



BOSHI WENKU

〔法学·法理学〕

立法平等问题的研究

LIFA PINGDENG WENTI YANJIU

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内容提要

本书综合运用历史分析法、文献分析法、规范分析法、价值分析法等方法,从平等与立法平等、立法平等的理论价值、立法平等的现实意义、立法平等的实证考察和立法平等的实现几方面,结合我国有关立法现状,运用法理学、立法学和宪法学等法学理论来探讨立法平等问题,并提出立法应突出“以人为本”的理念。

本书可供法学学习者、研究者参考使用。

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摘 要

作为一种基本的价值判断,平等是指人们在政治、经济、社会、法律等方面享有相同的待遇。从法律意义上讲,平等意味着一国之内的全体公民都处于同等的法律地位,享有同等的权利并承担同等的义务;他们的合法权益受到同等的保护,他们的违法行为也受到同等的追究;任何人都不受歧视,任何人也都没有特权。要达到这样的状态,不仅需要严格的执法和公正的司法,确保对每个人平等地适用法律,更需要而且首先需要平等的法律,即被适用的法律本身必须是平等的。换言之,不仅要求执法机关、司法机关在执法、司法活动中平等对待每一个人,而且要求立法机关在立法上平等对待每一类人,即在其制定的法律中赋予每一类人平等的权利和义务。可见,法律平等不仅仅是指法律适用的平等,而应当包括法律本身的平等,即立法平等。

立法平等是指立法应当顺应平等原则的要求,对于所有类属相同的人,都赋予平等的权利,并为他们行使权利创设平等的机会。也就是说,对于类属相同的人,法律应当一视同仁,为他们设定平等的权利、义务及责任;而不得给予不合理的差别对待,不能对任何人有任何的歧视,也不能让任何人有任何的特权。当然,一视同仁不等于“一刀切”,立法平等也不等于不加区别地平均分配权利和义务。对于那些因为客观条件的巨大差异而在事实上处于不平等状态的人们,法律应当给予适当的区别对待(例如对妇女、残疾人、未成年人等特殊群体的特别保护),以使用形式上的某种不平等来抵消客观上的不平等,进而达到实质上的平等。因此,立法平等应当是形式平等和实质平等的统一,既要坚持一般情况下的无差别对待,又要注意特殊情况下的区别对

待，即做到“相同情况相同对待，不同情况不同对待”。

从理论上讲，立法平等既是平等原则的具体体现，也是公民平等权的立法保障，还是法律正当性的重要基础。我国《宪法》规定“中华人民共和国公民在法律面前一律平等”，表明平等既是宪法确立的一项基本原则，又是宪法赋予公民的一项基本权利。平等作为一项宪法原则，需要通过民法、刑法、诉讼法等部门法的具体规定加以贯彻。只有通过这些法律的具体规定，平等地赋予有关主体明确、具体的权利及义务，平等原则才能落到实处。反之，如果没有这些法律的具体规定，或者这些规定是不平等的规定，那么，宪法上的平等原则将无异于“水中月、镜中花”。平等作为公民的基本权利，是指公民平等地享有权利而不受歧视。平等权的特别之处在于它没有明确具体的内容，而要通过其他权利的享有及行使的程度来体现。这一特点决定了平等权的落实直接依赖于各种立法的平等规定。只要任何立法作出不平等的规定，如不合理地限制或剥夺任何人的受教育权，则不但直接侵害其受教育权，而且也侵害了他的平等权。而只有各种立法都平等地赋予公民各种权利（如教育法赋予平等的受教育权、劳动法赋予平等的劳动权等），并为他们行使这些权利提供平等的保障，公民的平等权才能得以实现。同时，法律作为协调人与人之间关系的基本规范，只有它本身的内容是平等的，即平等地对待各方当事人直至所有的人，它才是正当的。相反，那些不平等的立法，不管其制定程序及实施状况如何，都不具有实质正当性，也就难以得到人们的自愿认同和遵从。

就现实而言，立法平等既是发展社会主义市场经济的需要，也是建设社会主义法治国家的需要，更是构建社会主义和谐社会的需要。由于“市场是天生的平等派”，所以市场经济理当是一种平等经济，市场的各种主体都应当处于相同的地位，享有同等的权利，遵守同样的规则。市场经济的这种平等性，必然要求作为市场活动基本规则的法律也必须是平等的。故此，立法应当贯

彻平等原则，作出平等的规定，赋予市场主体平等的权利和义务，以保障市场主体的公平竞争。社会主义法治应当是形式法治和实质法治的统一，即不能仅仅停留于依法而治，而应该追求良法之治。这不但要求有法可依、有法必依，而且要求所依之法必须是良善之法，其中包括法律应当充分体现平等原则，一律平等地保护每个人的正当权益，不对任何人有任何的歧视；同时要求每个人平等地承担相应的义务，不让任何人有任何的特权。只有这样的平等之法，才会得到人们发自内心的认可和服从；也只有依这样的法来治理国家，才符合社会主义法治的真谛。和谐社会的本质特征在于利益均衡（包括经济利益以及文化、教育、医疗卫生、社会保障、公共参与等社会利益），而利益不均衡的重要原因之一是立法的不平等。不平等的立法不但有可能直接导致利益失衡，而且有可能引起一些人对现行制度的不满，甚至是对整个社会的仇视，进而作出与制度对抗、与社会为敌的行为，直接破坏社会的和谐与稳定。惟有通过全方位的平等立法，在各方面都赋予人们平等的权利和平等的机会，让全社会的成员共享改革和发展的成果，才能从根本上扭转利益失衡的局面，才能真正实现社会和谐。

反观我国的立法，虽然我们的宪法、民法、刑法、诉讼法以及其他很多法律都较好地贯彻了平等原则，从多方面作了平等的规定，在一定程度上顺应了发展市场经济、建设法治国家和构建和谐社会的要求，但是仍有不少立法存在一些不平等规定。特别是对市场经济的发展起着重要作用的《公司法》《破产法》《企业所得税法》等，在2005~2007年相继修订之前，存在诸多严重不平等的规定，与市场经济的平等属性格格不入。即使修订后的新法，也仍然存在一些不平等的规定。如《公司法》关于一人有限公司和国有独资公司的规定（两者有着诸多差异）、《破产法》关于破产制度适用范围的规定（仅仅适用于企业法人）、《企业所得税法》关于该法适用范围的规定（不适用于合伙企业

和个人独资企业)，都有悖于平等原则，更不符合市场经济的平等要求。究其原因，出现这些不平等的立法，与历史传统的影响、意识形态的限制、立法体制的缺陷以及法律移植中的文化冲突，都不无关系。但就直接原因而言，很多不平等的立法与国家采取的经济及社会政策有着直接的关系。如 1991 年制定的《外商投资企业和外国企业所得税法》，很大程度上是为了鼓励外商来华投资而制定的，所以给予外商投资企业及其外国投资者诸多税收优惠，导致与内资企业的税负相比严重不公。此外，立法的平等与否还直接受制于人们对平等的认识水平。平等概念具有相对性和主观性，昨天认为是平等的规定，今天看来可能觉得不平等。从这个意义上讲，立法平等有一个渐进的过程，而且只能是相对的平等。

为了实现立法平等，立法者首先应当强化平等意识，牢记并深刻理解“公民在法律面前一律平等”的宪法原则，从宪法的高度认识立法平等的重要意义。其次，应当转变立法观念，从追求立法数量转向追求立法质量；从“宜粗不宜细”的粗线条立法转向精确立法，增强法律的可操作性；从“成熟一个制定一个”的分散立法转向统一的法典立法，避免法律之间的冲突；从权力本位转向权利与义务的统一，充分尊重和保护公民的权利。再次，应当加强立法民主，在切实保证并进一步增强立法机构的民意代表性的基础上，大力推行“开门立法”，广泛听取社会各界、各阶层的意见和建议，确保法律最大限度地反映民意。同时，应建立健全对立法行为的监督机制，以督促立法机关修改或废止那些违反宪法平等原则或者侵犯公民平等权的立法。归结为一点，就是要坚持以人为本的立法理念，即立法应当以人的权利和自由为本，以人的类本质为本，把每个人都作为平等的人来加以尊重、关怀和保护。



Abstract

As one fundamental value evaluation, equality refers to the same political, economic, social, legal treatment. From the perspective of law, equality means that each member of one nation, irrespective of his or her social status, should enjoy the same rights and shoulder the same obligations; should be entitled to the same protection when rights are infringed upon, should be subjected to the same punishment when committing the same unlawful acts. No one should be inferior to another. No one can enjoy the unfair privilege. To realize such ideal image, strict lawful enforcement and fair judicatory should be required to ensure the equal legal treatment to each one, and further more, equality-oriented laws are needed as a precondition. In other word, law-enforcement organs and judicial bodies are expected to deliver equal treatment to each one in the lawful enforcement and judicatory. Legislative bodies are also hoped to grant equal treatment to each group of people, making an equal distribution of rights and obligations in the enacted laws. It can be showed that equality in law concludes equality in application of law and equality in legislation.

Equality in legislation suggests that equal rights and equal opportunities to achieve them should be bestowed to each member of the same group of people. That is laws should treat equally without discrimination, granting the equal rights, obligations and responsibilities to each member of the same group of people, not giving anyone unreasonable differentiating treatments, discrimination or unfair privileges. Of course, treating equally without discrimination doesn't mean impos-



ing uniformity in all cases; equality in legislation doesn't refer to making an absolute equal distribution of rights and obligations in any cases. For those dumped in unprivileged situations owing to the objective conditions with enormous differences, laws should grant reasonable different treatments (such as the female, disabled, minors and other group of people who need special treatment) to achieve the substantial equality by eliminating the objective inequality. Hence, equality in legislation is the combination of exterior and substantial equality, referring the indiscriminate treatments in general cases and reasonable different treatments in special cases, sticking to the principle of "same situation should be given same treatment, different situation should be given different treatment".

Theoretically, equality in legislation is the manifestation of the principle of equality, the legal safeguard of citizen's rights of equality and the important foundation of the legal justifiability. Constitution states "the citizens of PRC are equal before the laws", making it explicit that equality is not only one fundamental principle but one basic right granted to the citizens. As one fundamental constitutional principle, equality should be detailed into provisions in civil law, criminal law, procedures law and other departmental laws. Only by detailing into provisions and granting the definite and specific rights, obligations and responsibilities to the relevant subjects, the principle of equality can be implemented and carried out virtually. On the contrary, if without the detailing provisions or the equal specific provisions, the principle of equality is nothing but "flower of mirage and moon of illusion". As the basic right, equality refers to the right of being treated equally without discrimination. What's special about the right of equality is its abstractness, enveloping no definite and specific capabilities and showing itself by enjoying and exerting other rights. By virtue of



its characteristic, the enjoying and exerting of the right of equality is directly depended on the legislation of equality. Any unfair provisions would result in violating the specific rights and the right of equality, such as the provisions robbing and imposing unreasonable restrictions on anyone's right of education would infract the right of education and the right of equality. Only by granting citizens various equal rights in all legislations (for example the right of equal education enacted in the Education Law of PRC, the right of labor enacted in the Labor Law of PRC) and providing equal legal safeguards in exerting the rights, the right of equality can be exerted. And meanwhile, as the fundamental criterion in coordinating personal relationship, laws should be equal to be justifiable. On the contrary, the unequal legislations should never be justifiable or win the voluntary consents or conformity of people regardless of the process of their formulation and implementation.

Virtually, equality in legislation is the response to the call to developing socialist market economy, constructing the socialist law-ruling country and building socialist harmonious society. Due to the inherent equality of markets, market economy should be economy of equality, giving equal status, rights to various parties of economy and imposing on them the same regulation to follow. Laws, as the basic rule of market behavior, should be equal to guarantee the equality of market economy. Consequently, the policy of equality should be carried out in legislation, granting the equal rights and obligations to the market subjects and ensuring their fair competition. Socialist law-ruling should be the combination of exterior law-ruling and substantial law-ruling, pursuing not only the rule by law but more importantly the rule by the justifiable and felicitous law. It means not only that there are laws to go by and ensure that the laws are strictly observed but the observed laws should be justifiable and felicitous law. Such justifiable and felicitous



law should be equality-oriented, providing equal protection to justifiable rights and interests without discrimination, imposing the equal obligations without any unfair privileges. Only such equality-oriented law can win the voluntary consent and observance from people and be the right tool to rule the socialist country. The nature of harmonious society is the balanced interests (include economic interests and other social interests such as culture and education, healthcare and medicine, social security, public participation and etc) and the culprit behind the unbalanced interests is the inequality in legislation. Unequal legislation would result in unbalanced interests, the hatred and rancor for the whole social system and society, and even the anti-society behaviors such as the confrontations which will undermine the stability and harmony of the society. Only by forming a comprehensive legislative structure centered on equality, granting people the equal rights and opportunities in all aspects, sharing the fruits of open-and-reforming among all the members of the society, the situation of unbalanced interests can be reversed and the social harmonies can be realized.

After examining the legislation of our nation, it can be found that although constitution, civil law, criminal law, procedures law and many other laws have carried out the principle of equality, catering to the need of developing socialist market economy, constructing the socialist law-ruling country and building socialist harmonious society, some unequal provisions still remain in some legislations especially the laws and regulations that are crucial for the fostering and development of market economy (such as the corporate law, the bankrupt law, the taxation law on enterprises and etc) and were plagued with inequality before amending in 2005 - 2007 and hurdled the economic development. Even after revamping, the laws are not totally free from inequality. Just name a few. In the corporate law, one-person company and

exclusively-owned-by-state Company enjoy unequal treatment. The bankrupt law is only applicable to the enterprises legal persons. The taxation law on enterprises is not applicable to the partners' enterprises and individual enterprises. They violate the principle of equality and contradict the requirement of market economy. The reasons blamed for them are the historical and traditional influence, the ideological limitations, legislative weakness, the lack of jurisprudent study and the cultural conflicts of legal transplant. But one more direct cause is the economic and social policy adopted by the government. For example, the 1991 taxation law on enterprises invested by foreign capital was enacted to encourage more foreign capital to invest in China, rendering preferential taxation to the enterprises invested by foreign capital and their investors and creating unfair advantages for such enterprises against their domestic counterparts. Equality in legislation is concerned with the viewpoints of people to its concept which prone to be subjective and relative so as the regulations deemed equal in the past are thought as unequal now. In this sense, the quest for equality in legislation is inching and progressive. And such equality can be only relative.

To achieve equality in legislation, firstly, legislators should strengthen the awareness of equality, keep it in mind and take a deep understanding of the constitutional policy "the citizens of PRC are equal before the law", to know well the important meaning of equality in legislation from the high-altitude perspective of constitution. Secondly, the legislative mindset should be altered, from the quantity-oriented mode to the quality-oriented one, from the rough approach of legislation to the precise and delicate one which improves the flexibility, from the separate way of "formulate one when it's needed" to the comprehensive codifying which can avoid the conflicts among the de-

partmental laws, from the power-centered structure to the right-centered one which focus more on respecting and protecting citizens' rights. Thirdly, legislative democracy should be enhanced. Based on ensuring and under girding the representation of public opinions in the legislative institutions, the policy of "open-door legislation" should be implemented in the earnest, lending attentive ears to the voices and recommendations of people of all walks and all stratus, guaranteeing the public opinions can be reflected in the laws as much as possible. Meanwhile, the supervisory system over legislation should be perfected to prompt the legislative bodies to amend or rescind the legislations that violate the constitutional principle of equality and infringe upon the citizens' right of equality. In summary, the philosophy of "putting people first" should be adhered to, laying primary emphasize on the right and freedom of human kind, focusing on the nature of human, caring, protecting and respecting each one as equal person.



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