

The Constitution of the Legal Responsibility of Institutional Discrimination

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Abstract

As a kind of typical public law discrimination, institutional discrimination brings violation to the citizens' equal rights. Therefore, discrimination body's legal liability shall be pursued. All in all, the legal responsibility of institutional discrimination is a public law responsibility which is made up of the public power as main infringement subject, formal and informal regulations as infringement action, and the coexist of fault and innocence as subjective status.

Key words: Institutional discrimination; Infringement subject; Infringement action; Subjective status

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INTRODUCTION

Institutional discrimination is because that the formal acknowledgement of the state or the execution of public power causes certain amount of social groups continuously suffering common and standard unreasonable treatment. As a kind of typical public law discrimination, institutional discrimination brings violation to certain social groups' equal rights. Since public power subject diverged from the distribution of justice in the process of designing the institution, then we should investigate its legal responsibility to amend the already violated civil rights.

1. PUBLIC POWER SUBJECT

From the concept of institutional discrimination it is not difficult for us to get the point that the infringement subject of institutional discrimination is public power subject. The research focus of modern public law gradually turns to the performance of public functions. That is to say,

on one hand, public law positively deals with public functional departments' functions, structures, organizations, and procedures; on the other hand, by setting up and perform public functional departments' responsibilities to negatively manage, control, and supervise the performance of public functions. (Cane, 2008)

It has broadened the research field of public law in a large degree. However, at the same time, the expansion of public law research has made the public power subject's scope a bit vague. After all, whether a function is public or not is a normative not a factual question. When vague public power subject meets indistinct institutional discrimination, the problem seems to get more complicated.

This paper thinks that within the research framework of institutional discrimination, we can at least divide institutional discrimination infringement subject into legislative organs, administrative organs, judicial organs, and other public power subjects. As provided by the Constitution, legislative organs, administrative organs, and judicial organs are most formal legal institutions' designers and promoters. In the process of the design and promotion of legal institutions, even judicial organs which are thought as the guardians of the Constitution have the possibility to violate citizens' equal rights or get involved in institutional discrimination, not to say that legislative organs can vacillate among different discriminations based on different parties' or regions' disputes on interests or administrative organs diverge away from the goal of public interest to realize officials' or interest groups' self-interests by violating citizens' equal rights. Such phenomenon is especially obvious in China. Since the Supreme People's Court has judicial interpretation power, thus, judicial organs do have institutional discrimination upon citizens in certain circumstances in practice. For example, according to the stipulation of "The Supreme Court's Judicial Interpretation and Law-Application for Personal Injury Cases": "Compensation for death shall be 20 times of the per capita disposable annual income or rural per capita net income of the court of claim", such judicial interpretation has caused the institutional tragedy that urban and rural residents' lives are of "different prices". (Ren, 2007) As to the other public power subjects, this article makes reference to Prof. LI, Haiping's idea to call them as non-state public power or social public power. According to the understanding of Prof. Li, non-state public power is "enjoyed by the organizations that do not stipulate in the Constitution as state organs." (Li, 2012, November 24) The scope of non-state power at least contains political parties, People's organizations, and social organizations. The common place of these organizations

is that they all have public affair management power in certain forms or in different degrees and therefore can make discriminatory institutional arrangement on their members or other citizens in certain scope.

In fact, non-state public power does not only exist in China, it can be found in many countries and regions around the world. And the institutional discriminations made by non-state public power subjects are not rare of ordinary occurrence. For example, in the “Smith vs. Alwright, 321 US. 650” case in 1944 USA, democratic Convention of the State of Texas passed a resolution that colored races are banned from being democrats or attending elections of the Congressmen, state governors, or other officials (Zhang, 2004). Apparently, such resolution of Texas Democratic Party is a kind of institutional discrimination on the election rights of colored races within the scope of Texas, therefore, it was finally aborted by the Federal Supreme Court. As we can see that even in countries like the USA which have well developed political and legal systems, institutional discrimination is inevitable. It is not very difficult for us to imagine that

in countries with less developed political and legal systems, policies made by political parties can become documents with legal force in practice to bind governmental organizations. Under this circumstance, the state organs carrying out such policies made by the political parties, it is possible for them to violate citizens’ basic rights. (Yao, 2006)

2. THE FORMAL AND INFORMAL SYSTEMS

Since institutional discrimination is carried out by public power subjects through institutional design, then the design and implementation of the systems are apparently the infringement act of institutional discrimination. According to different ways of the setups of the systems, there are formal and informal systems. The former one is “a series of regulations or rules created by organization members, especially the leading groups, on purpose on the basis of social life experience.” (Si, 2011) The latter one refers to “a series of restrictions recognized by the society and gradually formed during people’s long term social interactions.” (Wang, 2005). Although informal system is mainly shown as traditional concepts, moral standards, village regulations and agreements, customs, and ideologies and so on, and is “basically implemented under the non-mandatory force or ‘soft constraining’ such as public opinion and self-restriction of social members” (Xin, 2005), this does not rule out the important role played by state power on the formation of informal systems. Xiebosier and Weigast explicitly pointed out in a research about the institutional foundation of committees’ power that

those congressional committees powers which cannot be explained by formal regulations, are formed from a set of informal and unwritten restrictions and those restrictions evolved under the background of participants’ repeated interactions (exchanges). Even these restrictions never was included as formal regulations, they are gradually accepted as systematic restrictions. (Douglass, 2008)

Or, to be precise, when informal institutional factors initiated from social life are accepted and recognized by state organs and promoted by state power, the informal system in the public law area can exist. For example, the informal system of civil servants enrollment refers to “a series of factors such as the value and belief of the official examination formed on a long-term basis, ethical norms, ethical principles, and ideologies.” (Wang & Gong, 2008) This system mainly forms during historical accumulation and social convention and thus accepted and recognized by state power. In practice, no matter formal or informal institutional discriminations, is very typical. As for the former one, for example, Article 8 of the Marriage Law in People’s Republic of China states:

Both the man and the woman desiring to contract a marriage shall register in person with the marriage registration office. If the proposed marriage is found to conform with the provisions of this Law, the couple shall be allowed to register and issued marriage certificates. The husband-and-wife relationship shall be established as soon as they obtain the marriage certificates. A couple shall go through marriage registration if it has not done so.

This Article has limited marriage between only two different sexes and thus excludes the establishment of marriage of the same sex which apparently has become a formal institutional discrimination for the equal rights of marriage to the same-sex. And for the latter one, for example, the discrimination upon woman in China’s public servant examination is a typical informal institutional discrimination. Although the Constitution, the Labor Law, the Employment Promotion Act, and the Civil Servant Law and other laws clearly state that female and male enjoy equal employment rights, in the practice of recruiting civil servants, the discrimination against women has become very common no matter in the central government or in local governments. It is definitely institutional discrimination in informal system arrangements.¹

3. FAULT AND NON-FAULT COEXIST

For the subjective state of liability, tort liability law has changed from pure subjective fault to the coexistence of fault and non-fault. Ricoeur has pointed out:

Contemporary history which is called as Liability Law prefers to give non-fault liability application scope under the pressure of related, safety, risk and such concepts from the technical layer of this term. However, non-fault liability has the tendency of replacing faulty concept, just as the anti-punishment of civil liability has to contain complete anti-self-accusation. (Ricoeur, 2007, p.28)

¹For example, according to the “2011 Report of Employment discrimination in the National civil servant recruitment” released by the Institute of Constitutional Government of China University of Political Science and Law, compared with the result of 2010, the gender discrimination has increased in 2011. Positions with gender discrimination have increased from 1203 of 2010 to 1,519 of 2,011 and the proportion of all positions increased from 2010’s 12.96% to 2011’s 15.6%. For example, the announcement of Fujian Province’s civil servant recruitment 2012 shows that the number of positions only opens to male is 940 while the ones only open to female is 101, number of positions without limitations on gender is 1,833. That is to say, male can apply for more than 2,700 positions while female can only apply for 1,900 positions.

Although Ricoeur's analysis strengthened the importance of non-fault liability in modern liability law, he obviously overstated the wide application of non-fault principle. The reason that non-fault principle comes into being is nothing but because

people want to see that when there is a lack of fault actions the compensation can be also made sure. Thus, the objective evaluation of damages has the trend of eliminating the subjective connection between actions and the doer. Just from this, the concept of non-fault liability forms. (Ricoeur, 2007, p.29)

However, the coexistence of fault and non-fault liability indeed enriches the content of liability law and better protects citizens' legal rights. The change of subjective constitutive elements of liability in Tort Liability Law also deeply affects the anti-discrimination law. Professor Li, Weiwei concludes:

The expansion of the scope of anti-discrimination law from direct discrimination to indirect discrimination can be considered as derived from the development of fault theory of tort law. This development has close relation with the people's interests that anti-discrimination law protects. (Li, 2012)

Professor Li, Weiwei thinks as intentional discrimination, direct discrimination obviously should have fault on its constitutive elements; while as neutral discrimination, indirect discrimination is not formed by having subjective intentions, instead, it is defined by the harmful consequences of the act, therefore, it should focus on the non-fault concept in subjective elements. This paper thinks that the conclusion of Professor Li, Weiwei also applies on institutional discrimination. In the institutional discrimination, indirect discrimination and direct discrimination also exist. For example, the "On further strengthening the recognition of urban residents entitled to basic living allowances" issued by the Ministry of Civil Affairs in 2010, when affirming the low income people, there is provisions on the type and condition of family property and family income. It is thought that family property refers to "securities, deposit, real estate, vehicles and other properties owned by family members who live together." And family income is "the disposable income including income from wage and salary after tax and social security payment, business net income, income from property, and transferred income owned by all family members living together within a specified time limit." From the literal aspect we can see that these provisions do not contain discrimination, however, if we refer to Article 3 of Marriage Law, it is not difficult to find out that the family relations recognized by Chinese laws only include spousal relationship, parent-child relationship, grandparent and grandchild relationship, sisterhood or brotherhood relationship, and other relationship based on heterosexual marriage. Homosexual marriage based relationships cannot be counted as family relations. We cannot say that the provisions of the Ministry of Civil Affairs intentionally discriminate homosexual persons, but the fact of the provisions indeed show that homosexual persons are excluded which is obviously an indirect discrimination. However,

Article 3 of the Marriage Law is worth considering. As an expression of sexual freedom, homosexuality cannot be accused. However, due to the discrimination of religious culture, traditional morality, and the concept of child-bearing, homosexual persons are widely discriminated in social life. Legislators have accepted such social concepts and thus institutionalize and legalize such concepts by legislation. Therefore, the definition of family relations in Article 3 of Marriage Law is definitely direct discrimination for homosexual persons.

There is another subjective state of institutional discrimination worth study. There is legitimate institutional discrimination in history, or to say, the institutional discrimination in good faith. Then how should we define the subjective state of such institutional discrimination? This paper thinks that the historical legitimacy of institutional discrimination or the good will of the purpose of such design is relative. When the foundation of such legitimacy or good will does not exist or changes, if the public power refuses to amend, then the subjective state should be faulted. For example, the discrimination against women is not a real discrimination in history for a very long period and even be recognized as a kind of protection for women. With this concept in heart, the institution design of women's discrimination usually shows man's care and concern for them. "Men probably treat women as parents. ... in another way, the care women's life got is more than men." (Brest, Levinson, Balkin, & Amar, 2002) The care-based institution design even affects women themselves. "Most women resign to fate and do not want to make any actions; ... when they entered into the world, they take men's opinions to bring into correspondence with men." (Simone, 2011) Under such background, the discriminative arrangement in the system against women does not appear so dazzling but with some kind of reasonability. Such reasonability even lasts until recent era.

The modern citizen Constitution also includes the modern constitutionalism. There is no clear prohibition on the discrimination on gender. It's a reflection of the discrimination raised by real sex in politics and society. Therefore, in modern times, women are discriminated by many areas. (Sugihara, 2000)

However, the historical legitimacy does not mean the institutional discrimination against women is legal at present. On the contrary, if there is still discriminative arrangement against women in institutional design, then the public power must have fault in subjective state.

CONCLUSION

As discussed above, the legal liability of institutional discrimination is an independent legal responsibility made up by subject of liability, way of acting, and subjective state. The reason that we study the constitution of institutional discrimination's legal liability, on one hand, is to further discuss and investigate the content of the legal liability of institutional discrimination; on the other hand,

the most significant meaning is to get rid of the limitation of formal legitimacy of analytical-positivist jurisprudence and to ascertain the legal liability of public power subjects' institutional discriminations through the study of the constitution of legal liability of institutional discrimination. This is the premise of regulating institutional discrimination.

REFERENCES

- Brest, P., Levinson, S., Balkin, J. M., & Amar, A. (2002). *Processes of constitutional decision making: Cases and materials* (Vol. 2, pp.980-981). In F. J. Lu, Q. F. Zhou, Q. F. Zhang, & G. M. Shen (Trans.). Beijing: China University of Political Science and Law Press.
- Cane, P. (2008). *Responsibility in law and morality* (p.377). In L. H. Luo (Trans.). Beijing: The Commercial Press.
- Douglass, C. N. (2008). *Institutions, institutional change and economic performance* (Hang, Hang & Wei, Sen, trans., p.56). Shanghai: Truth and Wisdom Press; Shanghai Joint Publishing Press; Shanghai Peoples Publishing House.
- Li, H. P. (2012, November 24). *Non-state public power: Basic categories of China's constitutional jurisprudence* (p.38). Proceedings of the 8th Academic Seminar of China Constitutional Law Basic Categories and Methodologies, Changchun.
- Li, W. W. (2012). *Theory of anti-discrimination law* (p.171). Beijing: Law Press China.
- Ren, X. R. (2007). Institutional discrimination and the function of equal rights protection institution – From the view of farmer rights protection. *Contemporary Law Review*, (2), 6.
- Ricoeur, P. (2007). *The just* (p.28). In C. M. Cheng (Trans.). Beijing: Law Press China.
- Si, H. W. (2011). *System rationality and social order* (p.127). Beijing, China: Intellectual Property Publishing House.
- Simone, de B. (2011). *The second sex* (p.187). In K. L. Zhang (Trans.). China: Shanghai Translation Publishing House.
- Sugihara, Y. (2000). *The history of the constitution – New theory of comparative constitution* (Lü, Chang, & Qu, Tao, trans., pp.120-121). Beijing, China: Social Sciences Academic Press.
- Wang, Q. M., & Gong, L. B. (2008). Conflict and convergence of China's formal and informal institutions of civil servants employment. *Public Administration*, (5), 17.
- Wang, T. (2005). Analysis of formal and informal regulations of power rent-seeking. *Journal of Shanxi University of Finance and Economics*, 6, 3.
- Xin, M. (2005). *On institution* (p.102). Beijing: People's Publishing House.
- Yao, G. J. (2006). *Unconstitutional responsibility theory* (p.163). Beijing: Intellectual Property Publishing House.
- Zhang, Q. F. (2004). *Western constitutional government systems: United States constitution* (Vol. 1, p.396). Beijing: China University of Political Science and Law Press.