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反就业歧视法 基础理论问题研究

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总序

随着市场经济的推进,经济社会快速发展,我国开始加快制定现代意义上社会立法的步伐。1994年《中华人民共和国劳动法》是改革开放后全国人大常委会通过的第一部法典式社会法案。2006年以来,相继通过并实施《中华人民共和国劳动合同法》、《中华人民共和国就业促进法》、《中华人民共和国劳动争议调解仲裁法》等法案,社会立法速度之快居于各法律领域之首,初步形成社会立法体系,在干预社会利益分配、化解社会矛盾、增进社会公平、促进我国经济社会可持续发展上产生了重大影响。

我国社会立法处于社会主义初级阶段。在快速成长过程中,社会立法存在种种不足和问题。第一,诸多社会立法层次较低,有的重要领域尚无法可依。第二,社会立法决策针对热点问题,立法的系统性、前瞻性有待提高。第三,社会立法质量有待提高。现行社会立法风格粗犷,原则性规定多,条款的可操作性较弱,司法适用性有待加强。第四,某些立法有部门立法之嫌,利益关联过强,社会公众参与不足。第五,社会法的立、改、废偏慢。第六,已有社会立法实施效果不尽如人意。特别是在劳动基准、劳动合同、职业灾害防治、劳资关系协调、劳动争议处理等方面,"不是无法可依,而是有法不依",问题众多,极端事件频发,弱势群体尚未充分享受到经济发展成果。

社会法面临着一系列重大挑战。第一,如何合理界定社会法的定位与功能。社会立法是什么,能够是什么,应该是什么?从 16世纪英国"圈地运动"时期制定《济贫法》,为资本主义原始积累与发展的直接受害者提供生活救济,到资本主义大工业时期德国创造性地制定和实施一系列社会保险法,创设社会保险制度,以增强人们在工业社会防范各种社会风险的能力,保障人的生存权和发展权,再到 1935年美国国会通过具有划时代意义的《社会保障法》,引发西方工业发达国家纷纷修订、补充各自已有的社会保障制度,从而极大地缓和了社会矛盾,促进了社会稳定与安

全。社会立法的最直接目标就是给予社会个体以社会安全感,维护整个社会的安全 与稳定。我国的社会法担负着怎样的使命?第二,我国社会呈现贫富两极分化、城 乡二元结构、地区发展不平衡等社会问题。在此环境下,社会立法在衡平社会利益 分配过程中,应当更加积极,更有作为。第三、社会不同阶层和利益群体对已实施 的社会立法有不同认识。例如,《劳动合同法》施行曾引发较大争议。学术研究应 当积极回应。第四,近年来不断发生较大规模的劳资冲突事件或者严重的劳动者利 益受损事件,表明在我国社会发展新阶段中,劳资关系遇到了新问题、新情况和 "壁垒",应当加强研究相关应对策略。第五,市场经济发展到一定阶段后,社会环 境发生深刻变化,人心复杂,利益取向凸现,社会立法如何更有效地化解社会矛盾, 促进社会和谐。

因此,亟待加强社会法各个领域和层面的研究。探讨施行中的社会立法之制定、 设计是否科学、合理? 是否达到了立法当初预期的目标? 存在哪些主要和突出的问 题?是否有必要进行适当的调整或修正?应当从哪些方面予以补充和完善?遇到了 哪些新情况和新问题,需要制定哪些新的社会立法?应当采取哪些有针对性策略和 措施,才能从根本上扭转有法不依的现象?如何从质量和技术上提高立法水平,使 社会立法更加科学、合理,使社会法实施更有成效?这些都是我国社会法领域当前 迫切需要解决的重大问题。在深入调查、研究的基础上,借鉴其他国家和地区社会 立法的有益经验,提出具有现实针对性和时效性的结论与建议,意义深远。

社会法专题研究论丛立足于社会法领域的基础理论、现实问题的创新研究,强 调原创性,突出为我国社会立法、司法和社会保障与福利的完善提供有益参考。本 丛书具有下列五方面特点:第一,强调学术创新。每本著作选题或大或小,提倡小 题大做。充分利用国内外现有资源,运用跨学科方法,多角度地研究我国社会法领 域的问题。所涉主题新颖,具有较强的理论前瞻性,涵盖社会权、救助权、劳动者 人格权保护、劳动基准、劳动合同、企业规章制度、社会保险、福利权等专业领域; 观察、分析、反映各种社会关系及其社会利益分配中的真实状态,发现主要问题与 不足,为完善我国社会政策决策提供深度参考。第二,注重实践性。我国实行改革 开放政策三十余年,经济社会高速发展的同时,社会管理和服务遇到了诸多新问题、 新情况,积累了许多社会风险和矛盾。贫富两极分化、群体性事件、极端事件频发, 弱势群体保护不足等这些问题,促使我们反思"效率优先、兼顾公平"的发展战 略,如何促进经济社会的全面进步和可持续发展?立足中国,探寻社会立法本身设 计或条款存在的不足、缺漏和问题, 积极探索我国社会法建构和实施中的突出问题 和难点,在深入研究的基础上,注意衡平各方面利益,系统地提出对策建议,具有较强的实际应用价值。第三,为促进我国社会法理论系统化、体系化建言献策。虽然现代意义上的社会立法诞生于西方资本主义国家,迄今已形成了完整的价值体系、理论解释范式,西方工业化国家的社会立法极为发达。中国工业化过程中应当充分借鉴西方的成功经验,但是,对西方经验抱着纯粹的"拿来主义"态度,无疑是不能解决中国所有问题的。中国正处在传统与现代化之间、东方文明与西方文明的交叉点上,对中国问题的研究、解决,必须深入中国社会实际,切中各种社会关系调整的命脉,回应中国社会深层次的利益调整需求,提出我国自己的社会立法体系建构、理论解释范式、立法策略。第四,寻求解决司法审判和仲裁中的疑难问题的路径和方案。公民的社会权利和利益的实现有赖于完备的解决争议的救济机制。本丛书社会法的司法救济研究,分析司法实践中出现的新型案件、新问题,并对之加以理论化、体系化,社会法争议的解决提供指引和参照。第五,本丛书为开放式,作者以对社会法学有专攻的中青年学者为主,以厦门大学社会法学术队伍为基础。竭诚欢迎社会法同仁们加盟,贡献社会法精深之作。

社会对法律、权利、公正、公平的需求不断增长,法律供应的复杂性增长,对社会法提出了更多更高的要求。期待本丛书能为推进我国社会法的立法、法律适用和理论研究有所帮助。

是为序。

蒋 月

内容提要

"歧视"是指不合理的区别对待。就业歧视,是指就业过程中,雇主(用工单位)基于劳动者个体的或者群体的与工作岗位性质没有必要联系的特征因素(例如种族、肤色、宗教、性别、残疾),而对之予以不合理的区别对待。简言之,就业歧视是指求职者或受雇者在求职或受雇过程中所遭受的不合理的区别对待。就业歧视不仅侵犯公民的平等就业权,而且使那些在经济、政治、社会、文化等方面处于贫弱地位的社会群体进一步被边缘化,进而加剧底层社会群体与中层、上层社会群体之间的矛盾和冲突,阻碍和谐社会的构建。因此,国际组织与世界各国普遍地将就业歧视作为反就业歧视法予以严格规制的对象。

就业歧视现象在我国相当普遍。因为我国还没有真正意义的反就业歧视法(包括基本法和单行法),而且《劳动法》、《就业促进法》等法律中仅有的少数几个反就业歧视法律条款,也由于亏缺对就业歧视的法律责任和救济途径的规定而形同具文。近年来,我国社会各界要求出台专门的反就业歧视法的呼声很高。但是,制度建构是以社会价值共识的生成为前提的。在我国,反就业歧视法律制度的建构需要一个反就业歧视的法律文化环境。反就业歧视法基础理论问题的研究,有助于我国民众反就业歧视权利意识的觉醒,有助于我国社会反就业歧视价值共识的生成。因此,加强对反就业歧视法(法学)的基础理论问题研究,为我国早日建立较为完善的反就业歧视法律制度做好理论铺垫,是当代法学研究者,特别是劳动法学研究者的历史使命。

迄今,我国理论界对反就业歧视法相关基础理论的研究十分薄弱。本书作为改变这种现状的一种尝试,力图对国内外的反就业歧视法学研究的现状,就业歧视的界定与分类,反就业歧视的争论与立法演进,反就业歧视法的渊源、性质和原则,就业歧视的构成要件与法律责任等基础理论问题有所突破和创新。

除结语与后记外、本书共分为五章。

第一章是导论,包括前言与国内外相关研究文献综述两节。第一节前言表明,反就业歧视法学研究是劳动法学的前沿。反就业歧视法基础理论问题研究有助于我国民众反就业歧视权利的觉醒,有助于我国社会反就业歧视法律文化环境和价值判断的生成。而且,我国反就业歧视法的研究,在内容上应当注意体系化,在研究方法上应当跨领域与跨学科。第二节通过对国内外反就业歧视法相关研究文献的综述,使人们初步认识到国内外反就业歧视法学研究的现状,并揭示出我国学界对反就业歧视法基础理论研究的严重不足。即我国反就业歧视法的研究场域没有实现"中国化",研究内容没有实现体系化。

第二章是就业歧视的界定与分类。第一节就业歧视的界定,主要是梳理就业歧视的概念及其与用工自主权的区别。本书采广义的就业歧视说,既包括求职者在求职就业过程中遭受的歧视,也包括受雇者在受雇从事职业过程中遭受的歧视。针对一般的人往往将就业歧视混同于用工自主权,认为反就业歧视势必威胁用工单位(雇主)的用工自主权。该节开宗明义地指出,反就业歧视法就是要对雇主的用工自主权进行必要的限制,以实现劳动者的反就业歧视权利与雇主的用工自主权利之间的平衡。第二节就业歧视的分类,主要探讨了经济学和法学对就业歧视的类别划分,而且,法学分类离不开经济学对就业歧视分类的探索。研究反就业歧视的分类,可以进一步认识就业歧视行为或现象,并根据其特点从中探索遏制与消除就业歧视的规律性对策。

第三章是反就业歧视的争论与立法演进。第一节反就业歧视的争论,详细地论述了学术界围绕"是否应当反就业歧视","要不要进行反就业歧视立法"和"要不要实施纠偏行动"所进行的争论。争论的实质是平等与效率的价值冲突。而且,从争论的实际结果来看,反就业歧视法制化是历史发展的必然。第二节反就业歧视的立法演进,主要从比较研究和历史考察的角度,对世界相关国际组织和国家(地区)的反就业歧视法律规范进行了比较系统地整理,并通过两个列表完整地展现出来。该节在系统分析和掌握世界反就业歧视立法概况基础上,较为科学地将世界反就业歧视立法的发展历程划分为三个阶段。即 20 世纪 60 年代以前,是分散性反就业歧视法律条款的立法阶段,也是反就业歧视法的产生时期; 20 世纪 60 至 80 年代,是专门性反就业歧视单行法的立法阶段,也是反就业歧视法的发展时期; 20 世纪 90 年代以来,是综合性反就业歧视基本法的立法阶段,也是反就业歧视法的成熟时期。

第四章是反就业歧视法的渊源、性质与原则。这一章分为三节。第一节反就业

歧视法的渊源,主要论述了反就业歧视法的国际法、国内法和判例法三大渊源。反 就业歧视法不同于民法、经济法等一般的部门法,它自始至终都是与国际法联系在 一起的,特别需要国际人权法学和判例法学的理论支撑。第二节反就业歧视法的性 质,则通过对反就业歧视法兼有公法与私法的属性的论述,揭示反就业歧视法在性 质上是社会法。第三节反就业歧视法的原则,主要是论证反就业歧视法三大基本原 则:平等对待原则、纠偏行动原则和真实职业资格原则。其中,平等对待原则是核 心原则,并由该原则派生出纠偏行动和真实职业资格两个补强性原则。一般情况下, 反就业歧视法适用客观的居中性的平等对待原则。而在需要进行特别的利益平衡时, 才适用纠偏行动或真实职业资格的补强性原则。

第五章是就业歧视的构成要件与法律责任。第一节就业歧视的构成要件,包括就业歧视的一般构成要件与英美反就业歧视法中的就业歧视构成要件的分析。这一节首先对有关构成要件的基本理论进行了介绍,接着借助于民事侵权责任构成要件的理论框架,对就业歧视的一般构成要件进行学理建构,分析和探索可以适用于我国司法实践的就业歧视构成的判断标准。即就业歧视的构成应当包括四个一般性要件:就业歧视行为、损害后果、就业歧视行为与损害后果的因果关系、就业歧视行为人的过错。最后以就业歧视一般构成要件为依据,以具体的司法判例为线索,分析英美法中的就业歧视构成要件,以检视其哪些因素可以为我国所借鉴。第二节就业歧视的法律责任,主要分析了就业歧视行为可能要承担的违宪责任、民事责任、刑事责任与行政责任。借鉴国外的经验,我国未来反就业歧视法应当特别注意对就业歧视法律责任的规定,不但要规定民事责任、行政责任,而且,还要规定违宪责任和刑事责任。因为,在我国现有法律语境下,就业歧视的低成本甚至没有成本,是导致就业歧视普遍存在的重要原因。

反就业歧视法基础理论问题研究是一个宏大的研究课题,足以穷尽一个学者一生的时间和精力,不是一本书(或一篇博士论文)所能完全涵盖的。因此,诸如"反就业歧视的核心价值"、"反就业歧视的法律关系"等其他基础理论问题,只能需留待日后予以特别研究了。

关键词:雇佣法:反就业歧视法;基础理论问题

ABSTRACT

"Discrimination" means someone being treated differently unreasonable. Employment discrimination refers to the employer unfair treatment of an employee (or applicant) because of his or her individuals or groups characteristics factors (such as race, color, religion, sex, age, disability) that does not concern with the nature of the work in the course of employment. In short, employment discrimination refers to a job seekers or an employee being unreasonable treated in the process of job seeking or career. Employment discrimination is not only a phenomenon violation the equal employment rights of the citizen, but also it creates the social groups those poor and weak, disadvantage in the political, economic, social, cultural and other aspects are further marginalized, and thus increases the conflict between the bottom social groups, middle social groups and the tops. Employment discrimination will impede the formation of a harmonious society. Therefore, the international communities and some countries in the world believe generally that employment discrimination should be regulated strictly by the Anti-Employment Discrimination Law.

Employment discrimination phenomena are quite common in China. Because of that China has no real sense of Anti-Employment Discrimination Laws (including the basic law and the single law). Even though there are a few legal provisions against employment discrimination in the "Labor Law", "Employment Promotion Law" and Chinese other laws, the lacking of legal liabilities and channels for relief among these legal provisions against employment discrimination makes them a mere formality. So, in recent years, there is a loud voice for the introduction of specific anti-employment discrimination law in Chinese society. However, a law system construction is based on the value of consensus as a precondition. In China, the construction of the legal system of anti employment discrimination needs to generate common cultural environment and social value judgments as a precondi-

tion. The research on basic theoretical issues of anti-employment discrimination law will help to build the consensus value of anti-employment discrimination. Therefore, strengthening basic theoretical research of anti-employment discrimination law and doing theoretical preparation for early establishment of China's anti-employment discrimination law system, are the historical missions of the law researchers in contemporary China, especially of the labor law researchers.

So far, the related research on basic theoretical issues of anti-employment discrimination law is very weak in China's theoretical circles. This thesis attempts to change the status quo. And it seeks to achieve a breakthrough or an innovation in the basic theory of antiemployment discrimination law, such as the status of the study of anti-employment discrimination laws in domestic and foreign, the definition and classifications of employment discrimination, the debates and legislative evolution of anti-employment discrimination, the sources (origins), nature and principles of anti-employment discrimination law, the constituent elements and legal responsibilities of employment discrimination.

In addition to the conclusion and the postscript, this thesis is divided into five chapters.

Chapter 1 is introduction, which includes two subchapter. Subchapter 1 is preface and it shows that the legal system of anti-employment discrimination is the forefront of the Labor Law. It also tells us that the research on basic theoretical issues of anti-employment discrimination law will contribute to the awakening of anti-employment discrimination rights of our people, and will help Chinese society to build the legal and cultural environment and consensus value of anti-employment discrimination. Moreover, Chinese basic theoretical research of anti-employment discrimination law should pay attention to systematic in contents and cross-disciplinary research in methods. Subchapter two is the review of related literatures in research domestic and foreign. This subchapter let us recognize the research status of antiemployment discrimination law at home and abroad. And the literature review reveals that there are some serious shortages of China's academic research to anti-employment discrimination law, which include that the research fields is non-Chinese fields, and the research contents are non-systematic.

Chapter 2 is definition and classifications of employment discrimination. The first subchapter elaborates the concept of employment discrimination and the difference between employment discrimination and employer autonomy in employment. This thesis adopts a broad concept of employment discrimination. Employment discrimination refers to job seekers or employed worker being unreasonable treated in the process of job seeking or career. Most people often confuse employment discrimination with the employer autonomy, and believe that anti-employment discrimination is bound to threaten employer autonomy in employment. This subchapter openly points out that anti-employment discrimination law should restrict the autonomy right of employers. Only in this way, can the balance between the rights of employee anti-employment discrimination and employer autonomy be achieved. The second subchapter mainly discourses economic and legal classification of employment discrimination. Legal classification can not be separated from the exploration of the economic classification. The significance of classification of employment discrimination is that it will help us to know the features of employment discrimination and help us to explore the countermeasures to check and eliminate employment discrimination.

Chapter 3 is debates and legislative evolution of anti-employment discrimination. The first subchapter involves the debates on the issues of anti-employment discrimination. It discusses in detail the debates around three questions. Whether we should anti employment discrimination? Should discrimination be made illegal in the workplace? Do we need affirmative action? The debates essentially are the conflict between the value of equality and the efficiency. By the more, from the results of the debating, anti-employment discrimination law is the inevitable development of history. The second subchapter mainly studies legislative evolution of anti-employment discrimination. From the point of view of the comparative study and historical research, this subchapter has get together the world's anti-employment discrimination laws of the relevant international organizations and countries (or regions), and has listed it out in two forms. On the basis of reach and grasp of analysis of the overview legislation of the world anti-employment discrimination laws, the author has scientific divided the development courses of the world anti-employment discrimination legislation into three stages. They are dispersion legal provisions stage of anti-employment discrimination law (before the 1960s), specialized single law phase of anti-employment discrimination law (1960s -1980s), and comprehensive basic law stage of anti-employment discrimination law (since the 1990s).

Chapter 4 discusses the sources, nature and principles of the anti-employment discrimi-

nation law. This chapter is dived into three subchapter. Subchapter 1 mainly deals sources of international law, domestic law and case law of the anti-employment discrimination law. Anti-employment discrimination law is different from the civil law, economic law etc. Anti-employment discrimination law links with international law all the time. Because of that it needs the theoretical support of the international human rights law and international case law. Subchapter 2 studies the nature of anti-employment discrimination law. It expounds that anti-employment discrimination law possess the properties of both public law and private law. So it asserts that the anti-employment discrimination law is social law. Subchapter 3 mainly demonstrates three principles of anti-employment discrimination law, namely principle of equal treatment, affirmative action and genuine occupational qualification. The equal treatment principle is the core principle and the others are derived from equal treatment principle, and are the reinforcing principles. Under normal circumstances, equal treatment principle is applicable objective in the anti-employment discrimination law. In the need of special balance of interests, the reinforcing principles such affirmative action or genuine occupational qualification is applied.

Chapter 5 aims to probe constituent elements and liabilities of employment discrimination. The first subchapter is the constituent elements of employment discrimination. It includes general constituent elements of employment discrimination and constituent elements analysis of Anglo-American anti-employment discrimination law. Above all, it describes the basic theory of the constituent elements, and then with the help of the theoretical framework to tort liability elements, it constructs the general constitute elements of employment discrimination in theory. It also analyzes and explores the judgment standard for employment discrimination which can be applied to the judicial practice of China. The general constitute elements include employment discrimination action, damage consequences, relationship between employment discrimination action and damage consequences, and fault of employment discrimination action person. Finally, on the basis of general constitute elements of employment discrimination and from the clues of specific judicial precedents it analyzes the constituent elements of Anglo-American anti-employment discrimination law. And which aims to see to what factors can be learned by China. The second subchapter mainly analyzes the the liabilities of employment discrimination action may have to bear, including unconstitutional responsibility, civil liability, criminal responsibility and administrative responsibility. Learning from foreign experiences, China's anti-employment discrimination legal system construction in the future should pay special attention to the provisions of employment discrimination liabilities. Not only did the anti-employment discrimination law in future should provide the civil liability and administrative responsibility, but also unconstitutional responsibility and criminal liability. Because under the existing legal environment in China, low-cost or even no cost of the employment discrimination leads to widespread of employment discrimination.

Research on the basic theoretical issues of anti-employment discrimination law is an ambitious research project, which enough to exhaust the whole time and effort of a scholar's life. And it is not this book (or a doctoral thesis) can be fully covered. Therefore, other basic theoretical issues, such as the core values and legal relationship of anti-employment discrimination law should be studied later specially.

Keywords: Employment Law; Anti-Employment Discrimination Law; Basic Theoretical Issues

<u></u> 目 录

第一章 导 论/1

第一节 引 言/1

- 一、选题的背景 / 1
 - (一) 理论背景/1
 - (二) 现实背景/2
- 二、选题的意义 / 4
 - (一) 是履行反就业歧视国际法义务的需要 / 4
 - (二) 是生成反就业歧视社会价值共识的需要 / 5
 - (三) 是提升反就业歧视法学研究水平的需要 / 5
- 三、术语的界定 / 6
 - (一) 就业歧视 / 6
 - (二) 反就业歧视法 / 6
 - (三) 基础理论问题 / 7

四、内容和方法 / 7

- (一) 研究的内容 / 7
- (二)研究的方法/9

五、创新与不足 / 10

- (一) 研究的创新之处 / 10
- (二)研究的不足之处 / 11

第二节 国内外相关研究文献综述 / 12

- 一、国外的研究文献 / 12
 - (一) 国外研究文献简介 / 13
 - (二) 国外研究文献的评析 / 15

- 二、国内的研究文献 / 22
 - (一) 国内研究文献简介 / 23
 - (二) 国内研究文献的评析 / 27

第二章 就业歧视的界定与分类 / 38

第一节 就业歧视的界定 / 38

- 一、歧视的法律内涵 / 38
 - (一) 歧视源于偏见 / 38
 - (二) 歧视的定义 / 41
 - (三) 歧视的特征 / 44
 - (四) 歧视的类型 / 45
- 二、就业歧视的概念与认定 / 47
 - (一) 就业歧视的词条 / 47
 - (二) 就业歧视的概念 / 48
 - (三)就业歧视的认定 / 55
- 三、就业歧视与用工自主权的区别 / 57
 - (一) 反就业歧视法对用工自主权的限制 / 58
 - (二) 反就业歧视与用工自主权的平衡 / 60
 - (三) 涉嫌就业歧视的用工单位的抗辩理由 / 61

第二节 就业歧视的分类 / 63

- 一、经济学对就业歧视的分类 / 64
 - (一)影响经济学对就业歧视分类的理论 / 64
 - (二) 劳动力市场歧视与非劳动力市场歧视 / 68
 - (三)政府歧视、雇主歧视、雇员歧视、顾客歧视 / 69
 - (四) 劳动报酬歧视、就业招聘歧视、职业或工作歧视、人力资本投资歧视 / 70
 - (五) 劳动力市场前歧视和劳动力市场后歧视 / 71
 - 二、法学对就业歧视的分类 / 72
 - (一) 反就业歧视法对就业歧视的分类 / 73
 - (二) 直接歧视与间接歧视 / 76
 - (三) 制度性歧视与市场性歧视 / 79
 - (四) 先賦条件的歧视与自获条件的歧视 / 83
 - (五) 就业歧视的其他特别分类 / 84

第三章 反就业歧视的争论与立法演进 / 87

第一节 反就业歧视的争论 / 87

- 一、关于是否应当反就业歧视的争论 / 87
 - (一) 反对方的观点 / 87
 - (二)支持方的观点 / 90
- 二、关于如何反就业歧视的争论 / 94
 - (一)"要不要进行反就业歧视立法"/94
 - (二)"要不要实施纠偏行动"/99
- 三、争论的实质是平等与效率的价值冲突 / 103
 - (一) 社会平等与经济效率的冲突 / 104
 - (二)社会学对就业歧视的解说 / 105
 - (三) 反就业歧视法制化是历史发展的必然 / 106

第二节 反就业歧视的立法演进 / 109

- 一、反就业歧视法的概念 / 110
- 二、世界反就业歧视立法的概况 / 113
 - (一) 国际组织的反就业歧视立法 / 113
 - (二) 国家(地区)的反就业歧视立法/117
- 三、反就业歧视立法的发展阶段 / 127
 - (一) 20 世纪60 年代以前,分散性反就业歧视法律条款阶段 / 128
 - (二) 20 世纪60 至80 年代,专门性反就业歧视单行法阶段 / 132
 - (三) 20 世纪 90 年代以来、综合性反就业歧视基本法阶段 / 135

第四章 反就业歧视法的渊源、性质与原则 / 141

第一节 反就业歧视法的渊源 / 141

- 一、国际法渊源 / 141
 - (一) 国际人权法 / 142
 - (二) 国际劳工法 / 146
 - (三)区域性国际组织的法律规范:以欧盟为例 / 148
- 二、国内法渊源 / 151
 - (一) 宪法 / 151
 - (二) 反就业歧视基本法与单行法 / 154