



The Legal System of the Maternity and Parenting Leave Under the Background of China's "Three-Child" Policy: From the Perspective of the Right to Equal Employment

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Abstract. After the promulgation of China's "three-child" policy, the extension of the duration of maternity leave in various provinces has increased employers' hiring costs of female workers. As a result, the phenomenon of discrimination in female employment has become increasingly serious. Maternity leave is closely related to the realization of the right to equal employment. The uneven distribution of maternity leave, paternity leave and parental leave is one of the fundamental triggers for employment discrimination. The exercise of male reproductive rights and family responsibilities also affect employment equality, so it is imperative to improve China's legal system for maternity leave. With the aim of increasing China's childbirth rate and ensuring the realization of workers' right to equal employment, the nature and duration of maternity leave should be uniformly stipulated, mandatory leave should be established, and flexible use of leave should be supplemented.

Keywords: Three-child policy · Employment discrimination · Equal employment · Maternity leave · Mandatory leave

1 Introduction

To improve the population structure, and slow down the aging process, in May 2021, the Political Bureau of the Central Committee of Communist Party of China decided to allow a pair of husband and wife to bear three children and issued related support measures (General Office of the State Council, 2021). On August 20, with the population and family planning law amended (The National People's Congress of the People's Republic of China, 2015), the era of the "universal three-child" policy has officially begun. The number of women in the workforce has been keeping the rise, accounting for 43.5% of the total until 2020 (National Bureau of Statistics of China, 2021). With the proportion of dual-worker families increasing year by year, the pressure on female employment and

promotion is growing, which leads to a gradual depression in people's willingness to give birth.

Before the promulgation of the "three-child" policy, the government of China had implemented the "two-child" policy in 2015, which has made women bear more family responsibilities. As a result, women have less time and energy to participate in social work, which will have a severe impact on women's employment opportunities and quality (Kang & Lv, 2016). Since the "three-child" policy was enacted, people's willingness to give birth has not improved significantly. Actually, according to some scholars, the policy's effects on births and people's willingness to give birth in China would be limited (Chen & Sun, 2021). In spite of these worries, in order to implement the birth policy, the provinces are still taking measures, like lengthening maternity leave, lengthening or adding paternity leave and parental leave, and many other measures. These measures, however, further increased the labor costs of employers who hire female workers, so that many gender discrimination cases appeared in the employment market. Accordingly, women's willingness to bear children will be constantly reduced under the pressure of survival and promotion. Thus, the goal of the "universal three-child" policy will be difficult to achieve. As we can see clearly, the maternity and parenting leave is closely related to the realization of the female right to equal employment. Under the background of the "universal three-child" policy, the improvement of the legal system of the maternity and parenting leave is of great practical significance to solving the problem of female employment discrimination in China. Therefore, this article will research the reason for the problem of female employment discrimination from the legal perspective, and then find several practicable measures to avoid employment discrimination, especially gender discrimination.

2 Literature Review

In China, employers usually bear the costs of employees' maternity insurance premiums. In the maternity protection system, the academic circles are mostly concerned about the problem of medical costs for birth. They barely focus on the study of the legal system of the maternity and parenting leave. Research on holiday distribution is insufficient, for example, scholars study the leave for family care system from the perspectives of constitutional equality and put forward suggestions (Lin & Chen, 2019). In recent years, with the launch of a number of birth policies, some scholars have analyzed the legal system of maternity leave from the perspective of women's rights and interest protection. For example, some believe that the implementation of birth policies should take into account gender justice, and that the paternity leave system should be increased. In the meanwhile, supporting public services and relevant legal relief systems should be improved (Kuang & Cheng, 2016). There is also a view that after the nature of maternity leave is clarified, the parental leave is an important measure to promote childbirth, which reduces women's burden of family care and guarantees employment equality (Zhou, 2017). In addition, some scholars make quantitative analyses of the specific impact of the cost increase of female employees' leave and conclude that the extension of maternity leave would greatly increase the burden on employers (Lin Y., Comparative Studies between Maternity Leave System's Impacts on Women Labor Rights, 2018).

Although the above researches of scholars are from the perspective of the protection of women's reproductive rights to perfect the system of the family vacations, they only stay in the low-level institutional construction and fail to look at the right to equal employment and to deeply analyze the legal basis of the measures to adjust the maternity leave. Therefore, this article will analyze the causes of gender inequality under the current birth protection system, and the problems existing in the adjustment of the legal system of maternity leave under the "three-child" policy. While this paper will explore the legislative logic of the legal system of the maternity and parenting leave from the perspective of the right to equal employment, and put forward suggestions for improving the legal system in China based on the excellent legislative experience of foreign countries.

3 The Dilemma of the Legal System of the Maternity and Parenting Leave

A. Improving the Maternity Insurance System Cannot Solve the Problem of Discrimination

To ease employers' economic pressure on childbirth and solve the problem of female employment discrimination, some scholars put forward a suggestion that the burden of maternity insurance should be socialized, transforming the current "corporate welfare" into "social welfare". Only when the costs of maternity insurance are borne by employees, employers and the government, can "maternity welfare" be realized fairly (Yin & Zhou, 2020). Meanwhile, they think this measure would also increase the number of women of childbearing age in formal private enterprises (World Social Protection Report, 2019). Some scholars also propose to expand the coverage of maternity insurance to unemployed women, flexible employment women, floating women, rural women and other groups, so as to ease the pressure on the income of maternity insurance and enhance employees' ability to resist risks (Zhang & Li, 2015). Although these measures can alleviate the economic pressure on employers and enhance the support capability of female employees, they are unable to solve the problem of female employment discrimination.

The basic reason for employers' discrimination against female employees is the difference in economic costs of hiring employees of a different gender. These costs can be divided into two parts. One is direct economic costs, namely the costs employers pay for employees' social insurance or the costs of maternity subsidy employers may bear if they do not participate in social insurance¹. The other one is indirect economic costs, mainly including the costs of recruiting and training new staff for replacement in the duration of the maternity and parenting leave, the costs of salary during the leave,

¹ Article 8 of the Special Rules on Labor Protection of Female Employees stipulates: "The maternity subsidy for female employees who have participated in maternity insurance during their maternity leave shall be paid by the maternity insurance fund and calculated on the basis of the average monthly wages of employees paid by employers during the previous year; the maternity subsidy for female employees who have not participated in maternity insurance shall be paid by the employers and calculated on the basis of the wages of female employees prior to their maternity leave."

pregnancy costs (reducing workload leads to reducing employers' income) and so on (Lin Y., *Comparative Studies between Maternity Leave System's Impacts on Women Labor Rights*, 2018).

In terms of direct economic costs, overall, the socialization of the burden of maternity insurance can only reduce the burden of employers who insure employees, but cannot decrease the difference in direct economic costs that leads to employment discrimination. Because of the structure of maternity insurance, the costs paid by employers are the same for both male and female workers. However, the difference in direct economic costs mainly happens in illegal circumstances where employers fail to insure their employees. When employers have no special requirements for employees' gender, the costs of maternity subsidy for female employees and medical costs will be lower when not insuring employees. Besides, the economic costs will decrease when there are fewer female employees in this circumstance. At this time, the economic costs of employing male and female workers are different, so employment discrimination appears accordingly. For those employers, since employing male employees can avoid the payment of maternity subsidies and medical costs without joining maternity insurance, even if the premiums of maternity insurance get lower, they might still not hire female workers. Therefore, socializing the burden of maternity insurance cannot solve this gender discrimination.

It can be seen that improving the rate of employee participation in maternity insurance is a useful way to narrow the gap between direct economic costs due to gender. This measure is also the key to guaranteeing the female right to equal employment from the aspect of maternity insurance. In the meantime, the goal of equal employment can only be achieved through improving labor inspection and increasing the cost of breaking the law.

However, while direct economic costs are balanced, there are also indirect economic costs which is one of the fundamental factors of the unequal treatment of women in the workplace. Therefore, in the context that the improvement of the maternity insurance system cannot solve gender discrimination alone, the adjustment of the legal system of the maternity and parenting leave may become a breakthrough to realizing the female right to equal employment.

B. The Maternity and Parenting Leave System Under the “Three-Child” Policy Leads to Prominent Employment Discrimination

The legal system of the maternity and parenting leave is an important way to reflect the distribution of the costs of employees' time during childbirth and parenting. China's laws uniformly stipulate the minimum duration for maternity leave and support the implementation of parental leave, but do not specify paternity leave.

Specifically, at the level of national legislation, the Population and Family Planning Law of the People's Republic of China (hereinafter referred to as “Population and Family Planning Law”) defines the concept of maternity leave, regards the extension of maternity

leave as an incentive measure and welfare treatment, and supports the parental leave². “The Labor Law of the People’s Republic of China (hereinafter referred to as “Labor Law”), the Special Rules on the Labor Protection of Female Employees and the Social Insurance Law of the People’s Republic of China (hereinafter referred to as “Social Insurance Law”) set the duration and treatment of maternity leave that female worker ought to enjoy respectively³. At the level of local legislation, after the promulgation and implementation of the “universal three-child” policy, each province has its own regulations on the duration of maternity leave, paternity leave, and parental leave. Up to May 25, 2022, the specific duration of the maternity and parenting leave in each province is shown in Table 1.

As can be seen from the adjustments, to improve women’s willingness to give birth, most provinces extend maternity leave significantly. The majority of extended days of maternity leave are 30 days, and only a few provinces extend maternity leave by 10 to 20 days. The total days of maternity leave in all provinces have reached 128 days or more. Secondly, some provinces extend paternity leave slightly, mostly between 5 and 20 days, and the total days of paternity leave are fewer than 30 days. The days of parental leave vary from 5 to 15 in most provinces, while a small number of provinces do not provide parental leave. In addition, the horizontal comparison between the three kinds of leave shows the following two things: to begin with, the gap between maternity leave and paternity leave is increasing, which increases the costs of women’s childbirth time, and might enhance the possibility of female employment discrimination. Next, although parental leave is clearly mentioned in the law, it is not popular in practice. Its value and aim cannot be fully realized due to the lack of specific implementation rules.

In 2022, an authoritative recruitment platform in China analyzed women’s development in the workplace in the past year. According to the survey data, after the issuance of

² Article 25 of the Population and Family Planning Law stipulates: “The couples who bear children in accordance with the provisions of laws and regulations may receive the rewards of extended maternity leave or other welfare treatment. The state supports the creation of parental leave at the places where conditions permit.”

³ Article 62 of the Labor Law stipulates: “Birth-giving women workers shall be entitled to maternity leave no shorter than 90 days”. Article 7 of the Special Rules on Labor Protection of Female Employees stipulates: “The maternity leave of female employees shall be 98 days, including 15 days of antenatal leave. Extra maternity leave of 15 days shall be granted in case of dystocia. Female employees who bear more than one baby in a single birth shall be granted extra maternity leave of 15 days for each additional baby borne”. Article 8 of the Special Rules on Labor Protection of Female Employees stipulates: “The maternity subsidy for female employees who have participated in maternity insurance during their maternity leave shall be paid by the maternity insurance fund and calculated on the basis of the average monthly wages of employees paid by employers during the previous year; and the maternity subsidy for female employees who have not participated in maternity insurance shall be paid by the employers and calculated on the basis of the wages of female employees before their maternity leave”. Article 54 of the Social Insurance Law stipulates: “Where an employer has paid the maternity insurance premiums, its employees shall enjoy the maternity insurance benefits; and the unemployed spouse of an employee shall enjoy the maternity medical expense benefits in accordance with the relevant provisions of the state. The funds needed shall be paid from the maternity insurance funds”.

Table 1. Statistics on the Adjusted Days of the Maternity and Parenting Leave in Different Provinces (except Hong Kong, Macao, and Taiwan) (Unit: Day) (The information is derived from the “Population and Family Planning Regulations” of each province included in the Chinese website named “PKU LAW”, and the website address is: <https://sclx.pkulaw.com/law>. The time for collecting information is May 25, 2022.)

Provinces	Extension of Maternity Leave	Total Maternity Leave	Extension of Paternity Leave	Total Paternity Leave	Total Parental Leave
Jiangsu	30	128	0	15	0
Guangxi	10 (First Child) 20 (Second Child) 30 (Third Child)	148/158/188	5	30	0
Beijing	30	158	0	15	10
Tianjin	30	158	8	15	10
Hebei	0 (First/Second Child) 30 (Third Child)	158/188	0	15	10
Shanxi	0	158	0	15	15
Inner Mongolia	0 (First/Second Child) 30 (Third Child)	158/188	0	25	10
Liaoning	0	158	5	20	10
Shanghai	30	158	0	10	10
Zhejiang	30 (First/Second Child) 60 (Third Child)	158/188	0	15	10
Anhui	0	158	20	30	10
Fujian	0	158–180	0	15	10
Shandong	0	158	0	7	0
Hunan	0	158	0	20	10
Hubei	30	158	0	15	10
Sichuan	0	158	0	20	10
Guizhou	0	158	0	15	10
Yunnan	0	158	0	30	10/15

(continued)

Table 1. (continued)

Provinces	Extension of Maternity Leave	Total Maternity Leave	Extension of Paternity Leave	Total Paternity Leave	Total Parental Leave
Shaanxi	0 (First/Second Child) 15 (Third Child)	158/173	0 (First/Second Child) 10 (Third Child)	15/25	10
Ningxia	0	158	0	25	20
Xinjiang	0	158	0	15	0
Chongqing	30	178	5	20	5–10
Ji Lin	22	180	10	25	40
Heilongjiang	0	180	0	15	20
Gansu	0	180	0	30	30
Guangdong	0	188	0	15	10
Jiangxi	30	188	15	30	20
Henan	0	188	0	30	20
Hainan	0	188	0	15	10
Qinghai	30	188	0	15	30
Tibet	0	365	0	30	0

the “three-child” policy, 61.2% of women were asked about marriage and childbearing in job hunting. It is an increase of 5.4% over the previous year and much higher than 32.3% of men. In addition, 38.3% of women said marriage and childbearing would affect their career prospects, while only 17.9% of men hold the same view. In the group of married employees who have given birth, 23.1% of women said fathers “basically had no responsibility for housework and child care”, 66% of women had been full-time mothers and many women were suffering or had suffered “almost widowed parenting” (Zhilian Institute, 2022). The extension of maternity leave and its difference from paternity leave will further weaken the possibility of women returning to the workplace after giving birth. In addition to Pop Mart’s recruitment event of “childbirth planning” in June 2021 (Sun, 2021), in March 2022, China Newsweek exposed that the implicit discrimination in the job market was increasing on account of the extension of the maternity and parenting leave. Because of the costs of longer maternity leave, most employers do not hire women if they can hire men. In the process of career advancement, women will also be less considered in key positions (Zhao, 2022). These mean that compared with men, the “three-child” policy brings more trouble to women in the workplace, and the adjustment of maternity leave has also become an important factor when employers recruit workers.

Using “maternity leave” and “dismissal” as the full-text keywords, searching the judicial case and law library named “PKU LAW”, there are 720 relevant cases about labor disputes and personnel disputes. There are 23 cases from August 20, 2021, to February

25, 2022, as well as 20 cases in five months prior to August 20, 2021 (PKULAW, 2022). In the “Chinese Court Documents Website”, the results of 485 cases concerning personality rights disputes, labor disputes, and personnel disputes can be retrieved, among which 39 cases are between August 20, 2021, and February 25, 2022, and 22 cases are in the five months prior to August 20, 2021 (China Judgements Online, 2022). It can be found that in the majority of those cases, employers disproved employees’ charges about unlawful discharge on the ground of absenteeism or not up to the post. But digging inside the case, female employees’ maternity leave and employers’ unwillingness to pay the maternity subsidy are important factors for employers to terminate the contract. The results indicate that in judicial practice, there are large numbers of cases in which employers lay off female employees because of maternity leave. After the “three-child” policy was promulgated, these kinds of cases even increased slightly. According to the comprehensive inference of related news and other data, the adjustment of the maternity and parenting leave in all provinces has an indelibly negative impact on the job hunting and career development of women.

Hence, after implementing the “three-child” policy, although each province in China established paternity leave and parental leave to balance male and female reproductive burdens, the adjustment of the system of the maternity and parenting leave cannot realize the equality of men and women in employment. Under the background of the “three-child” policy, if we want to achieve equal employment through adjusting the legal system of the maternity and parenting leave, we must first analyze the legal relationship between the leave and employment discrimination, and then determine the nature and duration of leave according to the rights and obligations of each subject.

4 Legal Foundations of the Maternity and Parenting Leave: Realization and New Understanding of the Right to Equal Employment

The legal system of the maternity and parenting leave is essentially an important guarantee for a country to realize the reproductive rights of employees, and is also related to the realization of employees’ right to equal employment. The analysis of the basic legal relationship in the system of the maternity and parenting leave shows that employers and the employees are the most direct legal subjects in this legal relationship. It means that employees have reproductive rights and the right to taking the leave, while the employers are the subject of duties that the employers exempt the employees from work in their duration of childbirth and parenting. The duties of employers are essentially the result of state intervention in labor relations for the specific legitimate purpose of realizing basic human rights and social production and reproduction. However, in addition to this basic relationship, the allocation of the maternity and parenting leave also refers to the realization of employees’ right to equal employment. In this legal relationship, the subjects of the law are still the employers and the employees. The employees enjoy the right to equal employment, while the employers need to perform the obligations of not discriminating against the employees’ birth behaviors and the subjects of birth. This is an important embodiment of the nation’s realization of equal rights in the labor field. Therefore, the analysis of the legal system of the maternity and parenting leave

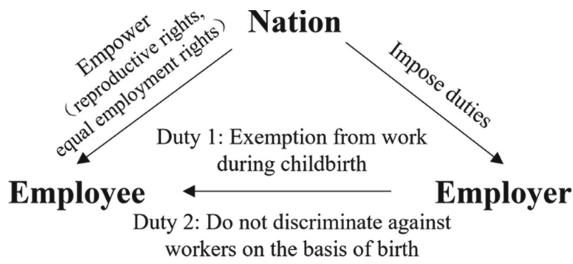


Fig. 1. The Structure of Legal Relationship of Maternity Leave

from different perspectives will present different legal relationship structures (Fig. 1 can visually show these legal relationships).

The right to equality is a bundle of rights whose form in the labor field is the right to equal employment. The distribution of the maternity and parenting leave is related to the realization of the right to equal employment for employees, especially female employees. Therefore, the following is to analyze the legal structure of the maternity and parenting leave from the perspective of the right to equal employment, while exploring the discrimination phenomenon in the implementation of the maternity and parenting leave.

A. The Realization of the Maternity and Parenting Leave and the Right to Equal Employment

1. The Source and Legal Structure of the Right to Equal Employment

The right to equal employment is a derivative right of the right to equality and the right to work (Wang B., 2010), and it is the embodiment and extension of the right to equality in the labor field. It is also the manifestation of the right to subsistence and development (Zhang Y., 2009). It means that the employees have equal employment opportunities, equal treatment, equal identities, and equal rules. In China, the right to equal employment comes from the Constitution, Labor Law and other relevant laws. First of all, from the constitutional level, articles 33, 42 and 48 of the Constitution of the People’s Republic of China (hereinafter referred to as the Constitution) respectively stipulate the right to equality of citizens, the labor right, and the right to gender equality in the labor field⁴. Visibly, the right to work is one of the laborer’s basic human rights. The right to work is an important part of labor rights, which includes the right to equal employment and the right to free choice of employment. Therefore, the right to equal employment is one of the specific manifestations of constitutional rights in the labor field (Zhang W., 2006). Secondly, from the perspective of labor laws, articles 3 and 13 of the Labor Law and article 3 of the Employment Promotion Law of the People’s Republic of

⁴ Article 33 of the Constitution stipulates: “All citizens of the People’s Republic of China are equal before the law”. Article 13 of it stipulates: “Citizens of the People’s Republic of China have the right as well as the duty to work”. Article 48 of it stipulates: “Women in the People’s Republic of China enjoy equal rights with men”.

China (hereinafter referred to as the Employment Promotion Law) stipulate the right to equal employment⁵. Articles 20, 26, 27, 28 and 31 of the Labor Law stipulate equality for urban and rural employees, equal employment opportunities provided by employers, equality for male and female employees and equality for employees of all ethnic groups respectively. These legal norms stipulate the right to equal employment in principle and protect different types of the right to equal employment respectively, especially in gender equality.

The right to equal employment is one of the important legal rights protected by anti-discrimination laws. The structure of the right to equal employment contains two parts including human dignity and employment opportunity. In practice, the employee obtains relief by filing an infringement lawsuit in court, and later China's civil cause of action stipulates that the equal employment right is recognized as a cause of action under the tort dispute, but this remedy method is flawed. The right to equal employment is characterized by private rights in the practice of judicial remedies, but considering its legal structure, it shall be in the field of labor law. The disputes related to this right shall be special torts and applicable for labor arbitration or other dispute handling procedures (Wang X., 2020). The maternity and parenting leave mainly refer to gender equality of the right to equal employment, so the following mainly discusses the legal system of the maternity and parenting leave from the view of gender equality. "The first prerequisite for women's liberation is the return of all women to public work" (Engels, 1972). Therefore, realizing equal treatment of women in the labor market and labor relations is an important part of guaranteeing women's gender equality. The economic and time costs of the maternity and parenting leave are bound to affect the realization of equal employment opportunities and equal treatment in the legal structure of the right to equal employment.

2. Opposition and Coordination: The Right to Equal Employment and Employment Autonomy in the Maternity and Parenting Leave

The legal system of the maternity and parenting leave is closely related to the realization of women's basic rights. In addition to the reproductive right, the right to equal employment is also one of the values pursued by the legal system. The childbirth and parenting leave in China's legal system includes three types, namely maternity leave, paternity leave and parental leave, among which paternity leave has not been written into the national legislation. Maternity leave separates female employees at the age of childbearing from their career development, making labor relations tend to be unstable. The laws stipulate that the duration of maternity leave for female employees should not be fewer than 98 days. After the "three-child" policy was promulgated, all provinces

⁵ Article 3 of the Labor Law stipulates: "Laborers have the right to be employed on an equal basis, choose occupations, obtain remunerations for labor, take rests, have holidays and leave, receive labor safety and sanitation protection, get training in professional skills, enjoy social insurance and welfare treatment, and submit applications for settlement of labor disputes, and other labor rights stipulated by law". Article 13 of it stipulates: "Women shall enjoy equal rights as men in employment". Article 3 of the Employment Promotion stipulates: "Workers shall have the right to equal employment and to choose a job on their own initiative in accordance with the law".

extended the duration of maternity leave to 128 days or more, far exceeding the other two kinds of leave. Therefore, the time for female employees to return to work after giving birth has been extended. As a result, they are faced with more severe problems of re-employment, salary reduction, post-transfer and unemployment.

The conflict between the employer's employment autonomy⁶ and the laborer's right to equal employment is the essential cause of employment discrimination. Considering the possible reproductive costs brought by women, employers may exercise their employment autonomy to maximize their interests. Without legal intervention, they may not hire female employees or treat female employees unfairly (Zhang W., 2006). In this case, the purpose of the employer's exercise of employment autonomy is to hire men to avoid the costs of maternity leave and gain short-term economic interests. However, it influences the realization of the female right to equal employment.

In order to improve female employment discrimination, it is necessary to clarify the value hierarchy between the two basic rights. The right to equal employment and the employment autonomy are equal in legal status, but the two rights have different interest demands. If conflict happens, the government, as the authority, has the obligation to balance and resolve it. Since "to make things conform to justice (fairness), there must be a balance without partiality. The law is exactly such a middle way of balancing" (Aristotle, 1997). Since China established its labor market in 1993, the opposite state between the right to equal employment and the employment autonomy has basically been formed in China's labor law field. The incongruity problem of these two rights in an imperfect competition market economy has been gradually pointed out by the academic circle. Especially after the former Ministry of Labor put forward to use the principle of "merit-based"⁷ to coordinate the relationship between the two rights, women, disabled people and peasant workers are increasingly discriminated against by employers for non-personal reasons (Yan, 2016). There is no special law in China to divide the boundary and the hierarchy of the two rights. Therefore, in order to realize the "coordination of the two rights", we can only consider the basic value and purpose of the law, and then determine which rights should be affirmed first according to the specific situation. The right to equal employment reflects equality, while the employment autonomy reflects freedom. Equality and freedom are both extremely important values and are not contradictory. But conflict may occur in specific law fields (Shu, 2012). From the connotation of the rights, the aim of the right to equal employment is realizing substantial justice, demanding equal treatment under the same circumstances and reasonably different treatment under different circumstances. Meanwhile, based on protecting employees' rights prescribed by law, the employment autonomy allows employers to implement reasonably different treatment for different workers. It follows that the employment autonomy is based on

⁶ Employment autonomy is the employers' right that according to the need of business management and laborers' performances, the employers can determine the way of using employees, whether to hire or not, and so on. Article 8 of the Employment Promotion Law stipulates that an employer is entitled to enjoy the right to hire workers on its own initiative in pursuance of the law.

⁷ The principle of "merit-based" is that employers should only consider employees' qualifications, and when employees have the same qualification, they will be offered the same opportunity.

the realization of equal treatment under the same circumstances. Nevertheless, the word “reasonably” is confusing, which is easy to cause conflict when applied to different legal systems and practices. Therefore, the key point to resolving the conflict between the two rights lies in the judgment of “reasonably” in the case of different treatment under different circumstances.

To judge whether reasonable or not, firstly, it is needed to return to the nature of the two rights. The nature of rights is the key to determining whether the rights can be protected. The right to equal employment is protected by the anti-employment discrimination law, bearing the basic function of realizing the right to subsistence (Li X., 2008). The right to subsistence is a basic human right and a positive right, which means it needs to be realized through the positive behaviors of the state (Huang, 2003). It is also a claim that requests the state to protect and help the economically weak (Osuka, 2001). Therefore, the right to equal employment is a positive right because of its power to guarantee the right to subsistence. It requires the state to take action to realize its interest demands. Hence, the priority of the right to equal employment over other negative rights is confirmed to some extent. The employment autonomy, in the meantime, belongs to the right to freedom, which means that the private subject holds the right based on the market economy without the help of other forces. It is a negative right. The state will intervene only when the right holder has a conflict with others. Thus, from the perspective of the nature of rights, female employees are in a relatively weaker position than their employers, so the state shall take positive actions to protect the right to equal employment and restrict employers’ employment autonomy.

Secondly, it is significant to compare the rationality and necessity of the interest demands of the two rights. The right to equal employment and the employment autonomy involves two aspects of one problem. In other words, the obligation subject of the former is the same as the right subject of the latter. The implementation of the two rights relies on the employment actions of employers, so it is necessary to analyze the rationality of employers’ discriminative employment actions under the background of the maternity and parenting leave. In this case, the principle of proportionality in public law can be used for reference. The employers’ discriminative treatment behaviors can be analyzed from the three levels of appropriateness, necessity and proportionality (Li X., 2008). Appropriateness means the purpose and means of discriminative behaviors should be legal and consistent with general cognition. From the purpose of behaviors, the discriminative behaviors of employers toward female employees are based on the result of the pursuit of maximum efficiency, which is rational. But under the background of the maternity and parenting leave, it does not have legality. Inequality is the result of one’s previous experience and talent is not deserved” (Rawls, 1988). Since giving birth is the female inborn ability, except for some jobs with “imminent requirements”, employers must not restrict employees’ right to equal employment because of the factor of birth, otherwise the general principle of justice may be violated. What is more, not only the personal dignity, social value and political value of female employees will be damaged, but also the ethical and order foundation of the community will be influenced (Yan, 2016). After deliberation with the principle of proportionality, it can be seen that the discriminative behaviors of the employers are not reasonable. Therefore, the discriminative treatment of employers is unreasonable under the background of the maternity

and parenting leave. Although the economic interests of employers are significant to some extent, after balancing the interests of the two rights, the realization of the right to equal employment has a higher value.

Then, when the two rights conflict, how to achieve the right to equal employment by inhibiting employment autonomy? In other words, how to maintain the female right to equal employment while minimizing the restrictions on the employment autonomy in order to achieve “the coordination of the two rights”? This is a difficult problem that the theorists have been discussing. Some scholars suggest restricting the abuse of employment autonomy by defining the boundary of the two rights (Li X., 2008). But this way can only establish the boundary of the two rights. The protection of the right to equal employment cannot be further strengthened. To realize the right to equal employment, it is still in need to take different measures based on the cause of discrimination. After the promulgation of the “universal three-child policy” in 2021, the adjustment of the maternity and parenting leave in all provinces overemphasizes the importance of the maternity leave while ignoring the employment of women at the age of childbearing, which is not in line with the legal and practical value. Although the provinces gradually increase paternity leave, due to the short duration, the difficulty of implementation and other reasons (Jing, 2017), it is hard to reduce female employment discrimination⁸. The abuse of employers’ employment autonomy makes it difficult to realize the female right to equal employment. In view of the causes of discrimination in this situation, the coordination of the two rights needs to be realized through the highest legal authority, i. e. setting the national legislation and modification of the legal system of the maternity and parenting leave. These measures ought to decrease the distinction of the time costs between male and female employees as much as possible, and should be at the expense of minimum sacrifice of employment autonomy.

3. Equality and Balance: Discussion on the Rationality of the Adjustment of the Maternity and Parenting Leave

Firstly, the unreasonable distribution of the current maternity and parenting leave is prominent, which becomes the cause of implicit discrimination. In order to avoid high costs and cumbersome substitution procedures, employers begin to discriminate against women implicitly. Such discrimination will result in the loss of equal employment opportunities and labor development opportunities for female employees. Moreover, it may fundamentally deviate from the basic value of the right to equal employment. Therefore, it is necessary to improve the current legal system of the maternity and parenting leave in China to balance the distribution of the costs of birth time.

⁸ Provincial legislation provides paternity leave and nursing leave for men between 7 and 30 days, which is much shorter than maternity leave. Some enterprises do not deny the existence of paternity leave, but refuse to take applications on the ground of the internal rules: “paternity leave shall not be taken within one year of employment”, or delay and require workers to adjust the leave on account of “too much work”. If the employers hold the excuse of “the demands of the work” to refuse to grant employees full paternity leave, then usually the workers can only give up their rights and choose to obey the arrangements. Because if workers insist on applying for leave at this time, they will face the risk of dismissal.

Secondly, adding paternity leave and parental leave in various provinces successively is an important measure to realize male equal reproductive rights and increase male time costs of childbirth and parenting to balance the value between males and females in the labor market. Based on physiological reasons (including childbirth, etc.), women have less productivity than men, so employers may discriminate against female employees “rationally” in consideration of their performance. If the law requires eliminating rational discrimination, the employers must sacrifice their benefit partly to adopt low productivity groups, or take measures to eliminate the productivity gap between groups (Yan, 2016). Obviously, setting and adjusting maternity leave, paternity leave and parental leave is a great way of optimizing the allocation of employment resources and a necessary measure to realize the right to equal employment.

A. The Realization of Reproductive Rights and Sharing of the Responsibilities of Family Care

The paternity leave and parental leave also affect the realization of reproductive rights and equal sharing of the responsibilities of family care, which can not only guarantee the all-round human development but also form a more harmonious employment environment. What is more, they can even promote the realization of the right to equal employment and the virtuous circle of employment ecology.

1. Reasonable Distribution of the Maternity and Parenting Leave Ensures the Realization of Reproductive Rights

The implementation of reproductive rights can not only rely on the maternity leave. The improvement of the paternity leave system can also better realize the health care for puerperae before and after childbirth, which also makes male reproductive rights come true. On the one hand, since puerperae need to maintain physical and mental health, paternity leave can provide time for male employees in the family to take care of puerperae, which can speed up the process of women’s recovery. In addition, it is also able to help women to return to the workplace earlier, as well as reduce the occurrences of employment discrimination (Wang & Li, 2012). On the other hand, if the maternity leave is too long but paternity leave is too short or even nonexistent, women will be more likely to suffer discrimination in the workplace. As a result, women’s desire to give birth will decrease. As the movement of reproduction needs the cooperation of husband and wife, men in this situation might also be difficult to realize their reproductive rights. In short, the distribution of maternity leave and paternity leave is not only an important measure to ensure the reproductive rights of men and women, but also a necessary way to improve women’s disadvantaged position in the workplace.

2. New Understanding of Male Maternity and Parenting Leave from the Perspective of Family Responsibility

One of the main reasons for employment discrimination against women of childbearing age is that they usually spend much more time taking care of their children and doing

housework than men do. A survey in Wuhan shows that in 92.69% of families, women spend more time than men on parenting and housework, 27.04% of women miss vocational training and self-improvement due to childbirth and child-rearing and 13.10% of women workers feel very difficult to work (Yin & Zhou, 2020). The essential reason for this phenomenon is that in the traditional division of family labor, men rarely share family affairs such as child-rearing. Pregnancy and child-rearing make women struggle constantly and become exhausted from work and family, which has a serious impact on women's health and work status. Since the reform and opening up, China has been advocating equality between men and women in the fields of law, economic policy and social culture. Women can also complete work of high quality, especially in the currently booming tertiary industry. Mental labor gradually replaces manual labor, and hence the gap between women and men in work efficiency and quality is very narrow. Driven by the development of social productivity, women's role in the traditional family is no longer unique and exclusive. The United Nations also says that parenting and housework are not the sole responsibility of women and should be shared by both men and women.

Many European countries have clear regulations on male maternity and parenting leave. After the enactment of the Federal Childcare Allowance Act in 2001, Germany changed parental leave into "parental time", emphasizing that child-rearing is not only a function of rest but also an important time for fathers to participate in child-rearing. Sweden carried out the reform of parental insurance in 1974. In this reform, they extended the subjects of parental leave to male workers, allocated 90 out of 480 days of paid maternity and parenting leave to males and the rest time can be freely negotiated between parents (Yu, 2022). The countries of the Organization for Economic Cooperation and Development (OECD) have set up paternity leave, care leave, parental leave and other leave related to childbirth and parenting, among which the paid paternity leave for fathers can reach 8.1 weeks and some countries have set aside 13 weeks or more paternity leave (Peng, Xu, Zhang, & Zhang, 2019).

Therefore, setting up paternity leave and parental leave from the national level can not only help the implementation of male reproductive rights but also keep up with the legislation trend of the international community. It will ensure the responsibilities of male family care and alleviate the pressure on women. In this way, women can return to work faster and better after giving birth so as to avoid discrimination. In addition, the gap between paternity leave and maternity leave should not be set too large at present. Although only women can give birth in the biological sense, the laws and policies related to childbirth and parenting protection should not only focus on protecting women and ignore male reproductive responsibilities. Overprotection of women is also a double-edged sword. The measures to extend maternity leave, for example, will not narrow the gender gap but worsen the employment environment (Lin & Wang, A Study on the Protection of Rights and Interests of Female Workers during Their Maternity Leave and Lactation Period in Workplace, 2021).

5 Suggestions for Improving the Legal System of the Maternity and Parenting Leave in China

Through the above analysis, after the "three-child" policy was promulgated, the adjustment of the maternity and parenting leave in each province, especially the extension of

maternity leave further aggravates female employment discrimination. Only by reasonably setting and adjusting the legal system of the maternity and parenting leave can the cost of childbirth and parenting be better balanced. What is more, the employers can be restrained from abusing the right to employment autonomy and the value of the right to equal employment can be realized finally. Therefore, based on the current implementation of the maternity and parenting leave, this article puts forward several improvement suggestions focusing on the adjustment of China's maternity and parenting leave from the perspective of the right to equal employment. These suggestions may achieve the aim of balancing the costs of time between men and women in childbirth.

A. The Nature and Duration of Maternity Leave and Paternity Leave Shall be Stipulated Uniformly

First of all, the nature of maternity leave needs to be clarified by different stages according to the physiological needs of female childbirth, and the duration of antenatal and postnatal leave should be reasonably adjusted. On one hand, pregnant women need to prepare for the expected date of childbirth, and maternity leave must include the time of preparation. The Special Rules on the Labor Protection of Female Employees provide that women can take 15 days of antenatal leave, which is in line with actual needs. In reality, women are in the most vulnerable state 30 days after giving birth when they need to rest for postnatal recovery. Thus, antenatal 15 days and postnatal 30 days of maternity leave should be unified as mandatory and exclusive leave. On the other hand, in order to achieve the aims of balancing the costs of time during childbirth and parenting and promoting women to return to the labor market, 30 days of postnatal leave ought to be adjusted appropriately to adapt to the system of paternity leave, reducing the duration difference of leave between men and women. However, it should be noted that such a provision does not mean that maternity leave is only 45 days. The duration of maternity leave should be adjusted on the basis of mandatory leave to satisfy individual needs, such as dystocia or multiple births should have extended maternity leave according to women's physiological needs.

Secondly, paternity leave is an important design to promote male workers to fulfill their obligations to care for family and achieve equal employment between men and women. The right of male workers to paternity leave cannot be abandoned and it should be set as mandatory and exclusive leave to prevent men from taking less leave. Paternity leave can encourage men to participate more in household work to balance work and family (International Labour Conference, 2009). If men take less leave, it will lead to two results: firstly, not only the health of puerperae and children cannot be guaranteed, but also the right to equal employment for female workers cannot be realized. Secondly, the omission of sharing family obligations will influence social harmony and stability. Therefore, paternity leave needs to be nationally stipulated as mandatory and exclusive leave to realize its value. In terms of the duration of leave, paternity leave should cover the puerperal period as far as possible to improve maternal health, and 45 days of mandatory leave is appropriate. In the Two Session of 2022, the delegate Shengnan Jiang put forward a suggestion to increase paternity leave to 30 to 42 days, which mainly considered that the puerperal state is 42 days. At this time, the puerperae are in great need of care. (Wang C., 2022).

It should be noted that the mandatory and exclusive leave ought to not only ensure the realization of the right to equal employment but also improve men's participation in childrearing and family care. Therefore, the labor division difference between men and women cannot be ignored. The duration of paternity and parental leave for men should base on the actual role that men can play. If men at home cannot play a supplement role in childrearing and parenting, increasing the duration of their leave will reversely affect the development of their families. Under the circumstances, if the maternity leave cannot be flexibly arranged, the subject of paternity and parental leave can demand less leave. However, such special provisions might be maliciously used, especially in the field of paternity leave. Therefore, in this special case, it is necessary to regulate the procedure of applying for decreasing leave. It should be required that the special application needs to be rose by the special male employee's wife, and the wife should be present in person and give some credible evidence to avoid moral hazard.

B. Maternity Leave and Paternity Leave during the Postnatal Lactation Stage Shall be Flexibly Arranged

After clarifying the nature of maternity leave and paternity leave, the experience of flexible leave in Nordic countries can be used to balance the time between “work-family” for both men and women. Both husband and wife can freely negotiate the number of leave days, but the results of the negotiation should be submitted to the relevant departments and the difference in the number of days between parents should be within a certain range. For example, 80% of the duration of parental leave in Sweden is used before children's age of 4, and as long as applying to relevant departments in advance, it can be flexibly used according to the working hours of 100%, 75%, 50%, and 12.5% per day. The United Kingdom allows parents to use 52 weeks of parental leave flexibly in three separate periods (Yu, 2022).

In addition, the maternity and parenting leave and maternity insurance have a close relationship. In addition to upholding the principle of equality between men and women and promoting men to take responsibility in the family, the duration of maternity leave and paternity leave should be considered from the view of economic costs. First of all, based on human rights, 15 days of antenatal leave and 30 days of postnatal leave must be given to both men and women compulsively, which cannot be exchanged or canceled. In this case, the duration of maternity leave shall be at least 45 days, and the duration of paternity leave is the same. Secondly, considering the costs of time and the depreciation of human capital caused by the leave, besides the expenditure of paternity leave, the total expenditure of the fund of maternity insurance for one birth should not exceed the expenditure of 98 days of mandatory maternity leave. Hence, the national unified regulations of the total days of the flexible use of leave should not exceed 53 days. In order to avoid unfair distribution of leave days for both husband and wife, the difference of the duration between parents had better be no more than 7 days, taking one week as a buffer period. In addition, each province can enact local regulations in accordance with the legislative purpose and value.

C. Mandatory Parental Leave with Flexible Arrangements Shall be Set Up

As an important tool to fulfill the responsibilities of family care, parental leave also affects the formation of an equal employment environment and should be clearly stipulated in national legislation. Parental leave is for family members to take care of children together, which needs to be realized by both parents. As a necessary leave to fulfill the responsibility of childrearing, parental leave should be defined as mandatory leave, which cannot be canceled or decreased. However, the subjects of parental leave are both parents and the responsibilities cannot be clearly divided, so there is no need to stipulate its exclusivity. Parents can take flexible leave to complete their responsibilities of parenting. The actual execution can refer to the shared parental leave and the allowance system of Nordic countries, such as Sweden, which stipulate the leave can be flexibly used in units of 12.5%, 50%, 75% and 100% per day. Considering the treatment, since childrearing is not only the obligation of a family but also the common responsibility of the country and society, the fund of maternity insurance should be used to pay the allowance of the parental leave while socializing the burden of maternity insurance.

6 Conclusion

The current childbirth policy cannot fundamentally solve the problem of the low child-birth rate. Instead, it will prompt employers to not hire women or restrict the employment of women due to the increasing costs. Therefore, the problem of female employment discrimination is becoming prominent. One of the main causes of this problem is the incomplete legal system of the maternity and parenting leave in China. During the leave, employers face pressures of both economic costs and time costs and have a weak ability to resist the risk, which increases female employment discrimination. Only by adjusting the law system of the maternity and parenting leave and reducing the difference in the costs between employing men and women can employment discrimination be reduced. In addition, the maternity and parenting leave are closely related to the realization of both male and female childbirth rights, and affect the distribution of the responsibilities of family care. A reasonable legal system of the leave can guarantee women's health and safety during childbirth, better realize male rights to reproduction and also promote men and women to find a balance between work and family. This measure can truly make people's all-round development come true, promote a better employment environment and finally realize employment equality. In conclusion, it is imperative to improve the legal system of the maternity and parenting leave in China with the following measures. The nature and duration of three kinds of leave should be stipulated at the national level, and the treatment during leave should be clarified, so as to have access to equal employment and coordinated economic development.

However, this article still exists some limitations as follows: On the one hand, the measures above are related to the system of maternity insurance, so if we want to make the suggestion come true, there are a lot of other studies to be done. On the other hand, this article analyzes the maternity and parenting leave and the female employment discrimination just in the legal field. It is also important for scholars from other academic fields to research this problem.

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