On the protection of the rights and interests of over-age workers from the perspective of retirement rights

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Abstract: The protection of the rights and interests of over-age workers has come to the forefront with the advent of an aging society in China. As a right of workers, the right to retirement should be an important perspective for analyzing over-age labor relations. In the current protection of the rights and interests of over-age workers in China, due to the neglect of the right to retirement, there are three major difficulties: the nature of "over-age employment relationship" is blurred, the unfairness of "over-age" determination for men and women, and the weak awareness of over-age workers to protect their rights. In this regard, we should build a flexible retirement model, realize the freedom of employment of over-age workers, gradually narrow the gap of "over-age" recognition, clarify the content of the rights of over-age workers, and further improve the relevant supporting mechanisms in order to effectively realize the protection of the rights and interests of over-age workers.

Key Words: Retirement rights; Over-age workers; Over-age labor relations; Flexible retirement system

1. Introduction

After China has entered an aging society, the labor market is facing the pressure of continuing employment of a large number of over-aged workers, and the protection of the rights and interests of over-aged workers has become more and more important. The existing protection of the rights and interests of overage workers is not logically and jurisprudentially smooth. In view of the fact that the nature of retirement has a direct impact on the protection of the rights and interests of over-age workers, the article intends to analyze the current legislative and judicial status of the protection of the rights and interests of over-age workers from the perspective of retirement rights, reveal the problems in the existing protection of the rights and interests of over-age workers from the perspective of retirement rights, and finally propose ways to improve the protection of the rights and interests of over-age workers in China.

2. Legal characterization of retirement rights and content of rights

2.1 Retirement and its juridical characterization

Retirement is often mentioned in daily life as well as a legal concept used in legal documents in China, but people's understanding of its concept is unclear. Tracing the legal documents issued in China in the past, the concept of retirement was first clearly introduced in the "Provisional Provisions of the State Council on the Treatment of Workers' and Employees' Retirement" issued in 1958. As for the meaning of retirement, some scholars believe that retirement refers to the legal act of a worker leaving the field of labor and the factual state resulting from that act to enjoy retirement benefits[1]. Other scholars believe that retirement is a kind of social security, mainly for the elderly workers who are unable to work or will lose their working ability.[2] In summary, although scholars have expressed the meaning of retirement differently, the basic meaning of retirement can be broadly concluded, that is, workers withdraw from the labor field when they reach a certain age or lose their working ability.

The issue of whether retirement is a right or an obligation has been debated in the academic circle for a long time, and there are roughly three views in Table 1: The first is the doctrine of rights. Scholars who hold this view mainly rely on the provisions of Articles 44 and 45 of the Constitution, and believe that retirement is a right, which is reflected in the content of the retirement system stipulated in the Constitution. The representative views of those who hold the right theory include: "The right to retirement refers to the right of workers to go home and take a rest when they reach the retirement age and the relevant unit or the state continues to pay wages." "The right to retirement as a right specifically includes the right to social security, the right to health care and the right to social assistance."[3] The second is the doctrine of obligation. The scholars who hold this view are based on
Article 21 of the Implementing Regulations of the Labor Contract Law, which defines retirement as a legal obligation, and believes that the law compels workers to stop labor relations with their units after reaching the legal retirement age, and cannot establish labor relations with their original units or other units, and the employees do not The employee does not have the qualification of the subject of work injury and cannot be recognized as a work injury.[4] This view is also commonly adopted in judicial practice. Finally, the doctrine of compound rights and obligations. This view is held by scholars who believe that retirement is a right, and the enterprise cannot force the retiree to continue working. Retirement is also an obligation, and workers must quit the workplace according to the relevant retirement rules. Workers are supposed to retire at their own will, and mandatory retirement can only be imposed under certain circumstances. The focus should be on respecting the worker's will to retire first, and forcing the worker to retire is not the main point. Although retirement should respect the will of the worker, the reasons and circumstances for compulsory retirement still dominate the practice of labor employment.[5] This article argues that the question of whether retirement is a right or an obligation should not be concluded from the existing legal provisions alone, but should be analyzed from the perspective of retirement itself and in the context of the existing system.

Table 1. Qualitative doctrine of the right to retire

<table>
<thead>
<tr>
<th>Doctrine</th>
<th>Basis of opinion</th>
<th>Main points</th>
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<tbody>
<tr>
<td>Doctrine of Rights</td>
<td>Articles 44, 45 of the Constitution</td>
<td>The right to retirement is the right to go home to rest and recuperate and to continue to be paid by the relevant organization or the state when the worker reaches retirement age. The right to retirement specifically includes the right to social security, the right to health care and the right to social assistance.</td>
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<tr>
<td>Doctrine of obligation</td>
<td>Article 21 of the Regulations on the Implementation of the Labor Contract Law</td>
<td>The law mandates that workers cease their employment relationship with their employer after reaching the legal retirement age, and cannot re-establish employment relationship with their former employer or any other employer.</td>
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On a contingent level, people have corresponding rights to safeguard their needs in each course of life, and even in each social role. In the working stage, workers need the protection of labor rights. In the retirement stage, retirement is the key to the quality of life of workers in their old age, and of course, they need the protection of retirement rights even more, especially for female workers, high paid workers and low paid workers. For female workers, in the process of retirement, China takes into account the physical quality and family role of female workers and stipulates that female workers withdraw from the employment field before male workers, depriving women of employment opportunities, which essentially reflects the inequality of retirement between men and women and violates the equal retirement rights of women. For highly paid workers, individuals with strong employability and high salaries, retirement is much lower than wage compensation, and retirement means a reduction of expected benefits, and they often have a strong desire to be employed. The right to freedom of retirement allows highly paid workers to maximize the value of their work. For low-wage workers, most of the security of life after retirement relies on retirement benefits. The right to retirement, as a social and economic right, with the right to material security as its prominent feature, aims to guarantee that citizens can live with dignity after retirement. Workers also need to enjoy retirement rights and realize their retirement benefits in the retirement stage. Of course, China does not have the concept of retirement rights in the law, but the attributes of retirement rights can be glimpsed from the existing legal norms. First, Article 44 of the Constitution provides that employees and staff of state organs shall retire in accordance with the law, and the state and society shall guarantee the livelihood of retirees. This article does not directly stipulate retirement as a citizen's obligation, distinguishing it from the Constitution's stipulation of other obligations, such as the obligation to pay taxes. This indicates that retirement is not an obligation of citizens in our country.[6] Second, China's labor law on the employment age limit, only stipulates that minors under 16 years of age can not be employed, the maximum age of employment is not specified for the time being, which indicates that workers can continue to be employed after reaching the legal retirement age.
On a practical level, observing the development of the retirement system, when the retirement system was first established, all countries unanimously took age as the criterion for workers to withdraw from employment, and designed their pension systems based on the legal retirement age. Once a worker reaches the legally prescribed age, he or she must withdraw from employment regardless of physical condition, employ ability and willingness to work, which forced people to identify retirement as an obligation. However, with the advent of the ageing population, the content of retirement systems in various countries has begun to change, and retirement has now gradually become a right of workers.

In common law countries, the U.S. amended the Age Discrimination in Employment Act in 1986 to remove the upper age limit for workers. In the United Kingdom, in 2011, it was decided that companies could not force workers over the age of 65 to retire if they wished to continue working. In civil law countries, Germany introduced a flexible retirement system in the 1972 pension reform, giving workers the right to retire on their own to a certain extent, and the Time Work for the Elderly Act, passed in 1989, changed the mandatory retirement system that was in place in the past. In Japan, the retirement age was reformed in 1970 to gradually raise the statutory retirement age for citizens, and the Employment Security Law for the Aged (revised in 2004) also requires that Japanese companies should ensure that employees are employed until the age of 65, and that companies should raise the statutory retirement age and implement a system of continued employment. [7] The provision to raise the statutory retirement age effectively takes into account the longevity and mental state of workers, satisfies their employment wishes to the greatest extent possible, and strives to make it so that when the retirement age comes, workers are looking forward to retirement. At this point, age is no longer used as a restraint for workers, and people can choose the point of retirement and gradually have a realistic right to retire. China's retirement system has undergone tremendous changes in regulations and policies regarding retirement since its inception in the 1950s. The retirement system was reformed in 1970 to gradually raise the statutory retirement age and implement a system of continued employment. [7] The provision to raise the statutory retirement age effectively takes into account the longevity and mental state of workers, satisfies their employment wishes to the greatest extent possible, and strives to make it so that when the retirement age comes, workers are looking forward to retirement. At this point, age is no longer used as a restraint for workers, and people can choose the point of retirement and gradually have a realistic right to retire. China's retirement system has undergone tremendous changes in regulations and policies regarding retirement since its inception in the 1950s. The retirement system was first an integral part of China's planned economy. Under the socio-economic foundation of the time, the workers were required to withdraw from employment in accordance with the state's compulsory arrangements, in line with the state's macro plan and subject to the state's regulations. With the progress of our time, our economic system has been transformed into a socialist market economy. Enterprises can gradually break away from the restrictions of the state in order to achieve self-management and operation, and have the right to recruit workers and decide the form of employment on their own. Naturally, workers can also achieve autonomy in employment and enjoy retirement rights. In recent years, China has also made plans to reform the retirement age, and has begun to delay the retirement age in small steps, and has set up local pilots for a flexible retirement system. Even if retirement is still partly obligatory due to the old social foundation, but based on the principle that legal rights and obligations should be rights-based, retirement should be more of a right of workers, not only because of the impact of social changes, but also because retirement as a right can better protect their legitimate rights and interests, which is conducive to the reform of the relevant retirement content.

2.2 Disclosure of the content of the right to retirement

According to the basic understanding of the existing academic circles, the right to retirement refers to the right of citizens to withdraw from the labor field after reaching the legal retirement age and to enjoy the corresponding retirement benefits stipulated by law. Retirement as a right mainly includes two aspects, one is the "right to withdraw from the labor field" and the other is the "right to enjoy after retirement", that is, the former is the guarantee of the latter and the latter is the result of the former, or can be summarized as follows: The rights that we enjoy due to "retirement" include the right to freedom of retirement and the right to equal retirement, while the rights that we enjoy due to "rest" mainly refer to the right to social security. [8] The details are as follows: The first is the right to retirement freedom. The right to freedom of retirement is the primary right of retirement. As a basic right under the right to freedom, the right to freedom of retirement refers to the right of workers to freely choose to leave their jobs and end their labor relations without the interference of the state or others through their own will. Specifically, the right to freedom of retirement has two aspects: firstly, workers have the right to choose to leave their jobs when they meet the corresponding legal circumstances, and secondly, workers can choose to continue working according to their actual situation when they reach the legal retirement circumstances. On the one hand, the state should guarantee workers' smooth retirement. On the other hand, retirement does not mean the loss of working capacity, and workers can naturally remain in their employment units. The Regulations on Labor Insurance promulgated by the State Council of the Central People's Government in the mid-20th century provides that under certain circumstances, the unit may continue to retain the worker. The right to freedom of retirement is a restricted freedom.

China's Constitution, the State Council's Interim Measures on Workers' Retirement and Retirement, and other legal documents strictly regulate the age and applicable circumstances for workers to withdraw from the work field. Retirement, as a right of workers, can certainly withdraw from their positions according to their own will, and they can withdraw from the employment unit early when they lose their working ability, and continue to work when they have the ability to be employed. However, voluntary retirement should be subject to the necessary restrictions, and the relevant departments should consider various factors when formulating the retirement system. First of all, different occupations should have different standards, especially for some special occupations, such as pilots and police officers, which require a high level of personal physical fitness. If we allow senior workers to continue to be employed, it will not only be unable to work efficiently, but also add unnecessary risks to enterprises or
individuals. Second, how to balance the relationship between the efficiency of the employer and the interests of the workers. The purpose of the freedom to retire is to enable workers who are willing and able to work to create value for themselves and the company. However, some workers may choose to stay in the company even though they should have retired and do not have the ability to continue to work, which will bring a lot of burden to the company and cause a retirement deadlock.

The second is the right to equal retirement. The right to equal retirement is, to some extent, a sub right of the right to equality. The right to equality requires that the law protects the legitimate rights and interests of everyone, and that every citizen is treated the same by the state and enjoys the same rights. Retirement, as a right of citizens, does not differ according to gender, family, nature of work, and other factors. The core essence of equal retirement right is that men and women should be equally protected by the state in the retirement system, so the retirement standard and retirement treatment should be equal for both male and female workers. There are formal equality and substantive equality. The so-called substantive equality refers to the different treatment that has to be adopted in certain special circumstances in order to achieve fairness and justice, which may seem unequal on the surface, but is actually a reasonable measure to be taken when formal equality may cause large differences in reality. Although it is inevitable that the state will agree on inconsistent retirement systems for different industries and genders, the ultimate goal must be to ensure that everyone enjoys a relatively fair right to retirement. Different retirement standards should also be a more reasonable and humane system that takes into account the actual situation. It is worth suggesting that equal retirement rights are usually a form of formal equality, and only when formal equality may lead to real inequality, reasonable differences are allowed to achieve real equality.

The third is the right to social security. The right to social security after retirement is the core element of the right to retirement, and is a guarantee for the realization of the right to retirement freedom and equal retirement rights for men and women. The main role of the right to social security is to guarantee the quality of life of citizens. In the event that a citizen's physical quality declines or illness renders him or her incapable of working, the state must provide the necessary material assistance to enable the citizen to live with dignity. China has designed a series of systems to enable workers to have a good standard of living after retirement, mainly the pension insurance system, medical insurance system and social welfare system. This is specifically reflected in the fact that after citizens withdraw from the labor field due to physical and occupational factors, although they no longer enjoy the salary paid by enterprises, they can request the state to provide material security and enjoy the corresponding social treatment.

In the retirement system, the right to social security mainly refers to the social insurance treatment that workers enjoy, specifically including medical insurance treatment for medical care and pension insurance treatment for retirement. As a kind of social insurance treatment, work injury insurance treatment has not been recognized as the social security right of the retired person for the time being, but there are various opinions in the academic circles about it. China's current laws stipulate that men should normally retire from the labor field when they reach the age of 60 and female workers when they reach the age of 50. However, as time progresses and workers have an increasingly broad view of employment and excellent physical fitness and employ ability, more and more retirees are choosing to be re-employed. In the Regulations on Work Injury Insurance, only workers who have a labor relationship with their employer are entitled to work injury insurance benefits. In the case of workers returning to the labor field after retirement, there are still many controversies whether their relationship with the employer is a labor relationship, and it is impossible to determine whether they are entitled to work-related injury insurance treatment.

2.3 The value of studying the right attributes of retirement rights

The right attributes of retirement rights have two main values for improving the protection of the rights and interests of over-age workers:

First, the right to freedom of retirement can provide a legal basis for determining the nature of labor relations for over-age employment relationships. Workers have the right to freedom of retirement and can quit their jobs at their own will. The state and society have the obligation of negative inaction towards this right of citizens, so they cannot force workers to retire, and age should no longer be a restriction on employment of older workers at the legal level. At the legal level, "over-age" is changed to "age-appropriate", and there is no longer the so-called "over-age workers". Moreover, the labor relationship should be judged by the subordination of the worker's personality to the employer, not by the age of the worker. Therefore, there is no age restriction on the eligibility of workers in over-age labor relations, and over-age workers can enjoy the relevant social treatment when they are injured at work, as long as they meet the requirements of labor relations.

Second, equal retirement rights provide a reasonable basis for over-age workers to retire at the same age. Under China's current law, women usually retire 10 years earlier than men, which indicates that the law recognizes that the age standard for female over-age workers is 10 years lower than that for male over-age workers. However, female workers who have reached the statutory retirement age have the same strong desire and ability to be employed as men of the same age, but are forced to retire, which is very unfair to female over-age workers. This gender-specific retirement system, which prohibits female workers from retiring at the same age as male workers, violates the equal rights of female workers. Men and women have equal retirement rights, and the law should not set a differential retirement age and should respect female workers. Female workers should enjoy the same retirement benefits as men. The same retirement rights can help reduce the difference between female overage workers and male overage workers, and improve
the current situation of employment discrimination faced by female overage workers.

3. Current situation of protecting the rights and interests of over-age workers

Regarding the current situation of protecting the rights and interests of over-age workers, it is mainly divided into the legislative level and the judicial practice level. At the legislative level, the relevant laws have few and unclear provisions. At the level of judicial practice, there are different approaches in judicial precedents due to different interpretations of the law by local courts.

3.1 Status of legislation

There is no law in China that specifically regulates the employment of over-age workers, and it is more reflected in the regulation of labor relations. From the Labor Law in 1995 to the Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law in Hearing Labor Dispute Cases (III) (hereinafter referred to as Judicial Interpretation III) in 2010, there are two laws, one administrative regulation, two departmental regulations and one judicial interpretation in force in China regarding the determination of labor relations of over-age workers.Among them, the Judicial Interpretation III, although no longer valid, still has a guiding value in judicial practice.

Article 44 of the Labor Contract Law, which came into force in January 2008, provides that the labor contract is terminated when the worker begins to enjoy basic pension insurance benefits in accordance with the law. In turn, the worker must reach the legal retirement age to enjoy the pension insurance benefits. However, according to the Social Insurance Law, workers who have reached the statutory retirement age are not necessarily entitled to pension benefits. In September 2008, the State Council issued and implemented the Regulations on the Implementation of the Labor Contract Law, which stipulates in Article 21 that reaching the statutory retirement age is one of the circumstances under which an employment contract may be terminated. There are two interpretations of this Article 21 in practice: the first one considers it as an amendment to Article 44 of the Labor Contract Law, where reaching the retirement age as a prerequisite for the termination of the labor contract can replace the previous standard. As soon as a worker reaches retirement age, the adjustment of the labor law no longer applies. The second holds that the employer has the option to terminate the employment contract when the worker reaches retirement age. Only if the employer expressly terminates the employment relationship with the over-age worker, will there be no labor relationship from then on, but rather a labor relationship. In 2010, the Supreme People's Court issued Judicial Interpretation III, Article 7 of which stipulates that employment disputes between an employer and its recruited personnel who are already enjoying pension insurance benefits or receiving pensions according to the law shall be treated as labor relations. Article 7 inherits the legislative spirit of the Labor Contract Law, which takes the beginning of pension insurance benefits as the node to end labor relations, and over-age workers who enjoy pension insurance benefits are not protected by labor law. For other situations there are no clear provisions in the judicial interpretation, and it is not clear whether there can be a situation to be treated as labor relations. This makes the judicial practice divided on the nature of the over-age employment relationship. One opinion is that those who reach the legal retirement age and enjoy pension insurance benefits are clearly treated as labor relations; another opinion is that the relationship between workers who do not enjoy pension insurance benefits and the employer is recognized as labor relations in some cases, yet in others, it is recognized as labor relations, and even other criteria exist.

3.2 Judicial Status

Due to the lack of laws and regulations with high validity to guide them, local courts have different opinions when dealing with disputes between over-age workers. By comparing the facts of the case, the basis of the decision and the outcome of the trial, it is found that in the cases of disputes between over-age workers and employers in judicial practice, different interpretations of the law by local courts and differences in local regulations have led to different approaches in judicial precedents, which are mainly divided into two types.

The first is to treat it as an employment relationship, which is the standard that most courts have found. Shandong Qingdao Intermediate People's Court (2018) Lu 02 Min Final 10248 held that Liu Yan did not work for Duobao Property Company when she reached retirement age, and her failure to pay social insurance and enjoy retirement benefits had nothing to do with Duobao Property Company. Therefore, there is no basis for him to claim the existence of labor relations between him and Duobao Property Company on the ground that he did not enjoy retirement benefits. The regulation of statutory retirement age has its corresponding formulation background, and breaking the correlation between retirement age and termination of labor relations is not conducive to the construction of a perfect social security system as a whole. The second one is handled according to labor relations. Anhui Anqing Intermediate People's Court (2019) Anhui 08 Min Final 2243 that He Moumou established labor relations with the defendant unit in August 2016, although he has exceeded the legal retirement age and has received the basic pension in urban and rural residents pension insurance, but did not violate the mandatory provisions of laws and administrative regulations, so the employment relationship between He Moumou and the bright community neighborhood committee for labor relations rather than labor relations. The Nanning Intermediate People's Court of Guangxi Zhuang Autonomous Region (2020) Gui 01 Civil Final No. 7150 points out that both over-age workers and employers who have established labor relations have the right to terminate the labor relations, and it cannot be deduced from this that workers who have reached or
exceeded the legal retirement age cannot establish labor relations with the employer. The Intermediate People's Court of Shaoxing City, Zhejiang Province, No. 570 (2020) Zhejiang 06 line final, held that "employees" should refer to workers in a broad sense who have labor relations (including de facto labor relations) with the employer, so workers who have exceeded the legal retirement age are not explicitly excluded. Generally speaking, in judicial practice, the resolution of disputes related to over-age workers is more controversial, and a uniform standard of adjudication cannot be formed. How to characterize the employment relationship of over-age workers? How to protect the rights and interests of over-age workers? There are still differences between the academic and practical circles.

4. Retirement rights perspective: the dilemma of protecting the rights and interests of over-age workers

Retirement has the property of right, but the mechanism of regulating over-age labor relations in China does not follow this basic element. On the one hand, the academia and judicial practice often ignore the right attribute of retirement right, and simply exclude the over-age employment status from the labor relations, and dilute the equal retirement right, which leads to the unfair setting of retirement age for men and women. On the other hand, the lack of legislative regulation and integration has led to the loss of the subject of retirement rights of over-age workers, which also makes it more difficult to improve the regulation mechanism of over-age labor relations.

4.1 Ambiguous nature of overage employment relationship

In China's academic circles and judicial practice, the workers' right to freedom of retirement has been neglected, mostly by simply excluding the labor relationship between the over-age workers and the employer, which affects the determination of the nature of the over-age employment relationship. Workers enjoy the right to freedom of retirement and can choose to retire or continue employment after reaching the legal retirement conditions without interference from others, and can continue to conclude employment contracts with their own or new employers. However, the existing legal system in China does not give workers the full freedom to retire. Article 21 of the Regulations for the Implementation of the Labor Contract Law takes age as the criterion for retirement and stipulates that the labor contract with the employer will be automatically terminated once the worker reaches a certain age. Article 44 of the Labor Contract Law takes the state's payment of pension insurance benefits as the criterion for retirement, and stipulates that the labor relationship with the employer to which the worker belongs will be terminated after the retiree receives the state's pension insurance benefits. Both of these provisions objectively serve to force workers to retire. The unclear positioning of the nature of the right to retirement and the neglect of the right to freedom of retirement have led to different standards of recognition of the relationship between over-age workers and their employers in both academic and judicial practice. There are five representative schools of thought on the nature of over-age employment relationship. [9] Four of which reject the nature of "over-age employment relationship": (1) The "labor relationship theory", which holds that China does not limit the maximum age of employment for workers, and that the legal relationship between workers who choose to re-employ after reaching retirement age is no different from that before retirement, and is still a labor relationship; (2) The "labor relations doctrine", which asserts that in labor disputes, workers in general are at a disadvantage compared to enterprises and need the tilted protection of labor law, but the state already guarantees the livelihood of retired re-employed people through various social benefits, and only civil labor relations regulation can already be effective; (3) The "illegal employment doctrine", which holds that when an over-age worker reaches the legal retirement age, his or her employment relationship with the original employment unit automatically ends and he or she is no longer eligible to enter into an employment contract; (4) The "special labor relationship", which believes that the over-age employment relationship is a special legal relationship, and workers who are over a certain age and then employed are not considered workers under the labor law, but considering that over-age workers are in a disadvantageous position in labor-management relationship, protection is not enough to be considered as labor relationship alone, so it is better to deal with it as a special form of labor relationship. For issues concerning the basic rights and interests of workers such as working hours and social welfare benefits between over-age workers and their respective units, refer to the Labor Law, and for issues concerning the autonomy of workers' will such as contract content and salary levels, refer to the Civil and Commercial Law; (5) The "social insurance standard theory", which holds that retirees who have received pension insurance before facing disputes arising from re-employment are treated according to the labor relationship. When a retiree faces a re-employment dispute, those who do not receive it will be treated as an employment relationship. In judicial practice, the relationship between over-age workers and employment units is mainly determined according to Article 21 of the Regulations for the Implementation of the Labor Contract Law and Article 32 of the Interpretation of the Supreme People's Court on the Application of Law in Hearing Labor Dispute Cases (I), and the retiree who receives pension insurance benefits is treated as a labor relationship. This recognition standard is consistent with the fifth doctrine of the academic community. According to the aforementioned analysis, the author believes that the nature of over-age labor employment relationship is a labor relationship. Workers enjoy the right to retirement freedom, and when they reach the prescribed retirement age, they can continue to work in the employer without retirement or establish labor relations with other employers. Therefore, in the determination of labor relations between over-age
workers and their employers, the main analysis is from the perspective of personality subordination, taking into account the judgment of subject qualification and labor remunerativeness.

4.2 Overage for men and women is considered unfair

In China's regulatory mechanism for overage labor relations, measures are usually proposed to protect the rights and interests of overage workers based on the different retirement standards for men and women, without considering the realization of equal retirement rights for female workers. Generally speaking, male workers over 60 years old are considered over-age workers, while female workers over 50 years old are considered over-age workers. Therefore, the regulation of employment relationship for female over-age workers is more demanding and less protective than that for male over-age workers. The right to retirement is a right that every worker enjoys. Female workers enjoy the same retirement rights as male workers, and they can choose to retire at the same age as men and enjoy the same social treatment according to the actual situation. It would be inappropriate to base the rules dealing with the employment relationship of female over-age workers on a gender-specific retirement age system that violates equal retirement rights, and then propose a regulatory mechanism under the wrong system.

The reason the state set the age lower for female workers is because of the belief that women are not as physically fit as men and have the social role of caring for their families. There are currently three types of statutory retirement in China, namely retirement under general circumstances, retirement for special types of work, and retirement after incapacity. As can be seen from Table 2, the general retirement age for female workers is 5-10 years lower than that of men. However, the level of medical care, economic conditions, the concept of life, and the status of women have all changed dramatically in our society today, and it seems inappropriate to still use the previous system to examine the differences between men and women. According to Article 2 of the Law on the Protection of Rights and Interests of the Elderly, 60 years old is the standard for determining the elderly. In terms of the ability of female over-age workers to remain in the workforce, the retirement age for women is mostly set at under 50 years old, and female workers in their 50s are not legally elderly and still have the ability to remain in the workforce. In terms of the willingness of female over-age workers to take up employment, many women in fact choose to re-enter the workforce after retirement. According to the China Population and Employment Statistics Yearbook 2015 to 2020, there are more employed females over the age of 50 than employed males over the age of 60 nationwide. Among them, in 2019, employed females over the age of 50 accounted for 27.4% of the employed female population nationwide, and employed males over the age of 60 accounted for 10.7% of the employed male population nationwide. It is enough to see that female over-age workers retirees are more willing to take up employment than men, but under the current law female workers are required to withdraw from employment units earlier than men, and the substantial equality embodied in the current retirement system in terms of retirement age for men and women is not in line with objective reality.

![Table 2. The setting of statutory retirement age in China](image)

<table>
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<tr>
<th>Reasons for Retirement</th>
<th>General situation</th>
<th>Special Trades</th>
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In the improvement of the mechanism for regulating over-age labor relations, we cannot only consider the legality of over-age, but also the rationality of over-age regulation. The inconsistency of retirement conditions for men and women, on the one hand, forcing female workers to withdraw from the labor field prematurely, is in fact an infringement of women's right to retirement freedom and deprives women of the opportunity to realize their self-worth. On the other hand, prematurely allowing women to enter retirement violates women's equal retirement rights and detracts from their social security rights. In China, workers can receive pensions only if they reach the legal retirement age and have accumulated 15 years of contributions. In terms of contribution rules, 15 years is the minimum lower limit, and the higher the number of years of contribution, the more pension you will receive. Female workers are often forced to withdraw from the workforce 5-10 years earlier compared to men, retire without pay and receive a smaller basic pension than men, which is not in line with the constitutional concept of equality between men and women. Some Western countries have set the same retirement age for men and women in order to protect the equal retirement rights of workers. Therefore, in the design of the regulatory mechanism for over-age labor relations in China, we should also fully consider the level of equal retirement rights for men and women, protect the legitimate rights and interests of women, give more attention to female over-age workers, and strive to achieve equality between men and women.
4.3 Over-age workers have little awareness of their rights

The integration of legislative regulation of retirement rights is an important issue in improving the mechanism of over-age labor relations. However, the current laws in China do not uniformly and clearly stipulate that retirement is a right of citizens or confirm the nature of over-age labor employment and safeguard the social insurance rights and interests of over-age workers. Over-age workers have not established the awareness that they can still choose to continue their employment even if they enjoy retirement rights, and their awareness of their rights is weak. The retirement rights of over-age workers need not only to be determined by the Constitution, but also to be regulated by the Labor Law and the Social Insurance Law, but the regulation of retirement rights in both aspects is lacking at present.

At the constitutional level, our country has very few provisions on the right to retirement, and some of these provisions related to retirement are vague. The right to retirement at the constitutional level specifically includes the right to rest, the right to freedom of retirement and the right to equal retirement. Article 43 of the Constitution provides that workers may choose to take a break, which in practice is equivalent to the choice of whether or not to leave a retirement position, but it does not follow from this norm that workers have the right to continue working without a break. Similarly, Article 44 only stipulates the qualification of the subject of retirement and the obligation of the state and society to guarantee the life of the retired person, but it does not determine whether retirement is a right or a duty of the citizens, and it is impossible to conclude that the citizens enjoy the right to freedom of retirement. At the same time, some scholars even point out that the right to retirement as stipulated in Article 44 only refers to the right to claim social benefits or pensions of retirees, and does not include the content of the right to freedom of retirement.[10] The right to equal retirement mainly refers to the retirement conditions and treatment of men and women shall be the same. Article 48 stipulates that the content of the rights of women and men are the same. However, at present, China has implemented a system of retirement for male workers and female workers at different ages, and to a certain extent, it can be concluded that China has not really established equal retirement rights for men and women.

At the level of sectoral laws, the provisions on retirement rights are scattered and incomprehensive. At present, China's legal system is based on the Constitution, and several regulations and rules provide for partial retirement in parallel. There is no unified legal regulation to integrate retirement issues, resulting in different approaches to over-age workers in academic and judicial practice, which is not very effective in protecting the rights and interests of over-age workers. The retirement system in China was initially prescribed by administrative regulations of the policy nature, namely the "Interim Measures of the State Council on the Retirement and Retirement of Workers" and the "Interim Measures of the State Council on the Resettlement of Old, Weak and Disabled Cadres" promulgated by the State Council in 1978, which mainly stipulated the essentials of withdrawal from the labor field.

and the social security possessed after withdrawal from the labor field. The conditions for workers to withdraw from the labor field are restricted by Article 44 of the Labor Contract Law implemented in 2008, which stipulates the termination of labor relations after receiving pension insurance benefits, and Article 21 of the Regulations for the Implementation of the Labor Contract Law in the same year, which stipulates the automatic termination of labor relations after workers reach retirement age. The content of pension insurance was initially stipulated in the Social Insurance Law in 2010. As for the delayed retirement system, flexible retirement system, and the recognition of over-age labor relations are not stipulated in the law, this part is only guided by local documents or court precedents, and many aspects of retirement rights are yet to be regulated by legislation.

5. Retirement Rights Perspective: Ways to Protect the Rights and Interests of Overage Workers

In the past, the legal regulation mechanism of over-age labor relations was to solve the problem from the perspective of post-retirement remedy. The identification of the right attribute of retirement provides a new idea to solve the regulation mechanism of over-age labor relations, that is, to avoid the illegal state of over-age labor relations from an ex ante perspective, and to clarify the rights of retirees to provide a legal basis for over-age workers to defend their rights.

5.1 Building a flexible retirement model

By setting up a flexible retirement system based on the right to retirement freedom, over-age workers are able to freely choose the age at which they leave employment according to their circumstances, and are no longer prohibited from employment once they reach the legal retirement age. Under a flexible retirement system, workers can choose to leave their jobs early or delay their exit from the workforce within a specified retirement age.

Generally speaking, a flexible retirement system consists of three important elements: the first is the design of a flexible retirement age, where the state makes a comprehensive analysis of the work characteristics and professional skills of workers in society and sets an appropriate retirement interval, and workers have a certain variety and selectivity in choosing when to retire; the second is that under a flexible retirement approach, which differs from the one-size-fits-all approach of the past retirement system, workers can choose to retire early or delay retirement according to their actual needs; thirdly, workers' retirement benefits also adopt flexible retirement income, which means that the retirement age or years of work corresponds to the amount of pension, and retirees will enjoy different pension benefits when they retire at different retirement ages.

However, China has not yet established a flexible retirement system and can appropriately draw on the experience of other countries. The flexible retirement system in the United States focuses on changing the
retirement age criteria. Initially, workers were required to retire from the workforce at the age of 65, but two major steps were taken to establish a flexible retirement system: the first was to establish an early retirement age, which was set at 62, but with reduced pension benefits. The second is to raise the age of withdrawal from the workforce, from 65 to 67. The U.S. has set an age range of 62-70 years, and workers can choose to exit the workforce at any age. [11] By also meeting the number of years of contributions required by law, workers can choose to withdraw from the workforce and apply for a pension, but the age of withdrawal from the workforce varies, as does the amount of pension received. In case of early retirement, the retirement amount will be reduced. If the worker withdraws from the workforce at the standard retirement age, he or she will receive the full amount of the pension. If you choose to delay retirement, the retirement amount will increase accordingly. Germany's flexible retirement system is broadly similar to that of the United States and is mainly reflected in the pension insurance system. Germany gradually stopped limiting the retirement age of workers in 1972 and designed a flexible retirement system for retirement, which provides for two types of early retirement situations. The first category is for workers who have reached the age of 63 and have 35 years of pension insurance, and the second is for workers who may not be able to continue their employment due to illness or unemployment. In terms of pension levels, initially workers in Germany did not have their pension benefits reduced when they withdrew from work early, but as Germany's elderly population became increasingly large and the problems of pensions became more pronounced, Germany began to provide for delayed or early retirement with corresponding increases or decreases in benefits. In order to realize the retirement freedom of over-aged workers in China, we can learn from the reform experience of the United States and Germany and set up a more flexible retirement interval with more freedom. Within the specified age range, workers can choose to withdraw from the labor field at any age and enjoy the corresponding retirement benefits. A flexible retirement system is essentially fair; people in various types of positions in society have different retirement needs, especially for overage workers. Over-age workers can choose to delay retirement to achieve their pursuits. However, when setting up a flexible retirement system, China should pay attention to the following issues: first, comprehensive consideration of the pressure on our pension insurance premiums. In setting the age range, the basic objectives of the economic system, the country's political, socio-economic, and general demographic situation should be considered comprehensively. Secondly, different regulatory mechanisms should be set for different types of retirement. The amount of pension received by those who leave the workplace early needs to be moderately reduced. For those who leave the workplace late, the pension amount can be moderately increased. At the same time, factors such as the fairness of the system and the differences between industries should be considered. Prevent some workers in high-risk industries from suffering pension losses after early retirement, and civil servants or those working in high-paid industries from increasing pension pressure by delaying retirement too much. Third, a comprehensive analysis of the possible effects of flexible retirement and compensation measures should be conducted. The flexible retirement system mainly solves the problem of social pension pressure and the increase of over-aged workers, and it is impossible to cover all aspects. At present, the flexible retirement system is also facing the opposition of the majority of the public. The public fears that the implementation of a flexible retirement system will impact the job market. The state must design flexible retirement with consideration of both the short-term and long-term effects of flexible retirement and work out compensation measures in advance.

5.2 Progressive introduction of retirement age parity

The female retirement system currently implemented in China was originally intended to be based on welfare care for women. However, in the face of women's longer life expectancy, improved employability and increased employment opportunities, women are still forced to retire earlier than men, which not only makes it difficult to protect female workers, but also seriously violates women's equal retirement rights and exacerbates the employment difficulties of female over-age workers. The gradual introduction of equal age retirement for men and women is conducive to the protection of women's equal retirement rights and also to women's career development. Gradual equalization of the retirement gap between men and women of the same age means taking a slower approach, gradually extending the retirement age for women, and reducing the impact of the retirement system adjustment on society. The most important feature of the gradual delay in retirement is the "small steps and gradual progress", which consists of three main phases. The first is a trial period, during which the retirement age will be moderately and gradually delayed, taking into account the public's acceptance. The second is the buffer period, during which the age at the end of the trial period will be used and no further delay will be made. The third is the improvement period, during which the delay mechanism will continue to be activated and the retirement age will be delayed to the target age. Some foreign countries are gradually starting to implement the same retirement age for men and women. In the United States, the retirement age is designed with reference to the time of birth of the population, so that male workers and female workers exit the workforce at the same time. The UK is gradually extending the time when women exit the labor field in order to achieve the goal of equal retirement age for men and women. Since 1995, the UK has introduced the Pensions Bill to extend the employment of female workers, i.e., from 2010 to 2020, to modify the rule that workers leave the employment field at the age of 60 and raise the retirement age to 65. In 2010, the UK government also stipulated that it will transitionally postpone the age of female workers leaving the workplace from 2010 to 2018, by roughly 9. In 2010, the UK government announced that the retirement
age for male and female workers would be unified at 65 years. The current retirement age in the UK is 65 for males and 60 for females. In fact, the average male worker leaves the workforce at 63.6 years of age and the average female worker leaves the workforce at 61.7 years of age, gradually achieving equal retirement age for men and women. [12]

In China, it is feasible to extend the retirement age for women to achieve the same age of retirement for both men and women. In fact, China has been considering a delayed retirement system since the 20th century, and in 2021, as China enters a new period of development, it is once again paying attention to the delayed retirement system, writing the gradual delay of the statutory retirement age into the 14th Five-Year Plan "Proposal", listening extensively to the opinions of all sides of society, and formulating a specific delayed retirement reform plan. Along with the trend of China's large elderly population base and increasing pressure on pensions, it is inevitable that China will implement a delayed retirement system. Nowadays, women's working ability, social status and knowledge level are significantly improved, and age cannot be a fetter for women's development. With this opportunity, China can take into account the different regions, industries, family economy and other circumstances, and learn from foreign experience to gradually extend the retirement age of women in small steps year by year. Extending the retirement age for women, which is in line with the requirement of equal retirement rights, can improve women's satisfaction and motivation to work at the statutory retirement age and meet the employment wishes of female over-age workers. Achieving equal retirement age for men and women will not only improve the social status of women, but also enable women to obtain the same employment opportunities as men. Specifically, the achievement of equal age retirement for men and women can be divided into three stages:

In the first phase, the existing retirement behavior is regulated, and in a manner similar to that of the United Kingdom, it is planned to take 10 years to change the status quo of women's retirement from the labor field at the age of 50 by raising the retirement age to 55; in the second phase, the age of the first phase is extended and maintained; in the third phase, the delay mechanism continues to be activated, and the retirement age for female workers is gradually extended until it reaches 60. Raising the retirement age for women in small, slow steps will help alleviate negative public sentiment and increase public acceptance. Realizing equal retirement rights for female over-age workers is conducive to maximizing self-worth and increasing overall social benefits; enjoying the same treatment as men is conducive to avoiding employment discrimination and achieving the goal of socially equitable employment.

5.3 Clarify the rights of over-age workers
Retirement has the attribute of rights, but the current laws in China do not provide for this, resulting in over-age workers having no basis for defending their rights and lacking awareness of their rights when their rights are violated. Regarding the regulation of the right to retirement, the legislative model should be based on the provisions of the Constitution, with the basic law as the core and other legal documents as a supplement. Firstly, the retirement rights of workers should be clearly defined from the constitutional level. Chapter II of the Constitution provides for the rights and obligations of citizens. The right to retirement should also be listed in Chapter II, but Article 44 only stipulates the subject of retirement and the obligations of the state and society to protect it. However, as a public law, the main purpose of the Constitution is to limit public power and protect the rights of citizens, and the content of the retirement of workers should be in accordance with the basic purpose, focusing on the protection of citizens' retirement rights. Therefore, I believe that Article 44 is a partial regulation of workers' retirement rights, but it is rather general and vague. Regarding the provision of equal retirement rights, Article 48 stipulates that the state guarantees women the same rights as men, and women can participate in the selection and training of cadres and receive the same salary as male workers. However, our system forces female workers to retire earlier than male workers, depriving them of their right to work and reducing their entitlement to benefits, so it seems that this article does not determine whether it includes equal retirement rights for men and women. Therefore, the constitutional level should continue to improve the content of the right to retirement, which can mainly increase the provisions of the right to freedom of retirement and the right to equal retirement, and also moderately increase the content of the retirement system in the content of the right to rest and the right to social security.

Secondly, At the sectoral level, there is a need for a special, high-ranking Retirement Law to unify the relevant elements of the right to retirement. Article 44 of the Constitution does not specify the legal basis of the retirement system, but only generally states that it is in accordance with the provisions of the law. The retirement system in China was initially regulated by two temporary measures promulgated by the State Council, along with a series of judicial interpretations in judicial practice. Since there were no retirement-related provisions in the constitutional text at that time, these two provisional measures were approved by the Standing Committee of the National People's Congress at that time and could be regarded as having quasi-legal rigidity. [13] However, the legislator has not been able to translate the two systems into law to provide for them. 2008 promulgated the Labor Contract Law and the Regulations on the Implementation of the Labor Contract Law, which provide for the elements of termination of labor contracts respectively. 2010 saw the introduction of the Social Insurance Law, which provides for social insurance. The content about the time of withdrawal from the labor field and the right to retirement is now regulated by administrative regulations and rules and other subordinate laws. The retirement system has not been legalized from the 1950s to the present, and is also mostly regulated by subordinate laws below the law. And whether it is a departmental law or an administrative regulation, it only regulates a certain aspect of retirement. Therefore, some scholars propose to
establish a law "Retirement Law" or other special related legislation to solve the problem of retirement system and over-age workers.[14] The basic issues of the retirement system are regulated by a special Retirement Law, which adopts a uniform standard. The same law is applied by each court when dealing with related disputes, which facilitates the determination of the nature of over-age employment relationship and realizes the fairness of legal procedures.

5.4 Further improve the relevant supporting mechanisms
In order to effectively guarantee the continued employment of the elderly, in addition to the improvement of legislation and the design of related systems, the government should also improve the relevant supporting mechanisms, increase intervention and governance, and improve social acceptance of the employment of the elderly workers, in order to fully realize the job security for the elderly.
First, improve the anti-employment discrimination mechanism for senior workers. In reality, employment discrimination against older people is common, and even in their 40s they are discriminated against by employers. The U.S. Age Discrimination in Employment Act stipulates that workers can certainly continue to be employed after reaching the age of 40, and their age cannot be used as a reason for employers to refuse to hire them, nor can they be forced to retire because of it. In Article 12 of China's Labor Law, it only stipulates that workers are not discriminated against in employment in terms of nationality, race, gender and religious beliefs, and age discrimination for senior workers is not explicitly prohibited. For senior workers, it is unfair to judge their employability by their age rather than their ability. Second, support is given to enterprises that accept senior citizens for employment. Enterprises are efficiency-oriented, and the reason why they do not accept senior citizens for employment is also due to factors such as their physical condition, work efficiency, and degree of work risk. In order to promote enterprises to accept senior citizens, the government can provide subsidies or tax incentives to these enterprises to increase employment opportunities for senior citizens. Of course, even if the state promotes the employment of the elderly and protects the rights and interests of over-aged workers, it should follow the principle of moderation. Some high-risk and high-intensity occupations are really not suitable for the elderly to continue to work. At this time, the pursuit of employment for the elderly will not only take up the employment opportunities of young people, but also lead to unqualified over-age workers forced to stay in the post, reducing the overall efficiency of enterprises, which is not worth the loss. Third, establish a supporting and articulated social insurance system. The social insurance system is a compensatory redistribution system, and its main purpose is to guarantee the livelihood of socially disadvantaged groups. In China, workers can receive corresponding pension benefits after they leave the employment field. When these workers are employed again, if they still pay the same premiums as ordinary workers, it may cause confusion in the existing insurance system, so a differentiated pension insurance premium payment system can be established.

6. Conclusion
In the past, the protection of the rights and interests of over-age workers mainly focused on the analysis of the characteristics of over-age workers themselves, but relatively neglected to grasp the prerequisite issue of the attributes of retirement rights. This paper believes that retirement should be a kind of right, and the protection of the rights and interests of over-age workers should not ignore the right attribute of retirement, and should change the nature of "over-age employment relationship" which is blurred due to the ignoring of the right attribute of retirement, and the "over-age" of men and women due to the dilution of equal retirement rights. We should change the problems such as unfair recognition of "over-age" due to ignoring the nature of retirement rights, unfair recognition of equal retirement rights, and weak awareness of over-age workers' rights due to the lack of retirement rights regulation. In the future, we should design a flexible retirement model, implement equal retirement age for men and women, and improve the retirement system to implement the retirement rights of over-age workers, and further improve the relevant supporting mechanisms to protect the legitimate rights and interests of over-age workers in a more comprehensive and effective way.

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