g., model contracts, legal forms for filing suit, arbitration resolutions, and elements of substantial laws such as the Labor Law, that are the ultimate authorization for processes, etc.) and other ideal typical elements of the case. The Center sells the *Directory* along with its other popular manuals intended to promote the general culture of law among Chinese citizens.<sup>8</sup> Other ways that CWLSLS “consults,” which is to say enters into and shapes the policy environment, is through what appears to be a popular email service for responding to routine queries, a website where readers can learn about legal processes and principles<sup>9</sup> as well as direct consultations with clients who come into the law clinic to lodge or voice complaints. In each case the object is to take on illustrative cases in order (1) to propagate knowledge about Laws (e.g. Inheritance Law, 1985; Law on Protecting Women's Rights and Interests or LPWRI, 1992; Labor Law, 1994; Marriage Law, 2001), Basic Statutes, Statutes and Administrative Legislation that bear directly or indirectly on women's status or claims and (2) to illustrate how individuals themselves can use legal procedures on their on behalf or, alternately, how they can enlist the help of a lawyer.<sup>10</sup> Later I will suggest that in teaching individuals how to use laws and procedures what the CWLSLS and other legal services centers do in a broader sense is to create a situation where what it means to be a person is reworked in principle and fact under principle of evolving contract law.

The CWLSLS is located at Peking University and consults clients there although the work extends – through electronic web machines, news reports, popular book dissemination, international media, willingness to take precedent setting cases, word of

mouth and so on -- beyond Beijing matters or local concerns. In all of these outreach efforts the lawyers and legal scholars take as their mission the process of addressing the real legal concerns of the ordinary people ( ~~法律~~ ). Equally important and noteworthy is that CWLSLS lawyers, legal scholars and law professors routinely consult upward. That is not only are they concerned with clients, most of whom are impoverished and some of whom are mentally deranged (*Directory*, 1-3). The Center's operational mission includes consultation upward on legal opinion (and, one imagines, for tactical advice) with a range of institutional players above itself. These units include the network of National Legal Services Centers under the jurisdiction of the Ministry of Justice, but more broadly speaking it also includes government departments, Party committees, corporate and donor (NPO, NGO) organizations working in and outside of the PRC, major research universities, corporate advocacy groups (e.g. The US-China Business Council) and global donor organizations like the Ford Foundation. Patrons who often figure prominently in news stories and photographic image-making efforts are Madeleine Albright, Hilary Clinton and Kofi Anan's wife. And CWLSLS staff include faculty and students at the Law School, who maintain open channels for consultation with individuals and committees in the Ministry of Justice ( ~~司法部~~ ), the Standing Committee of the National People's Congress, Peoples Supreme Court, Procurator, Women and Children's Affairs Commission, the ACWF, government ministries and family planning commissions, research institutes, university and law school faculties, and propaganda and media outlets ranging from official newspapers to reporters at U.S., Japanese, British and media agencies.<sup>11</sup>

Because the laws and regulations that women individually and women as a corporate social entity can call on in their capacity as women are scattered through a number of laws passed in the last twenty years, CWLSLS's overarching objective is to redefine the subject of "women" in the legal discourses as described above and to do so within the general framework of contract law.<sup>12</sup> As quite a number of social scientists and legal scholars have attempted to argue, the interests of women *as women* and their interests *as workers* do not always coincide and the possibly conflicting mandates of official women's and worker mass organizations are significant. Accepting this notion for the moment, it seems clear that the CWLSLS is effective and singular because it attempt to work *between* potential conflicts. Belonging to neither to the Women's Federation nor to All-China Federation of Trade Unions, this project avoids the structural impasse Howell, for one, sees stymieing institutional efforts to address questions of female labor regulation and abuses systemic in the female labor market. (Howell, 2000)

Indeed the strong argument that CWLSLS media make is that the rights of women are available potentially to all women, though in a potentially conflictual form, and that in making use of legal resources women transform themselves from social objects to social subjects while at the same time contributing to the institutionalization of China's legal processes and legal culture. The Center has found that statistically speaking that there are four basic areas of juridical concern (i.e. problems that can be cast in legal terms, that are already attached to potential rights, tort law and remediation for violations of due process with reference to legislated and authorized laws, regulations and processes) that women most commonly confront *because they are women*. These juridical concerns are divorce (claims on property and residence, processes), family (e.g., division of wealth

and children in divorce or case of death), personal injury (including spousal violence, rape, school related crimes, traffic accidents, etc.) and labor. For the purposes of this discussion I am restricting myself to the fourth major category. Under “labor and law” the Center’s primary concerns are in descending order of importance, matters regarding the labor contract system and violation of regulations (what are in essence due process claims as when legislation on the birth plan and labor law or regulation come into conflict), employer-employee relations, unjust or unequal retirement laws and labor compensation cases. (*Directory*, 2000).

CWLSLS is what might be called a public-private policy think tank. That is to say it is both a legally sanctioned or official outreach clinic and an organized, flexible, institutionally networked advocate for a specific category of citizens as defined under law. At the elite level, it is blending the non-official or autonomous initiatives of the women’s movement with the bureaucratically and politically invested progressive official women’s movement. Its implicit goal or objective is to organize and at times to reinterpret or reshape existing and evolving legal instruments. Invoking Constitutional and other major laws or legal safeguards it organizes around women the fully collated apparatus of law, processes and legal decisions available under market socialism. Taken as a whole the work the CWLSLS does is to present the case that the rights of women as legal subjects are singular and that promote women’s legal rights requires consulting downward to find out what real (i.e. legally understandable) women are complaining about.

It would appear that in the eyes of these policy-savvy lawyers the claims of women citizens are singular under PRC law. When the clinic’s lawyers succeed in procuring rights for aggrieved women that existing law grants them in potentia (i.e. when

they are parties to legal contracts), the CWLSLS acts to establish women as a juridical subject by virtue of legal advocacy and by establishing a record of solid precedents in court decisions. The CWLSLS's work requires them to use their expertise in order to carve a specific body of case law out of the larger regulatory system and to streamline and popularize the use of these constitutionally protected laws. CWLSLS is indeed a nodal point in the circuit which as Jing Wang and others argue, is effectively producing a new caste of civilized consumer subjects (Wang, 2001). But I would simply add that law is an intermediate instrument of governmentality, neither wholly state nor wholly capital, not wholly domestic or wholly international. The legal framework of rights and privileges in China, *like legal norms internationally understood and universally articulated*, is a rationalized logic. Jurisprudence represents and enforces norms, acceptable behaviors, expectations, claims on the common good, degrees of legal exploitation, methods of redress and avenues to justice (Ngok, 19, Cheng, n.d.). It is in other words, among many other things, an instrument for disciplining, categorizing and feeding labor power into PRC segmented labor and consumer markets.

Later, when I return to this project and develop the questions of stakeholding further I will focus primarily on the debates that have erupted among policy critics in the PRC who are now considering the best ways for institutionalizing and formalizing women's due process and labor rights. For instance, a discussion about amending the Labor Law itself (now 9 years old) has emerged which features contributions from leading experts and public intellectuals such as Jia Junling (贾俊玲, Law School at Peking University, Yang Yansui (杨艳蕊, Professor in the School of Public Policy and Management at Qinghu University and the Centre for Employment and Security, and

Hong Dayong, Renmin University, Department of Social Studies. There are a substantial number of apparently less prominent figures such as Zhang Zhen (張震, 2002), Lei Hong (雷洪, 2002), Li Bin (李斌, 2002, 2002a), Sun Juan (孫娟, 2000), Wang Jinming (王錦明, 2002), and Zhang Zhen (張震, 2002) who are conducting a wide ranging discussion of the flaws and potential advancement of substantial and procedural law in public fora. Obviously, these public intellectuals are all stakeholders in a policy environment where increasingly lobbying for policy is one of the objectives that the autonomous movements advocate. My initial research into this material and the various advocates who are actively promoting the revision of labor law and extension of due processes suggests that the bulk of this discussion is consistent with the positions implicitly and explicitly articulated CWLSLS publications. Whether this coincidence adds up to a loosely organized coalition of opinion makers or whether it is simply a popular debate that exigencies of development have instigated remain to be established.

## II. Global governance regimes and the regulation of “women” in labor law and regulation

The second discussion – what is the relationship of global governance and transnational corporate institutions and PRC domestic policy-making as regards women and labor regulation? – also raises questions of fact (e.g., what is the Eileen Fisher, Inc. Social Accountability Program or “SAI” doing in South China textile factories where the labor is by and large all female?).<sup>13</sup> But, perhaps as importantly, it poses the problem of how to interpret and generalize about borders as such. For instance, the Spangenberg Group, a “public-private” international consulting group with a global mission to expand justice systems (civil and criminal) is now working under a United States Department of

State-commissioned mandate (also collaborating in these projects with the Ford Foundation) to expand the legal rights of women in China. The Spangenberg group maintains connections with the Chinese Ministry of Justice and has, since 1996, worked closely with the China Legal Aid Centre movements in Hubei, Hebei, and Shaanxi Provinces.<sup>14</sup> The acceleration in the last three years of collaborative projects to mainstream lawyering techniques and the “clinic model” of pro-woman advocates under the auspices of groups like Spangenberg and Ford which act in concert with the USDS and USAID is consistent with the post-UN style of international rights advocacy. Whether and how these U.S. oriented initiatives compete with United Nations advocacy and inter-Asian projects in the growing pan-Asia movement of reregionalized “open region” strategies remains to be established.

Another, and more transparent example is the private consulting firm Rural Development Institute or RDI, which has since 1988 acted as a primary advisor to PRC policy makers on land law. Like the Ford Foundation Global Partnership for Women, the Spangenberg Group, the various Human Rights NGOs and the in-house corporate worker organizations, RDI also advises and encourages legal solutions to questions of Chinese women’s labor and job-related social welfare. Each of these organizations has slightly different relationships with Chinese government officials, committees, and policy institutes making it fruitless to generalize about international women’s legal initiatives. For the purposes of this discussion I will use the example of the Rural Development Institute to demonstrate how diverse the policy environment becomes when legal advocacy for women (in U.N. parlance, “gender mainstreaming”) from already institutionalized advocates like RDI, who have adapted the global governance rhetorical

commitment to “empower women” legally. Each of the organizations briefly mentioned above subscribes to the slogan of women’s empowerment, though obviously SAI is paying lip service to it exclusively because of the added value it supposedly gives to Eileen Fisher’s marketing strategies for its brand in the anti-sweatshop and international human rights-sensitive US consumer markets.

I use RDI as the primary example in order to make the following suggestions. First, the impacts of SAI or RDI participation in the policy environment are not wholly clear because the logic of their investment, their cost-benefit accounting (how does the Ford Foundation judge success? how does the USDS measure success? how should critical policy studies understand the policy objectives or solution streams that are the product of neo-liberalization initiatives in national policies and global governance? etc. ) are themselves not terribly clear. Certainly the PRC project of economic and institutional neo-liberalization in a reregionalized “Asia” is one of the larger horizon against which specific macro-policy relations are being struck and AFL-CIO lawyer Phil Fishman no doubt spoke for many vested interests in the Bush Whitehouse as well as the international worker’s movement when he told a recent US Congressional committee that “Whether we like it or not, China is the fundamental issue for workers around the world.” (CECC, 13)<sup>15</sup>

Second, however, though the ways that the PRC Labor Law and its processes work domestically are related to the regulation of female domestic labor markets as well as to the input of external policy advocates, how “external” and “internal” or “national” and “international” are conceptualized remains problematic. What a cultural studies’

position contributes to Critical Policy Studies is interest in investigating the logic of borders themselves. (Balibar, 2002)

The Rural Development Institute is a “nonprofit organization of attorneys helping the rural poor in developing countries obtain legal rights to land.” (RDI, 2002) Its mission is to use “law and policy” as the “primary apparatus to assign and define land rights” and to protect or restore land rights because “providing the landless rural poor land of their own kindles investment, boosts crop production, stimulates rural economies, reduces social conflict, fosters environmental stewardship, and provides incentives to have smaller families.” RDI’s mission thus situates it well within the internationalist discourses of orthodox global governance ideology as regards the mainstreaming of the “gender” concept and the use of laws, social science research, international human rights and World Bank protocols for measuring gender equality. (Barlow, unpublished)

Operating programs in India, Indonesia, Russia, Kyrgyzstan, Ukraine and Africa as well as in China, RDI has a particular project interest in Women and Land. Indeed a report that RDI conducted in collaboration with Chinese social scientists at the China (Hainan) Institute for Research and Development, “Women and Land Tenure in China: A Study of Women’s Land Rights in Dongfang County, Hainan Province” (Duncan and Li, 2001), focuses squarely on women’s land rights in China and rural female labor.

I highlight this report because its findings so closely resemble those of the China based CWSLSL which focus directly on the question of rural labor regulation. (*Directory*, 449-477) Both reports focus on the absence of specific mechanisms for distinguishing women’s rights over household rights and both promote the establishment of specific mechanisms and processes for the use of individuals. In a mirror image of the primary

problems facing female clients at the law clinic, the RDI authors Jennifer Duncan and Li Ping, note that in the absence of mechanisms or processes, “women’s legal rights are not easily enforceable, and become especially vulnerable in the context of marriage, divorce, inheritance, or transfer of household land rights.” Consequently, one part of the seven category report directly addresses questions of rural women’s labor rights, while pointing out that as a category of labor rural labor means female labor because women now constitute 60-75% of rural labor. (Duncan and Li, 3)

The report is comprehensive in terms of defining what constitute women’s land rights, how these are part of the state policy on contract law and what historical factors (from 1900 to the present) may be said to be conditioning the efforts of current government efforts to formulate, ratify, authorize and implement female citizens claims to property and ownership of their own labor. It also collates into one section all of the various authorizing legislation where elements of claims to land and labor are scattered. Included in the discussion are Constitutional level guarantees, General Principles of Civil Law (GPCL), the Law on Protecting Women’s Rights and Interests, the Marriage Law and the Inheritance Law. But it is also a field study which, like the CWLSLS publication attempts to mold policy advice around the solicited and reported needs of its target population and consequently takes the form of a social survey. This improves the “facticity” of the report, and consequently the weightiness of the advice. In this regard the RDI research resembles what Ellen Judd has recently called “GAD [Gender and Development, a World Bank policy discourse] with Chinese characteristics” in reference to the PRC government’s promotion of the successful “two studies, two competitions” policy which fuses “initiatives from above to mobilize women to contribute to national

economic development, and demands from below for improvements in economic conditions by and for rural women,” (Judd, 2002, 33 and chapter 3)

Before I speculate any further on the basic assumptions that fuel the specific policy recommendations Duncan and Li’s report seeks to make to policy communities in Hainan Province and, from the local to national rural policy-making venues, it is important to point out that RDI has been directly advising Chinese government officials since 1987. Its website notes that its central recommendation to Chinese policymakers (e.g. that legal changes be formulated and implemented securing farmer’s right to land, to increase laws and processes for insuring implementation of the laws, etc.) have born fruit in the form of “significant policy and legal reforms” foremost among which has been the 1998 Land Management Law itself and Central Committee Document No. 18 on illegal and unjust trade of rights-holding in the emergent rights market. This market, as the Duncan and Li report notes, is highly detrimental to the long-term interests of rural women. (Duncan and Li, 30). And the Rural Land Contract Law, which takes “important steps towards protecting women’s rights within the framework of the household contracting system,” is the direct outcome of RDI efforts. Currently, RCI “continues its role as the principal foreign advisor to China’s central policy-makers in the current reform process.” (RDI, “Our Work,” 2)

RDI’s approach to empowering women under law emerged, I suspect, after its primary commitments to advising on the formation of the Land Law. No doubt the focus on women is motivated by many factors, including the feminization of rural labor force, growing rural crisis involving female laborers and their children, the need to maintain an effective labor production mechanism in the absence of male labor, the growing and

highly ideological inputs of global governance to the “women’s rights are human rights” project as well as international awareness that women’s work sustains economic viability. Putting aside for a moment the question of the instrumental use of women’s rights policy in national geopolitical policies, RDI is a good example here because its long-term advisory relationship is older than the post-1995 rush to “feminize” global governance rhetorics.

The questions that RDI’s example raises for further discussion are (1) exactly how does one distinguish in the case of RDI what is “domestic” and what is “foreign” policy advice and how, in the generalized notion of the “policy environment” is it possible to keep these distinctions from collapsing into each other? Since, to my knowledge, RDI does not have a corporate or national sponsor, does not accept UN or USDS funding and is committed to seeing a just law implemented in China that will serve the interests of state and the interests of citizens in a way that benefits both, how is RDI *not* a “Chinese” operation? Are we working exclusively within formalist definitions of what constitutes domestic terrain? And (2), a point that I will take up in later sections, what is the universal principle of liberation being advanced and what are its local articulations? If we can no longer speak of a distinction between “universal and particular” then what sorts of logic should we draw on as an alternative? In the case of the Spangenberg Group and its relationship to the Shaanxi Association for Women and the Family where a “private” organization using U.S. funding collaborates with a provincial, semi-autonomous, popular, academic advocacy organization, how do we understand influence or the policies that governments and extra-government organizations formulate and how do we conceptualize their targets?

In linking the example of RDI to the general problem of how Chinese policy environment and policy projects work it is no doubt useful to recall the steady increase since 1983 in the numbers, responsibilities and intermeshing activities of subcommittees and permanent special committees ( ~~委员会~~ ) This has led to a general strengthening of the National People's Congress in the process of advising, ratifying, redrafting, strengthening and later supporting the institutionalization of the legal infrastructure in a process that he calls "bureaucratic self-strengthening." (Tanner, 104-112) In the process of advising, even helping in the processes that lead up to the State Council's drafting of laws, not only the mass organizations, social organizations or policy think tanks but also NPOs like RDI are actively contributing to research, development and implementation of PRC laws. One of the reasons why I am interested in this instability and complexity in the relation of what is domestic and what is foreign in policy stems from my reluctance to simply dismiss these interstate politics as the effluvia of neo-liberal processes of globalization. They are without a doubt that. They are part of the globalizing grid that has accelerated late capital accumulation. But to say this is not ever to say enough. It is precisely the task of experts to show the living possibilities that are opened up when, to borrow Balibar's Althusserian language "proletarians, women, colonized and enslaved peoples of colour, sexual minorities, and so on" take up "the real struggle to enjoy rights which *have already been declared*" elsewhere. When, that is, the universal class, "the class which is simultaneously a non-class, the class whose entire being resides in its alienation . . . present[s] itself as an absolute. . . . And . . . this idealization expresses itself in namings, creations of keywords, whose power to seize the imagination is all the greater for the fact that they initially expressed a radical negativity." And as even Balibar

now admits, that while “the people” or “the proletariat” were once that universal class “Woman and foreigner might yet become terms of this kind.” (Balibar, 2002, 7)

One of the basic assumptions that Rural Development Institute lawyers and Center for Women’s Law Services and Legal Studies lawyers share, to make this point immediate, specific and concrete, is that the Law, Chinese reform laws and the campaigns to formulate, implement and popularize the rights of women citizens, are in fact and in principle grounded in contract law. The backbone of legal reform and in what cultural studies language calls “legal discourse,” is contract law. How that contract law is being expressed and what sorts of legal edifices are being erected on the foundation of contract law is where the variety and ingenuity of legal-discursive “policy” becomes sociologically complex. The argument of political scientists like Tanner (relying on Schmitter) that legal policy-making at the stage of advising corresponds to “textbook corporatism” is another way of saying that in the process of law-making increasingly many different kinds of constituencies have been admitted into the process, have contributed their own perspectives, and have in fact participated in the development (if not the drafting) of laws.<sup>16</sup> It occurs to me at this point that within the PRC as a territorial entity (domestic) or outside of it in the ill-defined, competitive, global world of “development,” the common thread that advisors and responsible legislators share is the assumption that contract law is the foundation of legislative product. I will return to this problem in the last discussion, though I do see a link between the recoding of territorial boundaries and the new foundationalism of contract law discourse that contracts individual labor power to corporate and state interests. The logic of how individuals come to be positioned in relations to other individuals (marriage, divorce, family property

division, etc) and in relation to larger corporate, state, bureaucratic signatories (work unit, enterprise, health provider, husband's work unit, etc.) mirrors the various, negotiated, bureaucratized relations of consulting agencies, semi-public agencies, public-private charters, contracted bids, and the panoply of so-called "NGO" or autonomous actors in the international circuit.

One of the preoccupations and strengths of theory in "cultural studies" is the general question of how borders are created and how they operate. This debate is old now and has developed through discussions about "transnationalism" and "transnational capital flows" largely in the United States in the early 1990s, discussions in the late 80s and 90s initiated by migrant and ethnic American intellectuals focusing on migrancy from Latin America, and continuing to this day in the mapping of lived spatiality in progressive geography studies. Parallel to these culturalist preoccupations are the philosophic and psychoanalytic work that continental philosophers (largely in France and Italy) have pioneered in the decades since 1968. One can easily argue as Eleanor Kaufman and Kevin Jon Heller have, that what many have called the "linguistic turn" is as much a turn to problems of spatiality and materialism through the problem of Foucault's notion of "discourse," the geopolitics of neo-Marxism, Gramscian scholarship or Deleuzean and Guattarist mapping strategies. (Kaufman and Heller, 1998) Certainly, Foucault, who materialized discourse (carefully avoiding the Marxist problematic of ideology) in his detailed studies of the space of criminality, the space of rationality, the various technical means for "producing" subjects was aware of how borders emerged and reemerged as the effects of disciplinary techniques and discourses. Certainly, as well, the work of feminist theorists from geographers to the well known performativity thesis of

Lacanian critic Judith Butler have contributed as well to a preoccupation – sometimes explicit as in the work that Gloria Anzaldua and Cherrie Moraga began with their precedent staking This Bridge Called My Back, and often implicitly in queer theory and other more vested critiques – with social, sexual, intersubjective borders and boundaries. (Rose, 1993; Butler, 1993; Anzaldua, 1981)

In many of these studies the border or the boundary shapes up as problematic because, as Balibar says you “cannot attribute to the border an essence . . . . [and] if we are to understand the unstable world in which we live, we need complex notions.” (2002, 75) The project he undertakes is to think about the “borders” of Europe, now that Europe is (1) a space characterized precisely by its potential for the overriding of *national* borders, and (2) haunted by the dystopic example of the former Yugoslavia and its genocidal implosion. Balibar seems to enjoy thinking through the problems in essays in Politics and the Other Scene and stresses throughout the fact that in the current conjuncture borders are by nature vacillating because some are now superceded and others (against terrorism, diseases, migrants, etc.) are in held in place ideological and consequently, at least in “Europe,” are either invisible or supranational. Spivak has already pointed to the weakness in his formulation, his all too blithe admission that Europe is “the prime example of the normative sequence of social formations everywhere.” (Spivak, 2003, 51) But granting this weakness in Balibar’s excellent effort to rethink what is a border using Europe as his example, the “globe” rather than what Spivak would prefer, “the planetary,” it is still a useful insight. Borders between states, among nations, are undone. Maybe it is the rerouting of capital and the retrenchment of “Europe” in relation to the other great regions of the world that we can point to, perhaps

it is what I am arguing is the reregionalization of “Asia” around the Chinese economy. In the effort to analyze how policies and globalized relationships work, the problematic status of the boundary remains.

Underneath Balibar’s word play (and Spivak’s sometimes confounding prose, for that matter) the point of all this inventive speculation is a simple. “I see,” he writes, “advantages to working and playing with representations of this sort, *rather than allowing them to act on us unperceived, outside our consciousness and our grasp.*” Never losing sight of the political tension separating the European Union and the former Yugoslavia, his point is *both* that borders are a geopolitical reality that work on our unconscious *and* that the task of the theoretician or policy studies critic is precisely to locate what he calls in a related essay “the line on which we think.” (88) By this he means, I think, that the critic’s responsibility is to grasp how it is that the borders are no longer stable, what forms of universality (in his scheme these are “real” or economically globalized, the “fictional” or historical junctures where differences of institutions and representation are manifest, and the “symbolic” or “ideal” by which Balibar means dominant ideological forms).

### III. What is “women” in labor law and what are its historical and theoretical implications?

In a short essay “Labor Law Reflects New Realities,” Hilary Josephs made two important points that bear on the question of the subject women in policy discourse. She notes at one point that a salient feature of the 1994 Labor Law is “the subject of contract employment” and shortly thereafter that breach of contract and contractual obligations are an attempt to “endow state enterprises with *independent legal personality* rather than

view them as operating units of the government.” (Josephs, 1996, 2, my emphasis)

Josephs, who is the Anglophone scholarly community’s expert on this law, links the subject of gender discrimination to the high priority the new Labor Law gives to establishing “independent legal personalities” through contract law. Personality becomes in this way of thinking the artifact of an official agreement binding parties and situating them in relation to one another. How this personality is established and refined or redefined in specific juridical decisions is one good way of establishing what “women” is under law. Legal discourses are a test case for thinking about policy on women’s labor because they embed in their own logics and archives concepts of “women” that are abstract and yet applicable, practical. That is why I try here as much as I can in a provisional way to link policy concerns to an appreciation of PRC’s emerging legal culture.

A major problem that haunts (in a good way) my entire essay is that the subject of “women” always poses problems. How to define the subject being regulated in law or regulation has been a policy concern since the Chinese Communist Party institutionalized women’s liberation. The Land Reform law, the Marriage Law, the Law on the Protection of Women’s Rights and Interests are all entry points into both abstract and practical ways that the subject of women has been formulated and enforced. It is certainly why the preponderance of critical legal opinion from the CWLSLS lawyers and scholars at Peking University to the land lawyers at RDI to scholars like Christine Bulgar, Anita Chan and Catherine Cheng Jie all concur is the conflict of laws or the fact that there is no single line of legal precedent and authority that allows institutional redress for crimes against

women to be a continuing problem in the PRC legal reforms. This remains a matter for experts. (Bulgar, 2003; Chan, 1998; Cheng,

However, the subject of women in relation to labor and law in thought does open questions in cultural theory. In the last ten years particularly, in the universities as distinct from policy making center as such, a great crisis in social thinking about the subject women has emerged which is linked to the theory that the study of women must exhaust the kinds of types of women (i.e. it must be international). Various entry points into this project have been forwarded from the international legal theory that “women’s rights are human rights” to the various “transnational feminisms” and efforts to theoretical work out the implications of a world that claims universal rights in the face of the highly differentiated lives of women. In both the U.S. and in the metropolitan capitals of reregionalizing Asian states (Tokyo, Seoul, Jakarta, Beijing, Shanghai, Taipei, Singapore, etc.) this problematic is called the “internationalization of women’s studies and feminism.” Thus, states, global governance organizations and the United Nations institutions award grants and give incentives to those active scholars and bureaucrats who are willing to “change the shape of knowledge” or “change curricular resources” to reflect the realities of globalization or, in the case of Japan, to “forward the policy of Asianization.” (Lay, et al, ed., 2002)

The above is a reminder of points that I cannot address at any length since I have run out of time and do not want to risk taxing the reader’s patience. First, that the debate on what is the subject “women” has a long life that is dateable to the debates over sex and society in sexual theory of the late nineteenth century in Europe and its colonies, including the centrality of Freud. (Barlow, 2004; Khanna, 2003) In social theory, as in

social regulation (i.e. applied policies) the subject of women has always been an internally differentiated, class-stratified, age sensitive, normative and regulative demographic subject. In part this is because women has posed a problem for all modernist social planners (not just in China) who negotiated political decisions ranging from eugenic population control to international diplomacy. My work on “the question of women in Chinese feminism” has sought to establish the persistence of this subject in the liberation thinking of scholars and theorists beginning in the 1920s and continuing in theoretical publications to the present. Others are stressing the state’s regulative apparatus during the Maoist era and at various moments of the Chinese Revolution. (Manning, 2003)

Second, it is worth considering the possibility through the policy problem that the question of “women” is potentially not only a problem for labor laws and regulation but also for philosophy. In a thoughtful recent discussion of their philosophic positions Judith Butler, Ernesto Laclau and Slavoj Zizek debated questions of what I have been calling ideology, universality and politics. (Butler, et al, 2000) The American feminist, the European post-Marxist and the Eastern European Lacanian critic are agreed on the centrality of the question of women but disagree fundamentally on how the problem should be approached. Butler takes the position that sexual difference cannot be either the social or the psychological starting point for thinking about women in relation to injustice. Zizek takes the position that it is. Laclau make the point that has formed my operating assumption in this thought paper and has formed one of the basic problematics for me throughout my career. “What are the conditions of context-dependency and historicity as

such? Or – to cast the argument in a more transcendental fashion – how has an object to be constituted in order to be truly . . . historical?” (183)

The answers to this most pressing of questions in feminist cultural studies lies, I think in projects like this one. Certainly, the international governance mechanism ratified through the United Nations universal human rights machinery has mainstreamed social planning into development policies all over the world. It is important to track what institutional, economic and cultural capital is being pumped into the mainstreaming of global governance ideology. In other words, it is most important to track the economic forces of production and consumption which these policies seek to configure or to dominate. Who contributes what to which organization seeking what ends? These are traditional questions for social science fieldwork. They should continue to be asked and answered. However, the general context in which we ask these questions has changed. The localism of a Shaanxi Association for Women and the Family is no longer “local,” just as the United States of the AFL-CIO is not American and the Chineseness of the All-China Federation of Women is increasingly sensitive to international trends and global governance rhetoric. How this wrenching new order works and how it forms the conditions under which we think it is our job to investigate. Because I do think that, to borrow Balibar’s turn of phrase, we are well equipped to make the effort to confront what he grandly calls the impossible limit of autodetermination and to conceptualize the line on which we can think. (Balibar, 88) My concluding point here is relatively more modest. It is to suggest that thinking about The Center for Women’s Law Studies & Legal Service at Peking University may open a legitimate case for generalizing feminist theory. The

“Chinese case” has universal implications. The project for critical policy studies offers a means into this problem.

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<sup>2</sup> Jacques Derrida, “Structure, Sign and Play” probably, for relation of sign to field?

<sup>3</sup> Judith Butler, Ernesto Laclau and Slavoj Žižek, Contingency, Hegemony, Universality: Contemporary Dialogues on the Left (London: Verso Press, 2000).

<sup>4</sup> Gayatri C Spivak, Death Of a Discipline (New York: Columbia University Press, 2003), 51. I apologize in advance for the cultural studies language which I will use at certain times in this essay. The debates that concern me here in relation to critical policy studies deal with universalism, historical contingency, relation of capitalism and the “line on which we think” (Balibar, “The Borders of Europe” in *Politics and the Other Scene*, pp. 87-88) or so-called theory. I follow Balibar in accepting that theoretical generalizations are important because they are the line on which we think about the relation of what it is possible to think and our given historical conditions.

<sup>5</sup> Murray Scot Tanner (The Politics of Lawmaking in Post-Mao China: Institutions, Processes and Democratic Prospects Oxford: Clarendon Press, 1999) argues that lawmaking organs in the PRC “constitute . . . an increasingly ‘ambiguous decision-making technology’, in which authority relations have blurred and power has become ever more decentralized over the last fifteen years. . . . informal ‘rules’ of lawmaking which might define the relationship between Party, government and NPC organs have remained unclear, even to the system’s experts and practitioners. . . . [consequently] various lawmaking organizations . . . continue to evolve their own unique packages of power resources which allow them to influence lawmaking in differing degrees, at different stages of the process.” (131-32) Tanner’s underlying point is that in the PRC, as in governments lawmakers “constantly face a stream of problems, some of which are viewed as especially urgent or ripe for solutions at any given time, some of which go largely unnoticed for long periods. . . . the system also produces, more or less independently, a stream of available solutions (policy proposals) . . . to address one, two or perhaps even more of the currently recognized problems. . . . [and] a stream of opportunities for making choices or decisions. These include meetings, legislative sessions, elections, annual budgets, five-year plans, major projects, regular annual legislative bills which are awaiting passage, and so on. Under ideal circumstances, the organization actually resolves a problem when the various streams intersect or ‘flow together.’” (29-30) Ngok Knglun, “Guest Editor’s Introduction:” to “The Development of the Labor Law of the People’s Republic of China (Chinese Law and Government, January-February 2000/Vol 33., no. 1, pp. 3-22) for an excellent critical analysis of the process of producing the 1991 version of the established Labor Law. This essay acknowledges the impact of political events, advocacy politics, interest politics and media opinion.

<sup>6</sup> See ACWF website for notice of this research project.

<sup>7</sup> This same organization has published volumes entitled 当代中国妇女权益保障的理论的实现 and 妇女权益保障工作常用法律法规汇编 which I have not yet located. For a recent work that draws extensively on published reports and findings of CWLSLS see Rangita de Silva-de Alwas, “Remarks to the Congressional Executive Commission on China,” February 24, 2003. Silva-de Alwas is Director of International Programs, The Spangenberg Group, which appears to have a private-public relationship with the U.S. Congress.. <http://www.cecc.gov/pages/roundtables/022403/silva.php> (visited 8/24/2003).

<sup>8</sup> 郭建梅 (Guo Jianmei, ed., and 李莉 Li Li. Associate ed., , 婚姻家庭疑难百问 (100 puzzling questions about marriage and family) 生活中的法律 (Law in life series) 北京大学法学院妇女法律研究与服务中心 (CWLSLS) (北京: 中国工人出版社, 2001) (Beijing: Zhongguo gongren chuban she, 2001). Typical questions include what to do if your parents interfere with your love life, how to find your own marriage partner, whether or not you can legally marry your cousin, material and other questions regarding divorce and its aftermath, love and marital or domestic violence, marriage in old age and atypical patterns in marriage. The format is far more “popular” than the *Directory* but the basic object is similar which is to

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inform readers about the legal options open to them and to cite substantial law. The assumption running through the “Law in life” series is that women should become literate in the law. See Barlow (forthcoming) “The Pornographic City” for the dystopic versions of this vision in which women and the entire society suffers because women are “illiterate in the law.”

<sup>9</sup> The CWLSLS web site <http://www.woman-legalaid.org.cn/anlizhm/2.htm> offers a series of Q & A such as “What should a worker do when the enterprise will not sign a contract with the worker for an unfixed period of labor?” (企业不和工人签定无固定期限的劳动合同, 工人应该怎么办?), “What sort of salary should women employees [be entitled to] draw after an abortion? (女职工流产后, 应享受何种待遇?), “Should the women be paid less than men for the same work?” (干同样的工作, 女性的工资应该比男性的少?), “Can foreign capital enterprises terminate, or end the pregnancy leave, birth leave, or suckling leaves of their female employees’ labor contracts?” (外资企业可以解除, 终止孕期, 产期, 哺乳期女职工的劳动合同吗?).

<sup>10</sup> Catherine Cheng Jie, “Conflict of Laws in China,” in The China Connection Legal Forum: The Global Network for Chinese and British Lawyers was at the time her paper was posted, a PhD Candidate at Peking University and a likely contributor to CWLSLS discussions. Cheng’s argument stresses the problem of laws, regulations, statutes etc in conflict and how conflicts can be resolved. She underlines the regulatory function of law in the PRC noting the “concept of law as an instrument” and the distinction between “rule by law” and “rule of law.” However, she stresses due process and the principle of “legitimization through procedure” which she argues is a popular topic among Chinese graduate students in legal studies. The inspiration for legitimization through procedure is the Japanese jurist Taniguchi Yasuhen. This probably represents the thinking of CWLSLS. See [http://www.enstar.co.uk/China/law/articles/legal\\_b.htm](http://www.enstar.co.uk/China/law/articles/legal_b.htm) (visited 9/27/2003).

<sup>11</sup> This list is according to the unpublished “Five-year Consulting Report” issued in 2000. I am grateful to Hilary Josephs for sharing this precious resource with me. See typescript page 23.

<sup>12</sup> See Ngok Kinglun, “Guest Editor’s Introduction to The Development of the Labor Law of the People’s Republic of China: A Comparison of Three Versions” for a discussion of the centrality of contract in labor law. See 北京大学法学院 妇女法律研究与服务中心者, *妇女法律援助案例指南* (北京: 中国工人出版社, 2000) for explanations of how various general laws work procedurally for women plaintiffs.

<sup>13</sup> Congressional Executive Commission on China, of the 108<sup>th</sup> Congress of the United States of America, July 7, 2003. <http://www.cecc.gov/pages/roundtables/070703/89103.pdf> (visited 13 Oct 2003). Amy Hall, manager for social accountability at Eileen Fisher, Inc presented a description of the mission and work of the Social Accountability International organization and Phil Fishman, assistant director of international affairs of the AFL-CIO testified on Chinese “union law” but more importantly rebutted the Fisher project as a fig leaf.

<sup>14</sup> [http://www.spangenberggroup.com/work\\_inter.html](http://www.spangenberggroup.com/work_inter.html) (visited 11/2/2003) Spangenberg also works in Cambodia, Chile and Eastern Europe where it has won “competitive bids for projects to provide technical assistance to the United States Agency for International Development’s Global Rule of Law and Human Rights Program,” according to its web page. Also “The Spangenberg Group has been a participant of the project on Promoting Access to Justice in Central and Eastern Europe since 1998. The project is funded by the Eastern European Union, European Initiative for Democracy and Human Rights and Constitutional and Legal Policy Institute (COLPI, Budapest). The project is the collaborative effort of Helsinki Foundation for Human Rights (Warsaw), Interights (London), Public Interest Law Initiative (Budapest- New York) and the Bulgarian Helsinki Committee (Sofia).” For a discussion of the Shaanxi Association for Women and the Family and its development which does not mention the collaboration of the Spangenberg group see Gao Xiaoxian (2001).

<sup>15</sup> Barlow, “Asia, Reregionalization, Gender and Scholarship” (unpublished, 2003).

<sup>16</sup> One of Tanner’s examples is a case that the ACWF brought on behalf of a “huge number of female factory workers” in order to revise the 1987 Enterprise Law. ACWF presented evidence of infringements of workers legal claims to equal pay, maternity, health and vacation rights. To handle the large number of groups and constituencies advocating various changes the draft revision committee, representing the SEC, SCRES and NPC LAWCOM invited representatives of groups and organizations whose interests would be affected by changes. Legal specialists, social scientists, economists, state-owned factory managers, Party committee secretaries, ACFTU and CASS scholars all participated. Tanner does not mention in this case the participation of an RDI-like group. However, given the interest which foundation advocates and UN

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activists have in mainstreaming “gender” as a policy category it may be that the international groups participated through the auspices of ACWF. That remains to be established. (Tanner, pp. 198-99)

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