

## The Principles of Constitutional Equal Rights and the Implementation Mechanisms

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Received 16 February 2014; accepted 23 June 2014  
Publish online 28 July 2014

### Abstract

The equal right is from the respects of the human dignity. It constitutes the core elements of justice. The equal rights was a prerequisite for achieving other important fundamental rights, it has a dual nature as a broad application of the constitutional principles and a definitive statement of fundamental rights. The implementation mechanisms of the equal rights are divided into the direct “constitutional equal protection” and the indirect “legal prohibition of discrimination” explanations. In order to strengthen the implementation of the constitutional equal rights in China, it needs to perfect the system of the constitutional review and the legal system of anti-discrimination.

**Key words:** The equal rights; The constitutional review; Anti-discrimination laws

Li, H. (2014). The Principles of Constitutional Equal Rights and the Implementation Mechanisms. *Higher Education of Social Science*, 7(1), 113-116. Available from: URL: <http://www.cscanada.net/index.php/hess/article/view/5270>  
DOI: <http://dx.doi.org/10.3968/5270>

### INTRODUCTION

Equality is a core value concept in the modern legal society. It has taken for granted that the people have to be accustomed to the idea of the equality. In fact, the equal rights has experienced a long process of development. It not only contains an important value but has important legal functions.

First of all, equality stems from the respect for human dignity. The end of the grades' privileges meant that

everyone has equal dignity; there is no reason that people have different human dignity in the differences between the natural conditions and social attributes. Meanwhile, abstract dignity needed to be implemented as a set of legal systems, it needs to be reflected in the constitutional fundamental rights. The entire system of constitutional fundamental rights is based on the premise of the equal dignity, but the undifferentiated human dignity empowerment the intension and extension of the basic rights. Universality of undifferentiated human dignity and the equal property are determining the basic system, it derived from independent personalities and the rights to equal access for all the people.

Second, “the liberal conception of formal equality is one of consistency likes must be treated alike” (Barnard & Hepple, 2000, pp.562-585). Equality has given “justice” in the meaning and the content. Justice is the fundamental value pursuit in the modern society, the meaning of justice is in a high level of abstraction, and the standards of justice is full of historical evolution. So the constitutional equality rights cleared and fixed the meaning of justice in the modern times. From this point of view, the equality has a strong moral and ethical implication colors indeed. John Rawls, the scholar of the United States, argued the meaning of justice from an equality perspective. In his theory, the two core principles of justice are based on an equal footing.

Last but not the least, the equality is a pre-condition to achieve the other fundamental right. As a protective constitutional rights, the equal rights covered the entire basic rights category. For all citizens' fully extensive human rights, the equal rights provide the basis and environment, to make people realize that the civil political rights, economic, social and the cultural rights are on an equal premise with the basic human rights implications. Besides, the equality, which contains more constitutional value of objectives, needs to be reflected by the strict constitutional norms and the effective legal mechanisms

to protect. It is not the same that the equal rights with the specific provision in the modern constitutional state and constitutional guarantees; it has the different characters with the specific instruments to protect the equal rights. However, it is following some basic principles, sharing some common patterns as well. The constitutional norms and the constitutional guarantees mechanisms are the two aspects which have been analyzed by this article.

## 1. THE EQUAL RIGHTS IN THE REGULATORY STRUCTURES

The constitutional system, transformed into legal norms from the ethical values of equality, which is having a particular way of expression, showing a certain logical structure of the equal constitutional norms. To investigate the constitutional equal rights, it should be based on the constitutional structure. The constitution has the highly abstract characteristics, it needs to be carefully verified that the equal rights has the legal nature in the constitution. In other words, the constitutional principle of the equal rights is a broad and specific constitutional rights whether in both of the principles and the rights. In fact, the academic nature of the equal rights is in the existence of three different ideas: Equal is not an item that has a specific meaning of constitution basic rights, but a general principle in constitution, and the equal principles have a binding force for all main constitution. At the same time, the rights insisted that the equal rights is an independent constitutional rights, which correspond to the liberties, has a specific scope of the rights, boundaries, and the right contents. However, the composite nature thought, equal rights has a double nature, the laws do not discriminate against anyone, because it is not only a broad application of constitutional principle but a definitive statement of fundamental rights. From the opinion of the Chinese constitutional academic mainstream, the equal rights has double characters combine the constitutional principles with the constitutional rights. This article is taking a dual nature to analysis that the equal rights is a broad binding on all activities and basic principles in the constitution, but a legal rights to have various actual contents and relates to the specific rights. In our constitution text, for example, the principle of equality with regards to norms, but about equality, gender equality, civil equal rights, it is not only about the direct protection equal rights, but also about the indirect prohibition of discrimination.

In the system of the constitutional norms, the nature of the equal rights is reflected in many aspects, the constitutional norms give citizens a general claim on equal rights, and also contains a varies of special rights of the constitution. The 33<sup>rd</sup>, 4<sup>th</sup> paragraph of the constitution, clearly stipulates the basic rights and obligations shall apply equally to all citizens. The No.5 of the 5<sup>th</sup> in the constitution, which belong to the prohibition, to eliminate

that the class privilege from the general applicability of the law, so called “No organization or individual have the legal privilege beyond the constitution and the laws.” The No.1 of the 4<sup>th</sup> announced that China should follow the basic principles: equality of peoples, as a unified multi-ethnic country in the constitution. The no.1 of the 48<sup>th</sup> established an important right of equality: equality between men and women. In order to effective implementation of gender equality, guarantee and protect women’s rights in the constitution of additional care provision, guarantee that women have the equal rights as the same as men in the political, economic, social, cultural, employment, education, family and other fields. In the area of political rights, our constitution proclaimed the equality of all qualified citizens to vote and stand of election. Besides, the national rights of the public and the management of public affairs under the same conditions, which is not affected by the background, origin and unrelated factors in the rights to vote and to stand for election. In the area of religion, citizens have the rights to choose their own religion in China, and the religious identity of citizens cannot be the factors that limit their legal rights.

In the system of constitutional norms, equality also has fully reflected the constitutional principle of the right to property. The equal constitutional principle administers all of constitutional act of subjects, determines that how the citizens exercise their constitutional rights and boundaries, which determines that the principle of citizens’ basic rights and positions treated by the national public power. From then on, national legislative, judicial and law enforcement activities should be consistent with the constitutional principle of equality, and it can be said that the principle of equality is a part of the whole structure of legal norms.

## 2. SPECIFICATIONS WITHIN THE MEANING OF THE EQUAL RIGHTS

Simple concept of equality existed in the early human societies, equal ideas had formed in Greece era, but the modern concept of equality is benefiting from the modern western bourgeois revolution. Bourgeois revolution broke the yoke of the feudal privilege identities, established the born equal human rights concepts, formulated that the human beings are equal of the law in the constitutional principles. After the constitutional era, both of the intension and the extension of the constitutional equality is always the core of western legal philosophy, the equality of the law philosophy attracted a large number of Jurists, such like Rousseau, Rock, Tocqueville, and Bodenheimer. Equality is not only logical but also the historical. Equality belongs to the field of history, equal content and form are constantly changing with the development of history. Bourgeois revolution of equality, liberty and fraternity values orientation facilitates the process of legal norms of equality, started to become meaningful legal right to

equality, the system of the review in constitutionality and human rights of the modern improvement, to continuously enrich the connotation and improvement of the constitutional equality, so the equal rights became the system of the constitutional fundamental rights.

From the perspective of the constitution on the fundamental nature of the rights, all of the substantive rights almost can be attributed to the equal rights and freedom. Equal rights are focused on the rights between the main differences that exist in the enjoying and exercising of the right of freedom, and define the difference between rationality and legitimacy of individual rights. Meanwhile, liberty limits to the right subject itself, because the subject of rights is obtained and enjoy the benefits of a legal entity, and how this legal interests of realization of rights-holders free will on the main played what significances. Obviously, freedom based on the specific subject of rights itself, concerned about whether the acquisition and exercise of the freedom have the same opportunity, is a guarantee form of freedom. Due to the civil liberties, the main effect of citizens to exercise the freedom is the national public power, so it is mainly aims at the equal right in the national public power actually, relates to the relationship between the state's power and the civil rights. In the most of the constitutional states, the equal rights is bound by the state power, required the states to equal the empowerment and protection of the civil rights' freedom, it cannot be imposed on citizens with the differential treatment. Most connotation and valuable equal rights are reflecting in a variety of social freedom with the balanced situation for citizens.

Throughout the constitutional practice of the constitutional state, the constitutional norms are giving the prominent constitutional status on the equal rights and the equal principles. The universal declaration of human rights states that "all human beings are born free and equal in dignity and rights". *Declaration of independence* clearly conveyed the similar idea, establish the equal rights under the natural of human rights, which cannot be deprived and transfer. That part of the declaration which for most of us now is the Declaration of Independence accomplished that task in these words:

We hold these truths to be self-evident: That all men are created equal; that they are endowed by their Creator with certain unalienable Rights; that among these are Life, Liberty and the Pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed (Brown, 1962, pp.619-623).

### 3. EQUAL RIGHTS PROTECTION MECHANISMS

As the late justice is not the real justice, distant right is not the real right too, the equal cannot be called equal without

the guarantee. The protection mechanisms of the equal rights is the core essentials of the modern constitutional system. In the constitutional state of law practice, the legal protection mechanisms of equal rights can be divided into two forms, which are, the direct "equal protection" and the indirect "prohibition of discrimination". The equal protection of the law refers to the constitutional norms, clearly proclaim the equal rights, its implementation is defending the equal rights, complemented by a constitution examining and constitution lawsuit system which directly provides and maintains the equal rights. Equal protection of the law is the general practice of states to guarantee the constitutional equality, it's most commonly seen in the constitutional documents. This legal safeguard mechanism mainly manifests to two amendments to the constitution in American constitution, the equal protection clause and the clause due process of the law. Furthermore, Anti-discrimination rights are nearly always thought to be justified or explained by equality, although the precise nature of this relationship is rarely considered (Holmes, 2005, pp.175-194). So prohibition of discrimination is a legal method of equality to inspect and maintain from the opposite of equality, and the States through the special anti-discrimination laws or dispersed in other laws of anti-discrimination provisions to implement the constitutional equal rights, such as 'the Federal Civil Rights Act of 1964' of USA and the American with Disabilities Act (ADA). These two laws are expressly prohibited discrimination in employment and the implementation of the field of disability. In the implementation of the constitution, these two models are often complement and mutually complementary. At the same time, two kinds of mechanisms of legal protection on equal have the intrinsic logical relation, the equality means the same treatment of the same situation, different situations of discrimination. In the meanwhile, discrimination means unreasonable, arbitrary discrimination. Due to the highly abstract connotation of equality, it often needed by discrimination as the antithesis and reference provided the mirroring for equality. "The most basic meaning of equality has its limitations; it needs to be supplemented by the negative aspects of negation." Since equality is the antithesis of discrimination, prohibition of discrimination is maintaining effective legal method of the constitutional equality. "Deviations from equal treatment are justified by reference to the pursuit of goals such as equality of resources, or equality of opportunity" (Collin, 2003, pp.16-43). In the practice of constitutional government by the constitution and law, a positive confirmation of equal rights, at the same time, by prohibiting discrimination principle side security rights, those two legal mechanisms constitute a complete equal rights guarantee system. In China, for example, in our current legal system, equality and justice as the embodiment of equality, but fairness appears much more than 1,000 times. The 33<sup>rd</sup> of the

constitution establishes the general principle of equality, and the 3<sup>rd</sup> of the “Labor law” provided that the citizens enjoy the equal employment in the field of labor and the employment rights. Public service is an important way of civil administration in the national public affairs. In the field of civil servants recruited the equality as the primary principle in the 2<sup>nd</sup> of “Provisional Regulations on the State Civil Servants” of the civil servants selection process. In specific civil service recruiting links, the 2<sup>nd</sup> of the “Interim Provisions” civil servants employed confirmed the specific meaning of the equal principle in civil servant examination again. However, according to the principles of equality and fairness in the selection of the national public officers, all of the people should have the equal access to moral qualities and professional competence test, at the same time, the law also give special provisions on the prohibition of discrimination with incomplete statistics, the current law has more than 300 provisions which related to discrimination in China, although it did not enact specific anti-discrimination law department, but there are many scattered in other laws of anti-discrimination laws, these terms are explicitly ban all forms of discrimination, and the direct provision of “law without discrimination” reached 75. In the end, the conclusion of this analysis can be drawn by the legal norm: The two wings of the guaranteed constitutional equality are the equal protection and non-discrimination, they are interrelated and interdependent. Non-

discrimination gives real meaning to the equality, but the equal protection built a solid legal basis for the prohibition of discrimination.

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