



Research Report
Women's Rights Team
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By:

Women's Rights Team

(Idil Igdir

Ruhama Yilma Abebe

Linda Osman

Jayantika Rao Tiruvaloor Viavoori

Kristina Yildiz

Camilla Souza)

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Introduction

Pregnancy discrimination is a variety of employment discrimination that happens when pregnant women are not hired or even fired because of their condition or intention to start a family (Byron, 2014). Discrimination on the grounds of pregnancy or maternity is prohibited by Article 11.2 of the Convention on the Elimination of All Forms of Discrimination against Women (UN General Assembly, 1979). In addition to that, it ensures the right to maternity leave or equivalent social benefits.

Discrimination based on pregnancy or maternity can have serious consequences both for women and their families. They can lose critical income, health insurance and other benefits. Pregnant women who are not provided with suitable accommodation also risk their health and even the life of the child. When women are not protected from discrimination it is harder for them to escape poverty.

Fortunately, in 152 countries women have legal resources to fight against unlawful practices on the basis of pregnancy or maternity because the legislature of their countries prohibits the dismissal of pregnant women as is established by international law (Mykhalchenko & Recavarren, 2021). However, there are a number of countries where the situation is different.

In 38 of 190 economies, women can be fired just for being pregnant because it is not forbidden to dismiss pregnant workers. Asian countries are among those where a lot of work is still to be done to improve the working conditions of women. Due to this, the report at hand has chosen to discuss pregnancy discrimination in the workplace in four Asian countries.

The current report presents a comparative analysis of the situation with regard to pregnancy discrimination in China, Malaysia, South Korea and Japan. The authors also analyse the national legislation of each country and provide examples of unfair practices towards women.

Chapter 1

China

While the discrimination against women in the workplace is a serious concern in China, with the new steps to boost the birth rate in the country, discrimination against pregnant women is turning into a dangerous dimension. Among the many challenges female professionals have to face, the fear and anxiety of losing their job after becoming pregnant is a very real problem in the country.

In October 2015, China shelved its decades-old one-child policy and made an abrupt change by announcing the “two-children” policy to stimulate stagnant population growth and avert the ageing population and the dwindling workforce (Human Rights Watch, 2021). But not only did the birth rate not increase as hoped, it has also done more harm than good to women since it was first imposed, in particular through discrimination in the workplace (Minghui, 2021). Thence, the discrimination against pregnant women spread rapidly in China, especially as companies were reluctant to pay for multiple maternity leaves. As a result, it caused many inconceivable problems in the country, ranging from not hiring young women to forcing pregnant women to quit their jobs to avoid legal hurdles.

Nonetheless, the change in the policy did not stop there. Six years after the last policy change, China officially passed a law for the “three-child” policy in 2021 (BBC News, 2021). This means that China now allows couples to have up to three children, a major policy change from one child to three children in the country.

National Legislations

1. Labour Rights Concerning Pregnant Women

In China, the labour rights of female employees are primarily governed by the Law on the Protection of Women's Rights and Interests (the "Women's Law"), promulgated in 1992 and amended in 2005, and the 1988 Regulations on the Protection of Workers and Employees (the "Regulations") (Davis Wright Tremaine LLP, 2021).

Under Article 42 (4), Chapter IV Termination and Termination of Labour Contracts, China's Labour Contract Law, employers are prohibited from unilaterally terminating the contracts of a pregnant or nursing employee (Wang & Varall, 2017). The scope of protection also extends to women on maternity leave. However, this does not render the situation impossible to happen if the termination can be considered legal and reasonable, according to the provision of rules and regulations. That is, a statutory cause must be established to prevent an unlawful layoff under China's Labour Law when dismissing a pregnant or nursing employee. For instance, "an employer is prohibited, without statutory causes, from dismissing a pregnant employee, beginning on the date she is confirmed pregnant by a medical certificate until the expiration of her nursing period (i.e., 12 months after childbirth)" (Davis Wright Tremaine LLP, 2021). These may include acts such as committing severe misconduct, engaging in corrupt practices or causing substantial damage to the interests of the employer, etc.

2. Maternity Leave in China

China has established specific rules on labour protection for female workers that address women's maternity leave and employers' obligation to make reasonable adjustments to meet the needs of pregnant or breastfeeding workers (Huang & Huang, 2021).

In general, the official nationwide maternity leave is 98 days - in accordance with International Labor Organization standards (ILO, 2014). However, some provincial and municipal governments in China follow different maternity leave policies (Huang & Huang, 2021). For instance, as of November 25, 2021, with Shanghai's revised regulations, women are granted an additional 60 days of paid maternity leave on top of the existing 98 days (James, 2021). That is to say, before this date, women in Shanghai had a basic period of 98 days, including weekends and holidays, but with the changes, an additional 60 calendar days does not include statutory holidays. On the other hand, the increase in the number of calendar days of maternity leave in Beijing, from 128 days (98+30 days) to 158 days as of November 26,

2021, does not exempt weekends and statutory holidays, unlike the latter (Huang & Huang, 2021).

Moreover, Shanghai has also introduced a new rule under which couples can take five days of paid "parental leave" per year, separately, before each child turns three (James, 2021). In contrast, for new mothers and fathers in Beijing, this period is set at a total of 10 working days per year (Huang & Huang, 2021).

Yet despite some legal protections, there is no guarantee that a female employee will find her old job after taking maternity leave in China. In other words, Chinese companies, unlike many Western countries, do not have the obligation to preserve the job the employee had before going on maternity leave (Wang & Varall, 2017).

3. Laws Regarding Marriage and Childbirth Status Questions

On February 21, 2019, the Ministry of Human Resources and Social Security, the Ministry of Justice and the Supreme People's Court, along with eight other departments, issued the Circular on Further Regulations Recruitment Activities to Promote Equal Employment for Women, which addresses a series of prohibitions on questioning female candidates on marriage and childbirth status (Zhang & Laney, 2019). In the aforementioned Circular, rules such as not setting birth-related criteria for recruiters and not asking for a pregnancy test during the entry medical examination were also highlighted (Zhang & Laney, 2019).

1.2 Cases of discrimination against pregnant women in the workplace in China

While the Chinese Labour Law provided legal protection for pregnant workers, the practical reality did not even bestow half of it. Many enterprises have coerced pregnant employees or created an environment for them to quit their jobs “voluntarily”. According to China Daily, a female employee, Wang from Yangzhou, Jiangsu province was forced to resign by her employer due to her pregnancy with a second child in 2018 (Minghui, 2021).

Another scandal erupted in 2017, in which an employer began sending its newly pregnant employee on business trips too frequently, and was later demoted and then hired someone else to fill the position (Bloomberg Businessweek, 2021). As if that was not enough, the company refused to pay her salary after her sick leave due to pregnancy complications, removed her from the email system, and trapped her with a limited choice, forcing her to quit. The financial and mental burden created by this unacceptable treatment faced by employees who become pregnant is not at a level that we can underestimate in China. An apt example is that the discriminatory policy brought this pregnant woman to the brink of bankruptcy and therefore severely damaged her mental health, leading her to consider suicide in 2018 after a court rejected the first of three applications for labour dispute arbitration based on insufficient evidence (Bloomberg Businessweek, 2021).

Moreover, a company in Fujian province fired its employee, who was on maternity leave, for “extreme operational difficulties” despite the fact that it experienced no business-related losses (Human Rights Watch, 2021). The discriminatory cases against pregnant women in China are endless. Another company in Shandong province actually charged an employee 2,000 yuan (\$300) for having a second child earlier than allowed in her employment contract (Human Rights Watch, 2021).

Suspended by her company due to her pregnancy, Sun Shihan stated in a court filing that “the company's illegal behaviour incurred serious mental harm to me, resulting in me having a miscarriage on September 20, 2018” (Human Rights Watch, 2021).

Yet, this does not necessarily mean that justice is never served for women who have found themselves in a similar situation due to their pregnancy. In 2019, in southern China's Guangdong province, a district court ruled in favour of a woman seeking justice after her employer fired her for being pregnant.

1.3 Discriminatory policy against pregnant women in China

It is not hearsay but, unfortunately, a reality that women have to incur stress and discomfort of facing questions about gender and childbirth status when they go for job interviews. Notwithstanding the Chinese authorities finally banning such questions in 2019, the implications are still on the table. The situation is getting worse with the new “three-child” policy, which means not one, not two, but three potential maternity leaves.

1. Reluctance to hire young women to avoid maternity leave

When many Chinese employers receive a young woman's resume, they either ignore it or simply think of the recurring questions: "Is she married?", "Will she get pregnant soon?", "How many children is she planning to have?", "How much maternity leave will she take?". Neither previous experience or qualifications are of interest to employers, only the fact that they are women and their chances of getting pregnant (Wang & Varall, 2017). With the opportunity to have up to three children, employers are more reluctant than ever to hire women, especially young women, as they want to avoid giving maternity leaves and paying a salary during that time.

According to the article "China: When having a child is a poor career move" by Zixin Wang and Merriden Varrall, "even though employers are fully aware that it is unlawful to penalise women for having children, many of them would prefer not to take the 'risk' of hiring someone who could potentially need to take leave for several months".

On some job search websites, it has been found that employers are looking for someone who is good-looking, over 30 years old, and already has children. For instance, on the job search website 51job.com, an employer posted a position for a manager in a clothing company in Beijing, and in the job description, it was stated "age between around 30 and 35, already have children, good looking, and good disposition" (Human Rights Watch, 2021).

2. Forced resignation from jobs

In cases where women are hired and become pregnant, employers pressure or even force pregnant women or new mothers to resign voluntarily to avoid legal hurdles or legal penalties. They do this by either putting the pregnant employee through hell or creating a work environment they cannot handle. "A company in northeast Jilin province literally made a seven and a half month pregnant employee work at a construction site in the winter." (Human Rights Watch, 2021).

3. Demotion of status

Last but not least, another atrocity faced by pregnant employees or new mothers is being demoted from their current status.

According to the article “In China, Working Mothers Say They Are Fired or Sidelined” in the New York Times, Ms Liu, 42, worked for a company in Jinan, Beishute, for eight years, selling napkins and maternity products. She worked as a deputy manager when she had her first child in 2014. However, when she returned from maternity leave, she found herself demoted and her monthly payments reduced from \$1,120 to \$980. After a few years, when she got pregnant again, this time the company cut her salary to \$630 and did not even pay during her maternity leave.

Conclusion

China may ban gender-discriminatory questions for job interviews on paper and enact new laws and provisions to combat the discrimination against pregnant women in the workplace, but many women still receive such treatment from their employers in practice. Therefore the image of protecting women workers' rights remains an illusion. On the one hand, the Chinese authorities ignore the oppression and hassle that companies and employers inflict on women, especially pregnant women. On the other hand, at the same time, it tries to expand many social rights of working women so that they do not stop working when they get pregnant. But which is real and which is an illusion? The paradox of the Chinese authorities is costing women both their socio-economic life and mental health day by day.

That being the case, many Chinese women began posting on social media to show the world their experiences of being asked about their childbirth status during job interviews or being forced to sign contracts with companies that wanted to ensure that women did not get pregnant, or even being demoted and fired because they were pregnant (Wang & Varall, 2017).

As Yaqi Wang, senior China researcher at Human Rights Watch said “there are laws but there is no enforcement. If you go to labour arbitration, and you look at the composition of the committee: One is a representative from the company, one is a representative from the labour union, the third is someone from the government”.

Chapter 2

Japan

Japan is one of the most economically developed countries in the world (Asialink Business, n.d). Despite its economic development, there are improvements to make in terms of achieving gender equality in the country. This can be observed from the fact that Japan ranked 120 out of 156 countries in the 2021 World Economic Forum Global Gender Gap Index. (World Economic Forum, 2021) The gender inequality in the country has manifested itself in discrimination against women in the various facets of life including pregnancy discrimination i.e. discrimination against pregnant employees in the workplace or maternity harassment.

Maternity harassment is one of the types of harassment observed in the workplace, along with other types such as parental harassment, karoshi (long working), new employee harassment, age harassment, marriage harassment, and alcohol harassment, amongst others (Owada, 2018). As observed from the other sections, the focus of this paper is going to be on discrimination against pregnant women or maternity harassment.

2.1 National laws

In Japan, there are both laws related to general discrimination as well as laws regarding pregnant women in the workplace.

The primary legislation prohibiting discrimination against women is the Constitution of Japan. Article 14 (1) of the Constitution declares the equality of people under the law and prohibits discrimination on the basis of listed grounds including sex (Constitution of Japan, 1946). However, Japanese courts have restrictively interpreted this provision to apply solely to state action and prohibit what they termed 'unreasonable' discrimination. The condition to deem certain treatment 'unreasonable' remains without a precise definition (Sato-Nilsson, 2018).

A law that deserves mention is the Equal Employment Opportunity Act, which prohibits gender-based discrimination in the recruitment, employment, assignment, and promotion of workers. In addition, the revision to this law takes into account and prohibits discriminatory practices against pregnant women in particular or maternity harassment. Before such revision, the law prohibited companies

from demoting or dismissing women due to pregnancy, childbirth or taking maternity leave but failed to protect women from harassment from superiors and colleagues (The Japan Times, 2016). The enforcement mechanism regarding this act remains the publication of non-complying employers, which is rarely used (Sato-Nilsson, 2018).

The Labour Standards Act is also relevant in this regard as Article 4 of the Act prohibits discrimination in wages based on gender (Labour Standards Act, 1947). This legislation only applies to direct discrimination regarding wages and the worker is required to bear the burden of proof of existence of unfavourable treatment on the basis of gender (Sato-Nilsson, 2018).

The other law is the 2015 Act on the Promotion of Women's Participation and Advancement in the Workplace which requires employers to create action plans for women's participation and advancement. This Act requires the national and local governments and large companies to create action plans and publish information on employers' goals to achieve regarding the promotion of women's participation in the workplace. There are no standards that curtail the maximum and minimum for the goals that are to be set by the employers. Additionally, the Act contains no sanctions for failure to achieve indicated goals and rather relies on favourable treatment on public procurement for those with good practices (Sato-Nilsson, 2018).

The most relevant law regarding maternity harassment or pregnancy discrimination is the Act on Childcare Leave, Caregiver Leave, and Other Measures for the Welfare of Workers Caring for Children or Other Family Members. This Act obliges employers to take measures to prevent harassment related to pregnancy, childbirth and childcare leave in the workplace and prohibits disadvantageous treatment related to the same. However, there does not seem to be any punitive measures that are taken towards employers who do not take such measures beyond advice, guidance, recommendation, and finally disclosure of the names of employers who do not follow the recommendations and violate the aforementioned act (Government of Japan, 2021).

Another law that is relevant to maternity harassment or pregnancy discrimination is the Act on Promotion of Gender Equality in the Political Field which was recently amended to incorporate provisions regarding the development of a training and consulting system on harassment related to pregnancy and childbirth (Government of Japan, 2021).

2.2 Relevant Ratified International Agreements

The main international agreement under discussion in this part of the report is the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW). Japan ratified this convention on June 25, 1985 (OHCHR, 2022).

CEDAW is aimed at protecting women from all forms of discrimination whether at home, in the workplace or anywhere. Regarding employment and the workplace, in particular, Article 11 of CEDAW requires States to take measures to eliminate discrimination against women in employment. It also requires States to ensure that women have the same rights as men in exercising their right to work, the right to the same employment opportunities, the right to choice of profession and employment, the right to promotion, the right to job security the right to receive training, the right to equal remuneration, the right to social security, the right to protection of health and the right to safety in working conditions (which particularly includes the safeguarding of the function of reproduction).

The provision also specifically requires States to take measures to prohibit dismissal on the grounds of pregnancy or of maternity leave with sanctions, to introduce maternity leave with pay or comparable social benefits without loss of former employment, seniority or social allowances, to provide special protection to women during pregnancy in types of work proved to be harmful to them and to encourage the provision of necessary social services to enable parents to combine family obligations with work responsibilities and participation in public life (including promoting the establishment of child-care facilities).

Despite the relevance of the International Labour Organisation (ILO) Convention No. 183 on Maternity Protection (which was enacted in 2000) to this topic, it will not be discussed herein. This is because Japan has not ratified this ILO convention to this date (ILO, 2022).

2.3 Discriminatory Practices Against Pregnant Women or Maternity Harassment in the Workplace in Japan

Discrimination against pregnant women/ pregnancy discrimination or maternity harassment in the workplace is referred to as “matahara” in Japan (Bielski, 2015). Matahara involves harassment in the workplace against women on the basis of pregnancy, childbirth, request for childcare leave among others. According to a study conducted by Kachi et al.



A Pregnant Woman at the Workplace, Photo Source: www.alamy.com, n.d

regarding maternity harassment and depression during the Covid-19 era, 24.8 percent of pregnant employees were said to have experienced maternity harassment (Kachi et al., 2021).

The types of Matahara experienced by pregnant women in Japan include mental or psychological harassment, suggested dismissal, prevention from using systems related to pregnancy, dismissal, end of employment contract, forced to resign, demotion, refusal of request for lighter workload, wage cuts, verbal abuse amongst others. A study conducted regarding women who consulted Maternity Harassment Taisaku Network (a Japanese Non-Profit Organisation working on Matahara) revealed that approximately 54 percent of women who sought their services were victims of dismissal as well as a demotion and 37 percent of these women were victims of mental harassment or psychological harassment, including verbal abuse or problematic comments (Nippon, 2020).

Various cases of Matahara have come to light in the public eye in the past couple of years. The most fundamental case regarding Matahara was a case that was brought to the highest court in Japan i.e. Japan's Supreme Court known as the Hiroshima Hospital case. The plaintiff, in this case, was a rehabilitation therapist for 16 years at Hiroshima Hospital and had requested lighter or less demanding work as per Article 65 (3) of the Labour Standard Act when she was pregnant with her child. The hospital switched her work and also removed her existing title. Although the hospital placed her back in her work position upon her return from childcare leave, it refused to reinstate her to her previous title or rank in effect demoting her. Aggrieved by this decision, she brought a lawsuit against the hospital in court. This case was first brought to the Hiroshima District Court and Hiroshima High Court which rejected the claims of the plaintiff. However, the Supreme Court overturned the decision of both lower courts. This court decided that the demotion along with other favourable measures violate the Equal Opportunity Act. This is unless the pregnant woman consents to such treatment or special circumstances regarding smooth administration or personnel placement that make the treatment unavoidable exist (Okunuki, 2014).

Conclusion

Pregnancy discrimination and maternity harassment still prevail in Japan despite the various local and international legislations prohibiting such treatment. This shows that the issue in the case is not a lack of legislation in the area per se but rather a problem in the implementation. The problem in the implementation stems from both the absence of punitive measures in the laws themselves as well as the existing socio-cultural views regarding pregnant employees as well as the ideal worker in the country.

In order to curb pregnancy discrimination and maternity harassment in the country, work needs to be done to change the views of society regarding pregnant employees and the work culture as a whole. Additionally, there is a need to incorporate punitive provisions in local laws to punish those who perpetrate discrimination and harassment against pregnant women.

Chapter 3

Malaysia

Malaysia faces an increased level of employment fall outs, although it has always created opportunities across its sectors. One of the main reasons for this is the lower percentage of women engaging in the labour force. As the World Bank Organisation (WBO) points out, even though Malaysian women outperform Malaysian men in education, female labour participation remains low compared with peer countries. For example, while in Cambodia, Vietnam, and Singapore, the female participation rate is more than 60 percent, in Malaysia, it is only 52 percent (Jae El, 2021; Star times, 2019).

According to the International Labour Organisation (ILO), the fundamental reason for the lower percentage of female participation in work sectors in Malaysia is gender conformity, since the social norms that view "men as the main breadwinners and women as homemakers are deeply embedded in Malaysia." The gender ideologies have made it very difficult for Malaysian women to enter the world of work (ILO, 2017). Another fundamental factor contributing to the lack of women in Malaysia's workforce is the discrimination against women in workplaces; discrimination in access to employment opportunities, earning, treatment, and discrimination against pregnant women (Jae El, 2021). The latter will be the focus of this paper, as observed from the following sections.

3.1 National Legislation

1. Federal constitution

The primer legislation prohibited discrimination against women in the Malaysia Federal constitution. Under Article 8 of the Federal Constitution, all persons are equal to the law and entitled to the equal protection of the law. However, Malaysian courts have restrictively interpreted this provision as applying only to public sector employees, not to private-sector employees (Bhatt, 2010), which means that pregnant women that work in private sectors cannot use this Article to claim any kind of discrimination that she has been subject to (Bhatt, 2010; Hassan, 2012).

2. The Employment Act 1955

The Employment Act 1955 (the EA) is regarded as the most important employment statute, and it was amended in 2012. It outlines the minimum rights of employers and employees. The pregnancy and maternity rights for working women in Malaysia can be found specifically under Part IX of the EA.

However, the Employment Act provides only some measures and protection in relation to pregnant employees, and it only protects the female employee during maternity leave and not during pregnancy.

Section 34 of the EA prohibits female employees from working at certain hours, while Section 35 restricts women from doing underground work such as mining. Furthermore, Section 37 of the EA provides that pregnant women have the right to have 60 days of the paid maternity leave period, which is a far cry from the recommended minimum of 14 weeks/ 98 days by the ILO's Maternity Protection Convention 2000. Moreover, although the Act states that the breach of Section 37 constitutes an offence, there is no specific penalty provided. Besides that, the absence of protection against the possibility of termination on the grounds of pregnancy and the exclusion of termination on the closure of business under Section 37(4) is deemed to be unfair and discriminatory towards pregnant women (Human Rights Commission of Malaysia, 2017; Mallow, 2018).

Under Section 42(1) of the EA, an employer may terminate an employee with wages in lieu of notice of four months immediately preceding her confinement, and an employer may still terminate a female employee due to her pregnancy, as such an offence only involves the payment of merger fine, without any specific penalty for an offence of termination. Thus, the fine is inadequate to protect women and does not send a strong message to employers to not discriminate against women based on their pregnancy (Human Rights Commission of Malaysia, 2017; Bhatt, 2010).

It is recognised that the existence of unequal pay between males and females is attributable to pervasive discrimination against women in the workplace. Yet, there are still no specific provisions under the EA that mandate "equal remuneration for work of equal value" or any explicit prohibitions on gender-based discrimination during the course of employment (Bhatt, 2010).

Therefore, the Act does not provide adequate protection for women's rights within the workplace, especially for pregnant women.

3.2 Relevant Ratified International Agreements

The main international convention which protects women's rights against discrimination is the convention on the CEDAW. Malaysia ratified the CEDAW in August 1995.

The convention defines discrimination against women broadly as '... any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment, or exercise by women irrespective of their marital status on the basis of

equality of men and women, of human rights and fundamental freedoms in the political, economical, social, cultural, civil or any other field'. (Article 1 CEDAW).

In particular, from the perspective of employment, Article 11 of the Convention expressly relates to women's right to work, equal treatment at the workplace, and the right to the same employment opportunities as men. More importantly, it prohibits dismissal on the grounds of pregnancy and requires states to take measures to prohibit dismissal on the grounds of pregnancy or of maternity leave with a sanction, to introduce maternity leave with pay or comparable social benefits without loss of former employment, seniority or social allowances.

Since the current law in Malaysia, as the previous section shows, is inadequate to protect Malaysian pregnant women from discrimination in workplaces, a better approach would be to incorporate the CEDAW into the domestic law of Malaysia, as the CEDAW Committee suggested. As such, an approach will provide better sensitivity for gender equality in Malaysia and, in turn, will provide more protection to pregnant women in workplaces (CEDAW Committee C/MYS/CO/3-5, 2018).

Another international agreement that is relevant to this topic is the International Labour Organisation (ILO) Convention No. 183; however, it will not be discussed because Malaysia has not ratified this ILO convention to this date (ILO, 2022).

3.3 Discriminatory Practices Against Pregnant Women in Malaysia

According to a survey conducted by Women Aid Organisation (WAO), 44 percent of Malaysian women stated that they lost their job, miss out on promotions, were demoted, or were put through extended probation because they were pregnant; 49 percent said that they fear losing their jobs or being sidelined because of their pregnancy, while 31 percent put their pregnancy plan on hold fearing losing their job promotion (WAO, 2016).

Pregnant women in Malaysia are being subject to discrimination in most workplaces. However, the issue is more direct, particularly in the private sector, where women are being discriminated against even before getting pregnant. In private companies, during the interview process, women are asked about their personal life on whether they plan to become pregnant or if they were pregnant, and if the women's answer is yes, the company will not hire them (Kaprawi et al., 2021; The Asian Post, 2020).

A number of cases of discrimination against Malaysian women because of their pregnancy were brought in recent years, to illustrate the practice, two cases will be presented.

The case of Beatrice Fernandez v Sistem Penerbangan Malaysia & Anor is an important case that

highlights such practice. Fernandez joined the Malaysia Airlines System (MAS) as a Grand B flight stewardess, and she was bound by the terms and conditions of the collective agreement entered between MAS and the MAS employees union. This required all stewardesses in the Grand B category to resign on becoming pregnant; in the event of failure to resign, MAS had the right to terminate the employment relationship. Fernandez became pregnant but refused to resign, and MAS terminated her employment. Fernandez commenced proceedings at the Higher Court, submitting that the provision of collective agreement was discriminatory and in conflict with Article 8 of the Federal constitution. However, the Higher court ruled that Article 8 only binds the government and does not extend to discrimination in private agencies (Hassan, 2012).

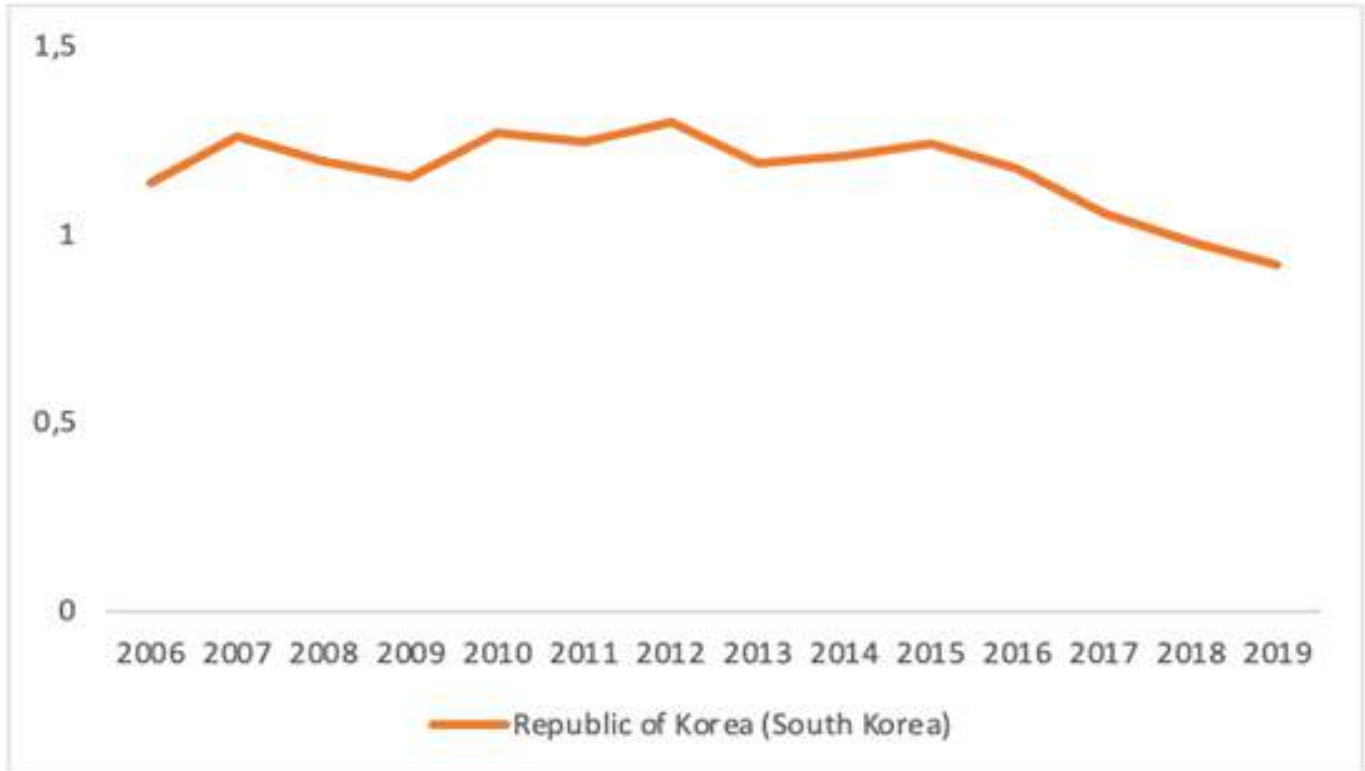
Another case is the case of Noorfadilla binti Ahmad Saikin v Chayed bin Basirun and Ors. Ms. Noorfadilla was offered employment as a "Guru Sandaran Tidak Terlatih" (GSTT). However, her offer was later retracted when she admitted that she was three months pregnant during the briefing for the said position. She then filed a case against the Education office, the State Director of the Education Department of Selangor, the Ministry of Education, and the government of Malaysia on the grounds that her post was revoked on the sole ground that she was pregnant. She argued that the act was tantamount to gender discrimination and in contravention of Article 8(2) of the Federal constitution. The Higher Court ruled that the act of revoking an offer of employment as a temporary teacher to a woman due to her pregnancy was unconstitutional and a breach of Malaysia's constitution (Wahab, 2018).

Conclusion

Pregnancy discrimination still prevails in Malaysia, mainly because the Malaysian national law (the federal constitution, and the EA) are fairly limited in their scope and application. Although Malaysia ratified the CEDAW in 1995, but until now, it has not adopted any elements of the convention into domestic legislation. Such an approach would be the first step into the process of ending the discrimination against pregnant women, especially in the private sector.

Malaysian women, as the executive director of WAO, Sumitra Visnaatan said, should be free to choose if and when to have a child without the fear of losing their jobs, terminating, demoting, or failing to hire, and the Malaysian policymakers must ensure these rights to all Malaysian women.

Chapter 4



'Fertility Rate of the Republic of Korea', Source: World Bank Data, 2019

South Korea

The Republic of Korea (hereinafter referred to as South Korea) has recorded a TFR (Total Fertility Rate) of 0.918 in 2019 (World Bank Data). Despite the country's five-year plan adopted in 2006 (Kim et al., 2019), the fertility rate has continued downward (see Figure 1). Statistics Korea has predicted that by 2022, the TFR could drop to 0.77 (National Statistics, 2021), which will be the lowest among other OECD countries.

In South Korea, the current generation has been termed the "Sampo Generation" (Seo, 2019), which means they have given up on dating, marrying or even having children. The downward spiral of the TFR can be attributed to the decision made by many South Koreans to delay having children. For many women, the decision to postpone marriage and pregnancy results from discrimination in the workplace. Workplace gender discrimination (WGD) is predominately prevalent in East Asian countries with strong patriarchal traditions (Kim et al., 2022). While South Korean women can participate in work outside of the home, traditional family structures that reinforce WGD are prevalent, which causes women to postpone getting pregnant.

The Korean government adopted the “Third Plan for Ageing Society and Population” program, which increased government spending on 'family and social protection reforms' (Kim et al., 2019). However, despite the Korean government's expenditure on 'family and social protection reforms', maternity and parental leave are still not guaranteed within many occupations. Moreover, many Korean companies disapprove of their employees using maternity and parental leave policies (Kim et al., 2021). Under neoliberalism, low fertility is generally associated with women's participation in economic activity (Park, 2020). However, by exploring the trend in South Korea, it has been showcased that pregnancy discrimination, WGD, and negative appraisals for using maternity leave have been the cause of the downward spiral of TFR.

4.1 National Legislations

In South Korea, under the Equal Employment and Support for Work-Family Balance Act, maternity and parental leave have been made mandatory. Maternity Leave is the policy wherein women and their partners can take up to 90 days or 120 days (if there are multiple foetuses) of leave both before and after birth (combined) (Yeo and Kim, 2022). The Ministry of Employment also introduced parental leave, an employment-protected leave of absence (unpaid) for employed parents that follows maternity leave (Lee and Shin, 2020). While the country does not explicitly guarantee paternity leave, men can take leave if their spouses do not use their parental leave. Many South Korean women have felt obligated to take 'career breaks' after childbirth to look after their children (Lee and Shin, 2020). These women would then be able to restart their careers once their children reached an older age. As such, many women either work less than they desire or have fewer kids. South Korean women are forced to choose between work or children as the working atmosphere is not conducive to women that are pregnant or for young children's mothers.

To be eligible for the leave, women and men must be enrolled in the National Employment Insurance Program "for more than 180 days" (Kim et al., 2021). While working women receive total replacement wages for the first 60 days from their employers, for the last 30 days, they get the remaining (partial or full) wages from the National Employment Insurance Program up to a maximum of USD 1750 (Kim et al., 2021). Depending on a woman's economic situation, losing half of her wages for the last 30 days may be burdensome and rush her to end her maternity leave earlier.

Labour laws in South Korea have been amended to reflect the interests of corporations (Lee, 2021), and therefore they are able to skirt around legislations against discrimination or bullying in the workplace. Despite South Korea's ratification of numerous conventions and treaties on the rights of women, there is a lack of equality within the country. For example, the country ratified the CEDAW in December 1984. However, the country is yet to adopt a "comprehensive anti-discriminatory law" (CEDAW, 2018).



'Fertility Rate of the Republic of Korea', Source: World Bank Data, 2019

4.2 Culture

South Korea is governed by a 'Confucian Patriarchal Culture' which has permeated many Korean companies. In the country, it is expected for women, even working women, to still look after the household responsibilities, with working women spending an average of three hours per day on unpaid domestic work while men spend an average of thirty minutes per day (Kim et al., 2021). Confucian ideology has shaped the rigid gender roles and familial and marriage roles. Confucianism shapes the foundation of state policy and even the working experiences for women (Sung, 2003). While the increasing female participation in the 80s and 90s labour market resulted in some changes in traditional ideas about women in society, traditional Confucian ideas persist. State policies are still endorsed that reinforce Korean Confucian patriarchal gender roles to reconstruct "national historical identities" (Jones, 2016). Consequently, eradicating gender inequality from Korean society still has a long way to go.

4.3 Pregnancy Discrimination Against Women in the Workplace

Analysing various literature has showcased that companies' internal culture reinforces gender discrimination in the workplace, making the working environment even more discriminatory against pregnant women. While labour laws prohibit discrimination against pregnant women, discussions with

trade unions have showcased that the laws are often ignored (Seo, 2019). Pregnancy brings another dimension to the already discriminatory gendered workplace for women. For many women, predominantly female migrant workers, if they become pregnant, they are often fired and asked to return only after the birth without getting any compensation (Choo, 2016). Similarly, it is expected for women working in manufacturing companies to quit if they become pregnant. Even documented migrant workers under the protection of South Korean labour laws are discriminated against when they are pregnant. Documented migrant workers that become pregnant are often forced to become undocumented as their companies often refuse to renew their contracts, making them even more vulnerable in their condition (Choo, 2016).

Despite the assumption, Korean women are discriminated against even in big multinational companies when they become pregnant. Employers employ pressure on Korean women to resign when they become married, especially when they are pregnant (Cooke, 2010). Additionally, many employed Korean women fear (negative) performance reviews after maternity leave or lack of career advancements. Women that opt for parenthood are often gender-segregated, and their path is stereotyped as the 'mommy track' (Hwang and Jung, 2016). By doing so, Korean mothers are often discriminated against and passed over for promotions or even projects as their work is not taken seriously compared to other single women.

However, women are not only discriminated against when they get pregnant. Even before many women are pregnant, they are discriminated against because of their chance of becoming pregnant. Like in other Asian countries like India and China, during interview processes, 'age limits' are used to screen out women that are at the age of becoming pregnant (Cooke, 2010). Companies tend to hire women that are younger than the norm for marriage age and after career breaks. While the practice has become more implicit due to the anti-discrimination laws, the discriminatory practice is still present, especially during the recruitment process.

Despite the laws to target discrimination against women in the workplace, WGD is on the rise as there is no legal punishment for employers' discriminative practices. In a way, the government condones the practices and reinforces the discriminatory structure of companies. The structure of the employees can be described as a "gendered pyramid" (Kim et al., 2021), where female employees are often at the bottom, and as one goes up, there are fewer women. For many women, dealing with societal expectations and working within the work culture is burdensome, specifically for pregnant and young

mothers. Therefore, they often take a 'break' to adhere to traditional societal gender roles to look after the children. Women are often seen as temporary workers in companies rather than fixed employees like their male counterparts. The standard narrative is that when a woman gets married and decides to get pregnant, she must quit her job to look after her child (Patterson and Walcutt, 2014). Often, women who have worked hard to reach managerial positions are pushed out of their jobs if they get pregnant.

As aforementioned, Korean companies disapprove of their employees using policies set by the government like maternity and parental leave. Often employees fear negative appraisals like a demotion, being laid off or being passed over for promotions if they use the policies set by the government to encourage more births in South Korea (Kim et al., 2021). Moreover, there are various restrictions to accessing the leave policies for many women. Depending on job tenure, size of the company and work hours (part-time or fixed contract), women are restricted from getting maternity and parental leave (Jang et al., 2016). In South Korea, as 70 percent of women are working in temporary positions or are contingent workers, many female workers cannot access maternity and parental leave or even the government insurance scheme (Jang et al., 2016). Discriminatory procedures that treat women as temporary workers can reinforce other discriminatory practices like pregnancy discrimination and force women to delay pregnancies.

Conclusion

The continued gender discrimination in the Korean workforce has nurtured an environment that discriminates against pregnant women and women that may get pregnant. Despite laws to protect women against various forms of discrimination, companies and employers continue to treat female workers inferior to male workers. A "tacit acceptance of the status quo" (Patterson and Walcutt, 2014) reinforces the discrimination against pregnant women stemming from a traditional Korean patriarchal culture.

Women are continuously facing discrimination, especially within the workplace. Gender discrimination in terms of recruitment, leaves, contract types, lay-offs, and promotions, has impacted relationships, pregnancy planning and evening childcare experiences. The discriminatory practices against women cause a high level of job insecurity. Women are compelled to delay marriages and pregnancies, not to be forced to quit their jobs. While doing so allows women to become more independent, the low fertility rates indicate the lasting effects of discrimination on the population. If women are continuously discriminated against simply because they will or might get pregnant and take maternity leave, many women may choose to postpone pregnancy plans or even decide not to get pregnant. Consequently, the country may face a population crisis soon.

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Women's Rights Team

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