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# On Non-discriminate Effort and Challenge of China from the Perspective of Law\*

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**Abstract:** China has been making great efforts to practice the principle of equality through legislation and litigation since its reform and opening to the outside world. Although some successes have been got, on the whole to achieve “non-discrimination”, China still has to face such difficulties as the divisional rural-urban social structure, the disharmonious legal system and the cultural environment that has lost core value.

**Key Words:** Equality; Nondiscrimination; Problem

## I

In 1999, it is officially announced that China will follow the road as that the People's Republic of China governs the country according to law and makes it a socialist country under rule of law through the Amendments to the Constitution of the People's Republic of China. In 2004, it is clearly defined as the duty of State in the Constitution that China respects and preserves human rights. As the cardinal principles of international law, the principle of equality and the rule of nondiscrimination must be observed in the construction of country under rule of law in that China has been playing an increasingly important role in the setup of the world today.

Since the reform and opening to the outside world, China has made a real achievement in the aspect of legislation. Tremendous efforts have been made in the acknowledgement of the principle of equality from the perspective of static text of law. Firstly, the Constitution which is of the supreme power has acknowledged the principle of equality. The article 4 of the current Constitution provides that all nationalities in the People's Republic of China are equal. The 2nd item of article 33 provides that all citizens of the People's Republic of China are equal before the law. And the article 34 provides that all citizens of the People's Republic of China who have reached the age of 18 have the right to vote and stand for election, regardless of ethnic starts, race, sex, occupation, family background, religious belief, education, property status or length of residence. Secondly, the principle of equality in constitution has been embodied in the basic branch laws. For instance, the article 3 of General Principles of the Civil Law of the People's Republic of China provides that parties to a civil activity shall have equal status. The article 4 of the Criminal Law of the People's Republic of China provides that anyone who commits a crime shall be equal in applying the law, and no one is privileged to be beyond the law. The article 8 of the current Civil Procedure Law of

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the People's Republic of China provides that the parties in civil litigation shall have equal litigation rights, and the people's courts shall, in conducting the trials, safeguard their rights, facilitate their exercising the rights, and apply the law equally to them. The 2nd item of article 9 of the 1995 Compulsory Education Law of the People's Republic of China provides that citizens shall enjoy equal opportunity of education regardless of their nationality, race, sex, occupation, property or religious belief, etc. And the article 36 provides that education receivers shall enjoy equal rights in going to school, entering higher school, employment, etc. And finally, the principle of equality has also been provided in administrative regulations and local regulations.

To be sure, the equality of rights in the perspective of legislation appears more distinctly the declaration of equality. In other words, legal acknowledgement is of major importance to the equality which is regarded as the concept of fundamental value in modern constitutionality, however, it is far from so. After all, equality is of essential utility and significance to the social subject only if it can be realized. The declaration of the equality of rights from lexical perspective doesn't set up any closed outer wall in advance only in view of social status or post open to all citizens.

Any social status or post is open to every citizen without any race or status restriction, and every citizen has the equal rights to achieve them. This is also called the prospect-regarding equality proposed by Douglas Rae which refers to that each citizen has been provided with the equal probability to attain to the given goal. However, the value of aforesaid equality from the lexical perspective will be seriously impaired if the consideration of the differences of the accessible means, resources, knowledge, and abilities of the social subject who is in the given time and space is casted aside. Therefore, due consideration should be given to not only the opportunity-regarding equality of rights, but also the means-regarding equality, as well as the endeavors of safeguarding the approximately equal means, instruments, resources, and abilities which will be employed in achieving the given goal or opportunity for people in real life. In the meanwhile, how is the distinguishable treatment of the social subject to be arranged?

## II

Once the understanding of the principle of equality is oriented towards the understanding of means-regarding equality, the principle of nondiscrimination will be worthy of attentive consideration. The article 2 of the Universal Declaration of Human Rights (1948) provides that everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The article 14 of the European Convention on Human Rights provides that the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. As a matter of fact, the principle of nondiscrimination provided in the European Convention on Human Rights has been realized in terms of the relatively clear criteria of judgment, diminution of the abstractness of the principle of equality, rectification of the malfunction or deficiency of the anticipated result of legislation through judicial cases by the European Court of Human Rights, etc.

Consequently, equality from the universal and declared perspective positively acknowledges the human rights and freedoms of every citizen, while the nondiscrimination from the concrete and essential perspective protects the human rights and freedoms of every citizen by whether the

discrimination can be considered to be acceptable or not. For that reason, the judicial process will be served as the important field where the principle of nondiscrimination works.

Since the era of the reforms and opens, China has made onerous explorations of judicial practices through the hearing of “anti-discriminations” cases with the target that striving for “equal measures”.

### The Major Cases/Events of “Anti-discriminations” (2004-2007)

| Cases/Events   | Time           | Keywords   | Influences   |
|--|----------------|--|--|
| 1.Zhang-Xianzhu v. The Personnel Bureau of Wuhu <sup>1</sup>         | Nov. 2004      | “The first case of Type B hepatitis discrimination in China” | The 120 million carriers of Type B hepatitis virus were focused by public and the local governments of Zhejiang, Sichuan, Fujian, and Guangdong etc had modified the prohibitions of employing public servants with this sort of virus. The state personnel department also further unified the standard of checkup and employment of state public servants. |
| 2.The “EEC migrants” event <sup>2</sup>                              | Jun.-Sep. 2005 | The discrimination in distribution of educational resources  | Questioning the “EEC migrants” that attack on the system which leads to the disproportion of educational resources in colleges and the phenomena of “same papers with different bottom-line” in EEC.   |
| 3.Mr. Yang v. The Research Institution of China Railway <sup>3</sup> | May. 2006      | The Type B hepatitis discrimination in employment            | The nominee in “the most highlighted cases of Ten in 2006” which reflected the awkward situations of more than 100 million carriers in China.  |
| 4.Qiu Zi v. Angli Company <sup>4</sup>                               | Jan. 2007      | The first case of discrimination by appearances.             | Shanghai Angli Investments & Information Ltd. announced a declaration of anti-discriminations which is the first one in Chinese enterprises.   |

<sup>1</sup> Zhang-Xianzhu, from Wuhu in Anhui province, graduated from the department of environment at Wanxi College. Mr. Zhang took the entrance exams of Wuhu’s public servants and got the 1<sup>st</sup> among the 30 examinees in 2004’s summer. However, he was disbarred the qualification due to carrying the Type B hepatitis. Then, he brought a lawsuit with the Personnel Bureau of Wuhu in 10<sup>th</sup> November.

<sup>2</sup> Li-Yang, who is in the Hubei hukou. He got a high marks with 897 points in EEC (The Entrance Examination for College) that made him as the 1st of natural sciences department in Hainan province after 2005’s EEC. Owing to his identity of “ECC migrant” that could not fitted in the condition of attendance in Hainan with two years, he could not be matriculated by Tsinghua University which is the first-class colleges that he chosen even through he was the zhuangyuan or the 1st in Hainan’s ECC. According to the Provisional Regulation of ECC Conditions in Hainan which was promulgated by the office of Hainan province in second half year of 2002, all the examinees in Hainan should correspond with these three conditions: the examinee him or herself and his or her legal curators should be in Hainan Hukou; the examinee’s last two years of high school should be attended in Hainan; and the examinee was in Hainan hukou while graduated from Hainan’s primary school or middle school. Furthermore, those in Hainan hukou and fitted in one of these three bans could only choose the second-class colleges and professional schools.

<sup>3</sup> Mr. Yang was the graduated in the department of civil engineering in SWJTU who signed a three-party employment contract with the Electrified Survey and Design Institution of China Railway in Tianjin and SWJTU. Due to the checkup of Type B hepatitis, the EDICR unilaterally canceled the contract with Mr. Yang. Hence he sued the EDICR in charge of violation to the court of Hedong District in Tianjin in 24-5-2006.

<sup>4</sup> Qiu-Zi is from Shangqiu in Henan province. As result of innate hydrocephalus, the brain is much bigger from her born. Qiu-Zi passed the interview by the Zhengzhou division of Shanghai Angli Educational Company and accepted fifteen-day training in the second half year of 2006. Then, signed a contract with Angli in Dec. and was allocated into the attached school, Jiashan Campus in 21<sup>st</sup>. However, she found something uncanny in the eyes of persons in campus’s charge when registered in 24<sup>th</sup>. Soon she was called back to Zhengzhou then told that Angli could not fulfill with contract by her appearance. Qiu-Zi went to arbitration with Angli in Shanghai Committee of Labor Arbitration for returning the fees of training 260 Yuan, of public affairs and traveling 50 Yuan and of the violation fund 10000 Yuan.

The Amendment of Constitution of P.R.C in 2004 with the content of "Human's Rights" which was embalmed as the new stage of Chinese legal indemnities in human rights. With the continuous and stable development of Chinese economy and the raising awareness of right protection in Chinese citizens, the trials of "anti-discrimination" would be taken as a mirror which reflecting the current society in China. All of the cases or events above have the vivid characters: One is that the significant effects in every annual span and the countless social focus that every sampling cases or events possessed by the public opinions through the webs and other medias; Two is that the selected four cases/event had reflected a broaden area of discriminations in China, such as health, localism and looks; Three, the gigantic numbers of the discriminated groups which had illustrated in the cases of Type B hepatitis or "ECC migrants" are more than or close to 100 million people; And four is that the "discriminations" were totally justified near 50% in the samples which show that Case 1 and 4 were "discriminated", Case 2 was rather dramatic that Li-Yang was matriculated by HK City University and Case 3 was unclear, which are all from the outcomes.

Admittedly, all mentioned above just simply sketched the images of "anti-discriminations". Taking the concerning research materials as the ground, the problem of discriminations in today's China is still very complicated and severe, which has spread into many fields such as birth, hukou or residency permit, sex, age, height and appearances, even the factors of name, shuxiang or sign of the zodiac and blood. According to the authorities, 85.5% of Chinese people believe that there exist discriminations in employment indeed and 58% among them consider that are serious or less serious.

### III

To impel the principle of "anti -discriminatory", China has a long way to go. The main reason lies in:

The First problem is the plight of the social structure. Rawls pointed out that, the main problem of justice is the basic structure of the society, more precisely, is the main distribution of basic rights and obligations, which decided the division of the benefits by the social cooperation.

(Rawls ,1998:5) . In other words, the injustice exists in the unfair social structure inevitably. The severe polarization of the rich and poor, and any other kind of social unfairness, which the Chinese society faced today, are closely linked to "the urban and the rural division structure". This "binary structure" first appeared in the area of economic, accompanying economical modernization, constantly expanded to cover almost all areas of the society, and gradually led to the heterogeneity of politic and culture in urban and rural regions. This binary structure is substantive reason of social discrimination, which exists widespread now. The state already realized this situation, and tried to change it. For example, in 2007, the authorizes of Chongqing and Chengdu were officially approval led by the State Council, to build up the reforming pilot areas of synthesis coordinating urban and rural region. It is the first time for the nation to establish reforming pilot area, to search for the new measures on "binary structure" problem. However, the social structure will not change overnight. It is doomed that the path of "anti -discriminatory" is uphill.

The second problem is the plight of the legal regime. The legal regime should respond to the needs of social development. Though the principle of "anti-discrimination" was manifested in the legislative aspect, it still appeared sketchy, difficult to operate. For example, the scope of anti-discrimination in employment is narrow, in current law. National Political Consultative Conference member Chen Wanzhi pointed out that the "Labor law" had only stipulated anti-discrimination in aspects of the nation, the race, the sex and the religious belief, lacking the stipulation to other

discrimination. . This situation made people tend to think that, the law did not prohibit the discriminations, except the above. Once the labor encountered such kinds of discrimination, they often lacked of legal method to defend their rights. Meanwhile, the long-term “Legislative Center” model neglected the judiciary effect to relieve discrimination. For example, China lacked of special relievable mechanism on "anti-discrimination" at present. This is a huge distance with developed country. Although the litigation on employment discrimination has emerged, the number is minimal, compared to the prevailing similar incidents.

The third problem is the plight of cultural support. To achieve the goal of “anti-discrimination”, the society required a healthy cultural atmosphere of equality, tolerance, and mutual respect. This kind of cultural precipitation is important spiritual support of "anti-discrimination" principle. With economical boom of China attracting worldwide attention, the words such as “economy”, “wealth”, “number”, and “calculation”, and so on, flooded the society. It is inevitable that “social Darwinism”, “Jungle Rules” become part of the Values. Some investigations indicated that, the first three sorts of groups, which were most seriously discriminated against in current China, is the AIDS patient, the disabled and the peasant laborer. The AIDS patient and the disabled were society's Minority groups, while the peasant laborer had made a great contribution to the social development. However, they were “discriminated”! Simone pointed out that , “equality is one of the vital factors of the human soul. It is disbursed to all human the same respect, the consideration, and the effective confirmation. Equally respect should be imposed on every human being, without examination of its situation. ”( Friedrich,1992). If China failed to construct the core morals and the cultural environment, which matched well with the modern society, truly respected to the equal rights and to the Minority group’s dignity, the implement of “anti-discrimination” will be more and more difficulty.

### **References**

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