

平等发展权

法律保障制度研究

STUDY ON THE LEGAL PROTECTION SYSTEM
OF THE EQUAL RIGHT TO DEVELOPMENT
EDITOR-IN-CHIEF WANG XIGEN

汪习根◎主编



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前 言

本书致力于从人权法哲学的视角研究“发展”这一中国的第一要务和当今世界的主题,提出和论证了平等发展权的有关新概念、理论和实践战略,旨在丰富和深化对作为新一代人权的发展权学术研究,彰显特定的现实战略价值和实践功能,对实现党的十七大、十八大和十九大报告三次提出的切实保障全体公民平等参与、平等发展权利这一战略目标具有一定理论和对策咨询价值。

本书的主要内容分为总论和分论两部分。总论是对“平等发展权”这一概念进行法律基础理论创新,从概念构建、内在要素、法理基础、价值共识、法治体系五个方面进行了全方位的深入研究。其创新观点主要体现在以下几方面:第一,在法理基础上,从包容性增长、制度正义论、民本和谐观、社会连带论、全面发展观、共享发展观六个方面全方位深入论证了平等发展权的内在合理性和外在必要性,尤其是将“创新、协调、绿色、开放、共享”五大发展理念融入发展权的理论构建之中,试图将发展权的理论基础研究推向一个新的高度。第二,在内容上,对平等发展权的含义和逻辑构成进行了富有新意的研究,提出了主体、客体和内核三位一体的平等发展权逻辑构成论。其中,在主体上,深入论证了个体与整体相融合的双向路径,克服了在理论上陷入到个体主义或整体主义两个极端的局限性。在客体上,提出了经济、政治、文化、社会、生态利益五合一的客体观。在内核上,克服了1986年联合国《发展权利宣言》将其视为是“发展机会均等”(the equality of opportunity for development)的历史局限性,从机会、程序、规则、结果公平四个维度求证了发展权的核心在于从形式平等(equality)走向实质公平(social

justice),提出了“以人为本的发展正义观”(people-centered development with justice)这一概念,得到联合国发展权机构的认可。第三,在制度上,从立法规范、指标设计、义务设定和救济机制四大方面对平等发展权的法律保障制度进行了系统化构建,提出了一系列保护平等发展权实现的法律对策举措。就救济机制而言,提出应当实现两个转变:一是从不可司法性到可司法性的转变,克服传统人权观认为发展权不具有可司法性的理论局限,构建具有可操作性的平等发展权法律救济机制;二是从侧重国际保护向强调国内保护与国际保护互动的转变,克服“发展权主要是一项国际法上的人权”这一所谓主流观点之不足,引入国内法的视角,构建发展权的国内法律救济机制。

分论部分对平等发展权这一总概念进行了精细化的拆分,契合当代中国发展中的重大现实问题,分离出平等发展权的子人权形式,逐一进行专项研究,针对不同类型的弱势群体分别构建出不同的理论模型与法律保障对策。

第一,关于贫困人口平等发展权的法治创新体现为:以平等发展为重心完善减贫立法、以国家义务为基础设计减贫义务、以赋权法治为机制推行减贫方法、以国际经验为参考创新减贫制度。第二,对农民工平等发展权的法治构想体现在两方面:一是建构“五位一体”的整体权利体系,包括农民工经济发展权、农民工政治发展权、农民工社会发展权、农民工文化发展权、农民工可持续发展权;二是在清理现行全部规范性法律文件的基础上创制一部综合性“农民工发展权保障法”,包括定性、定位、原则、主体、权利、义务、责任七大板块。第三,妇女平等发展权法律理念与制度创新主要包括:在探明了现有规范在法的要素、位阶、责任与实效四个方面所存在的局限性之后,通过法理优化,提出以社会正义发展观来导引法的规范构建。为了弥补《妇女权益保障法》之不足,建议制定一部完善的“妇女平等发展权保障法”,包括:总则、妇女经济平等发展权利、妇女政治平等发展权利、妇女文化平等发展权利、妇女社会平等发展权利、妇女可持续发展权利、法律责任七章。第四,儿童平等发展权法律理念与制度创新表现在:应当从以自由或社会为基调逐步转向以发展为基调的儿童权利保障新视角,在提出了一个新的儿童平等发展权概念之后,分别论证了基于健康正义、公共参与、经济

理性、社会福利、文化公平的儿童发展权,并探明了其实现路径。第五,残疾人平等发展权法律理念与制度创新表现在:通过分析残疾人权利的视角缺失及其转换,提出以残疾人平等发展权代替残疾人保护的传统模式;在进行残疾人平等发展权概念构建时,重点论证了基于机会均等的发展参与权、基于程序理性的发展促进权、基于分配正义的发展共享权;系统化地设计了残疾人平等发展权法治体系,分为残疾人平等发展权保障的法律原则、综合立法模式、多元治理体制、司法救济之道。第六,对失业人员平等发展权法治保障设想如下:在科学界定失业人员的基础上,通过重点分析基于失业的发展不平等,提出了失业人员平等发展权法律调控模式,揭示了经济排斥之补偿、参与排斥之矫正、社会排斥之弥合、文化排斥之补救、个体排斥之救济方式。

围绕课题,我们进行了一系列专项研究,先后在国内外发表了 20 多篇学术论文,出版了有关著作,应邀参与联合国和我国政府组织的专家咨询活动,提供了一批咨询建议,先后被我国政府和联合国采纳 10 多次,有关领导作出重要批示,载入联合国官方正式文件,在国内外产生了一定的社会影响。

当然,理论研究无止境。由于研究水平所限,本书势必存在着这样或那样的不足与局限。随着认识的深入和实践的深化,对这一主题的研究应该得到不断拓展与不断升华。我们真诚地期待国内外专家与同行不吝赐教,提出宝贵的意见与建议。

Foreword

The book is dedicated to studying “development”, the top priority of China and the core issue of current world, from the perspective of the legal philosophy of human rights. By putting forward and demonstrating the new concepts, theories and practice strategies related to the equal right to development, this book aims to enrich and deepen the academic researches on the right to development, and meanwhile highlight the specifically strategic values and practical functions of this right as a new generation of human rights. These efforts further provide theoretical and countermeasure consultation to the strategic objective of ensuring “people’s equal right to participation in governance and to development” proposed at the 17th, 18th and 19th CPC National Congress.

The book consists of pandect and sub-pandect. The pandect elaborates the theoretical innovations on the equal right to development by conducting an in-depth and comprehensive analysis from five aspects of concept construction, inherent elements, jurisprudential basis, value consensus and the system of rule of law. The book has brought forward three innovative opinions: Firstly, on jurisprudential basis, it has conducted an all-rounded and in-depth demonstration of the inherent rationality and external necessity of the equal right to development from six aspects, including inclusive growth, institutional justice theory, human-oriented harmony outlook, social solidarity theory, all-rounded development outlook and sharing development outlook. In particular, the book has incorporated five new development concepts of innovation, coordination,

greenness, openness and sharing into the theoretical construction of the right to development, trying to elevate the basically theoretical research of the right to development into a new level. Secondly, in content, the book has conducted innovative studies on the connotation and logical composition of the equal right to development and proposed the logical construction theory of the equal right to development which is a three-in-one composition of subject, object and core. Regarding subject, the book has deeply demonstrated the bi-directional path which can organically integrate individuals into society and thus overcome the theoretical limitation of ending up in the extreme situations of individualism or holism. Regarding object, the book has proposed the five-in-one object outlook consisting of economy, politics, culture, society and ecological interest. Regarding the core, the book has overcome the historical limitation of taking the equal right to development as the equality of opportunity for development in *Declaration on the Right to Development* launched by UN in 1986. Instead, it has elaborated how the core of the right to development has been changed from formal equality to social justice from the perspectives of opportunity, procedure, rule and result, and constructed a new concept of “people-centered development with justice” that has been approved by the development institutions of UN. Thirdly, the book, institutionally, has made a systematic construction of the legal protection system for the equal right to development from four aspects of legislation norm, indicator designing, obligation setting and remedy mechanism, and suggested a series of legal countermeasures and initiatives on realizing the equal right to development. Regarding the remedy mechanism, it has proposed two essential shifts: The first is to shift from being “non-legislation” to “legislation”. It aims to overcome the theoretical limitation of traditional human right outlook that thinks the right to development is not legal binding and set up a feasible legal remedy system for the equal right to development; The second is to shift from emphasizing international protection to the interactions between domestic protection and international protection. It aims to overcome the deficiency of the mainstream opinion that takes the right to development mainly as a human

right stipulated by international law and introduce a domestic legal remedy system for the right to development based on domestic laws.

The sub-pandecthas divided the general concept of the equal right to development into different sub-right forms according to the significant practical problems during the development of current China, and then dissected each of them. Based on these works, the sub-pandect has eventually developed different theoretical models and legal protection measures for different types of disadvantaged groups.

The first is the legal innovation about implementation of the equal right to development for the poor. It includes optimizing the poverty reduction legislation based on the principles of equal development, designing poverty reduction obligations based on national obligations, upgrading poverty reduction methods based on empowerment-oriented rule of law, and innovating poverty reduction countermeasure based on international experience.

The second is the legal construction of migrant workers' equal right to development which embraces two parts. One is to set up a five-in-one overall rights-based system, including migrant workers' right to economic development, political development, social development, cultural development and sustainable development. The other is to promulgate a comprehensive *Law of the People's Republic of China on the Protection of Migrant Workers' Right to Development* based on reviewing all of the current normative legal documents. This law should clarify seven issues of the right's nature, status, principles, subject, rights, obligations and responsibilities.

The third is the innovations in legal concepts and systems of women's right to development. One is to guide the normative construction of laws with social justice theory through a legal optimization from the perspective of jurisprudence after exploring the limitations of current norms in the element, hierarchy, responsibility and effectiveness of laws. The other is to formulate a consummate *Law of the People's Republic of China on the Protection of Women's Right to Development* to make up for the deficiencies of the *Law of the People's Republic of*

China on the Protection of Rights and Interests of Women, which includes seven sections of general provisions, women's equal right to economic development, political development, cultural development, social development, sustainable development and legal responsibilities.

The fourth is the innovations in the legal concepts and systems of children's right to equal development. It emphasizes the necessity of shifting the focus of children's right protection from "freedom" or "society" to "development". It then proposes a new concept of children's right to equal development, demonstrates it from the aspects of health justice, public participation, economic reason, social welfare and cultural fair, and finally clarifies the relevant paths to implement and realize all these rights.

The fifth is the innovations of legal concepts and systems of the disabled persons' equality right to development. It proposes to replace the traditional disabled persons' protection mode with a new one oriented by their equality right to development after analyzing the deficiency of the disabled persons' rights perspective in existing literature and the efforts of improving it. It then demonstrates the right to participation in development based on opportunity equality, the right to contribution to development based on procedural reason and the right to sharing in development based on distribution justice during the process of constructing the concept of disabled persons' equality right to development. It finally systematically designs the legal system for disabled persons' equality right to development from the aspects of legal principles, comprehensive legislation modes, diversified governing systems and judiciary relief methods.

The sixth is the suggestions on the legal protection of unemployed persons' equal right to development. It proposes a legal regulation mode for unemployed persons' equal right to development after scientifically defining unemployed persons and carefully exploring the development inequality due to unemployment. It then puts forward a series of relief means, including compensations to economic repulsion, correction of participatory repulsion, improvement of social repulsion, remedy to cultural repulsion and relief to individual repulsion.

Concentrated on this project, the research team has held the 30th anniversary academic symposium themed with *New Development Concepts and the Protection of Right to Development in China—In Commemoration of the UN Declaration on the Right to Development*. It has also chaired the drafting of the white paper on *The Right to Development: China's Philosophy, Practice and Contribution* entrusted by the State Council of People's Republic of China, conducted a series of themed research about this topic, and published over 20 academic papers and a few books in Chinese, English and Japanese. In addition, we have been invited to attend some expert consultation activities on the right to development organized by the UN and Chinese government. He has proposed a series of consultation advices, some of them have received written instructions from the senior leaders of Chinese government and accepted by the international organizations as their official documents for over ten times. All these works have produced positive social influence at home and abroad.

Even so, there is no end to theoretical research. Due to inadequate research proficiency, the book may have some defects and limitations here and there. As people's understandings and practice are constantly deepened, the study on this theme will be further expanded and improved. We thus sincerely look forward to valuable opinions and suggestions from experts and peers all around the world.

Xigen WANG *

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