The study of constitutional equal rights on the HBV discrimination in China

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Abstract

Owing to the hepatitis B virus (HBV) discrimination phenomenon, this thesis focuses on the right relief of the HBV carriers. This thesis aims at perfecting the protection of the equal right in our constitution and dispelling the unreasonable differential treatment of all forms. Because, according to a paper medical record which has nothing to do with the work ability, determining whether a person is qualified for a job constitutes discrimination. After all, Equality and prohibition of discrimination are the pillars of the legal system of modern human rights. We should perfect on the protection of constitutional equal right of HBV carriers from the legislative, administrative and judicial aspects.

Keywords

HBV discrimination, constitutional law, equal right.

1. Introduction

What is the result of discrimination? The result is all of your efforts are in vain when you are treated with bias. Because your some identity (including your nationality, place of birth, age, appearance, sickness) may be by nature, not connected with your will or behavior. Discrimination is negating one's will and individual effort. In this situation, discrimination is a kind of power, which makes people who is treated with bias despair.

2. The phenomenon of HBV discrimination and serious social harmfulness of HBV discrimination that China exists extensively at present

From the murder of Zhou Yichao to the administrative proceeding of Zhang Xianzhu, then to the constitutional review conducted to Standing Committee of the National People's Congress by 1611 citizens in November 20 2003, the activism of 120 million HBV carriers caused the widespread media attention. And it is worth our attention that, whether Zhou Yichao event and Zhang Xianzhu event, or previously known as "the first case of Chinese constitutional right of equality"——Jiang Tao sued the Chengdu Branch of People's Bank of China recruiting staff height discrimination in administrative litigation case, or the ugly girl, Zhang Jing asked the media for help because of job failures over thousand times, this series of media reports of the hot spots were related to the experiences about discrimination in job interviews of the heroes in such events.

Against employment discrimination has been the goal of the international community to work together. In our country, especially in the field of law, the research on problems of employment discrimination demonstrates the following characteristics:

On the one hand, the study of the legal field is less than that of the economic and social fields. Discrimination in employment is not only an economic problem, a social problem, but also a legal issue. Because, in a country within the rule of law; whether economic or social problems, are bound to be resolved by law. Unfortunately, although this issue had caused the attention of many economists and sociologists ten years ago, the research in the field of law has just begun.

On the other hand, the direct study is less than the indirect. At present, the aim of the research in the field of law is how to deal with the challenge of the social competition after China's entry into WTO. Therefore, it focuses on the overall study of the gap between the labor law and the international labor
standards, and lacks direct research on the issue of discrimination. Moreover, the study of this kind of external drive is obviously not conducive to the combination of domestic reality.

The current medical research has proved that the transmission way of HBV is similar to HIV, blood transmission, mother to child transmission and unsafe sexual behaviors. And the person who produced the antibodies after injected hepatitis B vaccine will not be infected. Therefore, the discrimination against hepatitis B infection is no reason, and it is no legal basis. Equal employment opportunity and equal opportunity to seek public office have become one of the basic human rights recognized by a series of international conventions. If the state organs refuse to employ HBV carriers for civil servants, enterprises and institutions can also refuse to recruit HBV carriers by the same reason. As a result, the employment rights of HBV carriers can not be achieved. It is unimaginable to disentitle the rights of labor and education for all patients with infectious diseases. They can't stand the pain of isolation from society. Society is also not likely to pack them for free treatment. Therefore, the right to labor and education of the patients with infectious diseases should undoubtedly be protected by law.

In fact, the discrimination phenomena in real life are far more than the appearance, height or the virus in these areas. Theory should be the guide of practice. To counter discrimination, it is necessary to study the phenomena of discrimination in the society, and to explore the theoretical and practical significance of the constitutional right of equality, and to draw all kinds of discrimination phenomena existing extensively in the Chinese society from this, point out that discriminates against behavior ignoring and infringement of the equal right of the constitution.

3. Equal right and relevant concepts

In China, the idea of equality has a long history and rich connotation. In the era of contention of a hundred schools of thought, the Confucian pursued building a world of equality of personality. In this world, although the blues the distinction between rich and poor, but each person's personality is equal and obtained the same respect and treat. Mohism pursued equality of work. The Taoism advocated the equality of all natural beings, and thought that each one has its good points and limitations. The legalism pursued legal equality and emphasized that the same rules apply to everyone. Although the ancient thinkers in China had different goals, they all wanted to build a peaceful and happy society based on equality. It is regrettable that the political ideas in ancient China were too much emphasis on obligations, less attention to the right, so there was no development of the concept of equality we have today.

Taken two or more than two objects as premises, equality is a concept that shows the relationship between the same object. Equality and freedom are the goals that mankind pursues for a long time, and it is the inner motive power of constitution development. But the values of the two are not always unified; sometimes there are contradictions and conflicts. In order to obtain the equality of people's value, eliminate all kinds of inequalities in the real life, human beings have made long-term efforts. From the history of the development of law, the right of equality denied the unreasonable discrimination of the feudal status, containing the continuation of the feudal society; it is the foundation of the modern civil society which is based on the law of capitalism. The principle of equality before the law, declared by the French Declaration of human rights, had produced a universal and far-reaching influence on the constitution of all countries. The enactment of constitutions since eighteenth Century, without exception, drawing on the constitutional precedent of the French constitution, explicitly declared that the principle of equality before the law, equality as an important individual right to be guaranteed.

Reviewing and analyzing the development of the equal right thought between China and western during the past centuries, it summarizes the concept of equal right. That means the citizen enjoys the legal right equally and fulfills the corresponding obligation. It also requires the country to offer right and principle that are protected on an equal basis. Its concrete characteristic includes four respects. Firstly the equal right concept means the citizen exercises the right equally and fulfills obligations
equally. Secondly the citizens have the right to require the country to protect equally. The country protects each citizen's equal status. No one will be treat difference because citizen's sex, age, job, origin, race, faith, etc. reasons. Thirdly it is one of the main duties of the country to guarantee its people enjoy the dignity of human personality and other fundamental rights equally. Fourth the equal right concept means it is the method or means of realizing the fundamental right.

Equal right is a kind of fundamental right and the principle of a constitution. Equal right, different nature with other constitution fundamental rights as a legal right, have certain position of surmounting in the fundamental right system of the whole constitution. Equal is universality and programmatic as the principle of a constitution, which become the foundation of every fundamental right of citizens. It is the spirit that comes from every citizen's fundamental right.

4. The evolution of the legal protection of equal right in foreign countries

Taken U.S.A. for example, we can find out the fact in detail that the establishment and development of the equal rights. By analyzing the different cases in different historical periods, we can better understand the equal right theory and the legal system to protect equal right in nowadays.

The section 1 of fourteenth Amendment to the United States Constitution stipulates: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The principle of "equal protection of law" can be aimed at "administrative classification", that is, after the enactment of law, law enforcement and judicial organs must apply the law to every citizen, and can not implement discrimination based on certain unconstitutional or illegal standards. But the general situation is that the law itself may not be equal, because the vast majority of laws are involved in the legislative classification, that is, through the classification, the law gives a special reward or punishment on the people with the type of feature, so as to have different effects on different categories. Of course, to enable the Council to carry out its legislative functions, the constitution do not prohibit any law that relates to the classification; because only the unreasonable classification violates the principle of equality of law. As the Supreme Court said in 1920, the classification must be reasonable, not arbitrary, and must be based on a distinction between legitimate and substantive relations with the legislative objectives, thereby allowing all of the persons in similar circumstances to obtain similar disposal.

In the history of American constitutional precedents, it is not hard to find out that the protection of the equal right of the constitution had experienced a long and tortuous process, and it had gradually established a set of relatively perfect theory and operation standards. The two classic cases, “Plessy v. Ferguson” and “Brown v. Board of Education of Topeka”, adequately reflected the course of the judicial struggle of the United States anti racial discrimination, and show that the court could facilitate the transformation of society. The US congress and government forbid various kinds of discrimination behavior by of using a large number of single file laws, adopting " action certainly ", setting up EEOC and EEOC. In this period, a series of laws against discrimination, such as Equal Pay Act, Civil Rights Act, Age Discrimination in Employment Act, Federal Occupation Rehabilitation Act, The Privacy Act, Pregnancy Discrimination in Employment Act, Americans with Disabilities Act, were passed.

In addition, European Human Rights Convention and the mechanism protection of equal right was the first human rights protect system appearing in the world. European human rights court used "European human rights convention" and "European Constitution" to ensure equal right by forbidding discriminates. It offered the international administration of justice for the people of member state enjoy the non-discrimination treatment on the basis of protecting at home. The protection of the domestic and ultra country's organization merged and drew lessons from each other.
The constitutions in most of countries had mostly implemented to anti-discrimination, which had offered the legal guarantee for anti-discrimination and enforcement of equal right. So the European human rights court had offered more effective security mechanism for protecting individual rights and freedom, as well as preventing discriminates.

5. The reason of HBV discrimination and the week point of equal right protection

The fourth part is about. Based on scientific conclusion, it announces that is absurd and ignorant to discriminate against HBV carriers. Attempt to define HBV discrimination accurately legally and analyze the economic, social origin behind this phenomenon from economics and sociology theory. Further explained the social harm of HBV discrimination, analyze its illegitimacy with the general theory of equal right to understand the case of "HBV Discrimination". Point out the week point of equal right protection in the current legal system of our country.

The definition of "HBV discrimination" is all sorts of inequality treatment the HBV patient and person who carries virus in the society (abbreviate as HBV carrier) have met. Especially the discrimination aims at latter. The discrimination mainly comes from in society's seal, the erroneous idea of the people as well as the utilitarianism view hides. A kind of inequality consciousness of treating HBV carrier is more generally exist in the health crowds. This kind of inequality consciousness is taking sense of self-protection as foundation which excessive inflation because of being frightened. The extremes consciousness ignore and even infringing to the HBV carrier dignity. The scarce of the society resource and economic resource are also the resource of discrimination. The HBV carriers have become a new vulnerable group. Generally speaking, the weak group is the difficult people in social life. In contrast, the discrimination and exclusion of HBV carriers are more important in people's misunderstanding and the sense of inequality, and the lack of the spirit of humanistic care in the utilitarian society.

HBV discrimination is very harmful to the society. They are locked out of jobs, education and marriage and suffer other plague of discrimination in social life. In recent years, with the expansion of college enrollment and the growing demand of the job market, the contradiction is becoming more and more prominent. HBV discrimination violates the equal right that the constitution protects. In the case of "HBV discrimination", instead of constitutional equal rights protection the court decides in favor of the plaintiff because of the main evidence is insufficient in the concrete administrative action. What’s more, the judgment said nothing about that whether the Wuhu personnel bureau's concrete administrative action is illegal or not.

This reflects the lack of protection to the HBV carriers in current legal system of our country. In China, the constitution principally stipulated the equal right without any legal explanation or judicial explanation to limit the HBV discrimination. Let alone implement the measure, illegal consequence mode and way to bear corresponding legal liability. It’s not allowed to review the laws suspected of being involved in on "HBV discrimination". The rule is out of the scope of judicial review by legislature or the judicial authority, so it is deal with the administrative organ. The range of employment discrimination is asserted to be too narrow, so that it can’t be relived by law. The judgment rule of HBV discrimination in the employment is lack in the law, and has not stipulated the exceptional situation discriminated against in employment. It also lacks the relief procedure of HBV discrimination and the protection of the right of privacy of HBV carriers.

6. The perfection on the protection of constitutional equal right of HBV carriers

First of all, from the legislative aspect, remedy the deficiency that the constitution stipulates, forbid discriminating against, make some support and stipulate to help the disadvantaged groups to realize equal right, establish the feasible clause in constitution in equal right. Perfect the legislation to make sure the HBV carrier can enjoy the equal rights exactly. Make laws to forbidden HBV discrimination
and expand the range of HBV discrimination in employment in our country's labor law. Protect the right of privacy off HBV carriers clearly on the civil law.

Secondly from the administrative aspect, the government should set an example in the course of exercising common power to guarantee the law can be implemented effectively and protect the legitimate rights and interests of HBV carriers. Government should in ensure HBV carriers’ rights to subsistence and rights to development. Make the public policy and make it slope appropriately to the HBV carrier. Make it regularization and institutionalized to propagate prevention the HBV virus and make great efforts to dispel people's psychological fear. Strengthen the supervision of medical advertisement, clear up the illegally medicine-practice completely. Set up an organization such as "Equal Employment Opportunity Committee" to deal with the case that employment discriminates against HBV carriers. Provide the legal relief to HBV carrier in the employment discrimination cases. Exert the pressure to the employer that discriminate HBV carriers by government contract.

From judicial aspect, we can protect HBV carriers’ equal rights by judicial review and application of the constitution. Draw lessons the public law in Germany, we can expand traditional the range of judicial review. If it’s lack of application basis in the ordinary legal standard to apply in the HBV discrimination, the judicial authority can apply the constitution into the judicial process so that the court can judge according to it.

7. Conclusion

Expend the respect of the aged in one’s family to that of other families; expend the love of the young ones in one’s family to that of other families. We hope that by exploring the HBV discrimination causes, social harmfulness and relief ways, to initiate for address today a variety of Chinese discrimination and bring some enlightenment.

Equality and prohibition of discrimination are the pillars of the legal system of modern human rights. The insufficient protection of the citizen's right of equality in China is not conducive to the maintenance of the authority of the constitution and the stability of the rule of law, and does not accord with the international trend of equal protection. The existing cases provide an analytical framework for the behavior of the government and other organizations. First of all, not all the differential treatments constitute discrimination; only unreasonable, inappropriate differential treatments constitute discrimination. Secondly, the basic constitutional rights provided the standard for the government behaviors. But this is not enough; only by combined with the cases, the basic rights can clearly definite, enrich and develop their connotations, which is more important for the protection and realization of basic rights. Thirdly, the basic constitutional rights should clearly be binding on the behaviors and activities of the state organs, including the legislature. After all, many violations of the rights of citizens are in the form of normative documents. Fourthly, related to this, it is essential to establish a mechanism to apply basic rights, to define, enrich and develop basic rights. At present, Chinese courts cannot apply the constitution. So we should seize the opportunities to actively promote the emergence of some systems, such as constitutional litigation. This is very necessary for the construction of the rule of law in China.

References


