THE JUDICIAL REMEDY IN THE MODERN AGE OF INTERNATIONAL LEGAL COOPERATION

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ABSTRACT: This article is an overview of social rights and its judicial remedy, which aims to illuminate the theoretical and practical reasons of judicial remedy for social rights in contemporary China. First, the article introduces constitutional norms and other legal norms in Chinese legal system related to social rights; second, it introduces main three debates on the justifiability of these constitutional social rights; third, it introduced the main approaches and typical cases in realizing judicial remedy of social rights based on given laws.

Keywords: judicial remedy, social rights, anti-discrimination

RESUMO: Este artigo é uma visão geral dos direitos sociais e seu recurso judicial, que visa esclarecer as razões teóricas e práticas da justiciabilidade de direitos sociais na China contemporânea. Pimeiro, o artigo introduz normas constitucionais e outras normas legais no sistema legal chinês relacionadas aos direitos sociais; em segundo lugar, introduz os três principais debates sobre a justificabilidade desses direitos sociais constitucionais; em terceiro lugar, introduziu as principais abordagens e casos típicos na realização de reparação judicial dos direitos sociais com base em determinadas leis.

PALAVRAS-CHAVE: remédio judicial, direitos sociais, antidiscriminação

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1. INTRODUCTION

This article is a theoretical overview of social rights and its problems in China depending on Chinese scholars' research in this area. "China" in this context refers only to the mainland from 1949. This paper focuses on arguments of Chinese scholars and typical Chinese cases about social rights. And the main purpose of this paper is to illuminate the theoretical and practical reasons why we have such an approach of judicial remedy for social rights in China nowadays.

2. WHAT ARE SOCIAL RIGHTS?

The first step to discuss judicial remedy of social rights is to understand the very Chinese meaning of "social rights".

Normally, there are three popular terms used in discussing and arguing social rights protection in Chinese academic area. The first is social rights (社会权), which translated from German constitutional legal theory; the second is welfare rights (福利权), which came from American constitutional and administrative law; the third is the right of social security (社会保障权), which is discussed much more earlier than social rights and welfare rights in China and focused mainly on social assistance when its beginning, which is also a topic of management science.[1]

Logically, the scope of welfare rights is broader than social security; even it includes social security. But in china, especially in everyday use, that a man who enjoys

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[1]According to the result of search "the name=**社会**权" in National Library of China, there are 7 books published until now; if "the name=**福利**权", there are 5 books published; if "the name=**社会保障**权", there are 13 books published. The result in China Academic Journal Network Publishing Database shows that, the number of those articles published in core journals with the name that includes "**社会**权" is 38; while "**福利**权" is 12 and "**社会保障**权"is 49.

the right of social security does not mean he enjoys social welfare at the same time. There are three levels of social rights protection: social assistance means man can enjoy the survival material assistance without any charge; social security means man can enjoy the social rights based on the social insurance; while social welfare means man can live better than just to be survival, which includes, for instance, to enjoy public service, material welfare Dan-wei (working unit)[2] supplies and so on, and it does not always depend on social insurance. Although some scholars inclined to use a broader understanding of social welfare in academic articles, this everyday using of social welfare still works in discussing. [3]

Comparing to social welfare, the scope of social rights is admitted to be broader, which includes social welfare, social assistance and social security, and even can be divided different protective status.

In Chinese common sense, only the right entitled in law may have the legal possibility to realize its value as a subjective right. Then, the abstract theoretical "social rights" in Chinese Constitution can be understood as a collection of substantial constitutional rights according to a prevalent idea, which argues that the social rights stated in Chinese constitution named as "Economic and social rights", combine the economic liberty and social rights based on the state economical policy, socialist market economy. [4] The "Economic and social rights" in Chinese constitution (1982) [5]includes the right of property and inheritance (article 13), the right to work (article 42), the right to rest (article 43), the survival right (or the right to material assistant, article 44, 45), and

[2] Dan-wei (单位) is a vague term in China. Normally, it could mean those state-owned business, public institutions (for example, university, hospital, etc), and government organs. The function of Dan-wei for employees was similar as a big family. The welfare of those employees, which included housing, medical care, retire pension, depended on Dan-wei they worked for.

[3] Sometimes the misunderstanding of social welfare came from the Chinese word "welfare"(福利). Comparing the "security/protection"(保障), welfare means those supplying out of the minimum standard of social assistance.

[4] 林来梵：《宪法学讲义》（第二版），法律出版社2015年版，第389页。

[5] The first constitution was promulgated in 1954, the second was in 1975, the third was in 1978, the constitution of 1982 is the current active constitution, which had several amendments after promulgated.

the right to be educated (article 46).[6]However, as a socialist country, social rights are more important than economic liberty.[7] Therefore, the substantial social rights could be understood as those entitled rights except the right of property and inheritance.

In addition to those substantial social rights prescribed, there are some general principles which are related to social rights. For instance, in article 19 it prescribes "the state undertakes the development of socialist education…"; and in article 21 it prescribes "the state develops medical and health services…". All of those prescriptions as general principles set up the aims the state needs to achieve. From article 21, some scholars inferred that there is a right to health as a sort of social right the constitution entitled, [8] the same as inferred environmental right[9]and cultural right.[10]

Normally, because the social rights are treated as positive rights which depending on the pubic financial support, the legislation and administrative policy are primary methods to realize prescribed social rights. Since 1978, the National People's Congress began to promulgate lots of legal codes on social rights protection; the state council also enacted lots of regulations or administrative orders to improve people's living standards. Scholars even theoretically connected these legal codes as a department of legal system, i.e. social law department, which includes labor law, law on protection of the disabled, law on protection of the minors, law on protection the interest of women, children and the elders, law on donations for public welfare, social insurance law, the trade union law, law on promotion of employment, etc.[11] In addition to these laws prescribed by people's congress or the standing committee of people's congress, there are lots of administrative regulations and policies. According to the official website of the Ministry of Human

[6] 韩大元、林来梵、郑贤君著：《宪法学专题研究》，**中国人民大学出版社2004年版**，**第273**页。
[7] 韩大元、林来梵、郑贤君著：《宪法学专题研究》，**中国人民大学出版社2004年版**，**林来梵撰写第十二章"社会**经济权利"**部分。**
[8] **上官丕亮**：《论宪法上的社会权》，**《江**苏社会科学》**2010年第2期。**
[9] 韩大元、林来梵、郑贤君著：《宪法学专题研究》，**中国人民大学出版社2004年版**，**第386**页；**白平**则：《论环境权是一种社会权》，**《法学**杂志》**2008年第6期**；聂鑫：《宪法社会权及其司法救济——**比**较法的视角》，**《法律科学》2009年第4期。**
[10] 聂鑫：《宪法社会权及其司法救济——**比**较法的视角》，**《法律科学》2009年第4期。**
[11] 张文显主编：**《法理学》**，**高等教育出版社2003年版**，**第106**页。

Resources and Social Security of the People's Republic of China, 1015 legal regulations and policies have been issued until now, which cover human resources, employment promotion, labor relation, salary and welfare, medical care, social security in rural, etc.[12]

Although social rights can be realized through the legislation and administrative orders, once social rights are prescribed as legal rights, people shall have the right to claim directly to courts for realizing their rights. That is why there is judicial remedy of social rights. But it is not so simple in China.

3. ARE SOCIAL RIGHTS JUDICIABLE?

Commonly, when we mention the judicial remedy of social rights, it means judicial remedy of constitutional social rights. But there are several obstacles in China as follows: (1) judicial ability dissent: social rights are positive rights, which depend on the public finance support and the national economic policy, therefore, the judges has not enough judicial ability to make reasonable judgments in these cases. (2) state's obligation dissent: our constitutional norms do not prescribe the substantial, justifiable rights, which cannot be interpreted as there is a direct obligation of state to realize the social rights. (3) constitutional system dissent: given the constitutional system, judicial courts cannot apply the constitution directly to any specific cases.

Anyway, although there are a lot of objections on this topic, there are still arguments trying to justify the possibility of judicial remedy of constitutional rights against these three dissents above. However, they still cannot reach an agreement.

A. THE ARGUMENT OF COMPARATIVE LAW

[12] http://www.mohrss.gov.cn/gkml/index3.htm.

The first argument to support constitutional remedy of social rights is not to debate with these dissenting opinions, but based on a comparative research. For instance, a famous scholar on social rights, Prof. Gong argues that the practice of universal constitutionalism shows a trend of social rights protection and their constitutional judicial remedies. There are tremendous developments in different countries, which include three different approaches.

First, social rights are specified by the constitution and are prescribed as subjective rights, which means social rights could be claimed directly to a court, as German and South Africa did.[13]

Second, social rights are not prescribed by constitution but with a judicial review established, judicial remedies may be indirectly used to protect social rights depending on due process and equal protection appealed as USA did. The typical case of this approach is the case Goldberg v. Kelly (397 U.S.254 (1970)).

Third, the social rights are inferred from general principles, which prescribe the political and moral obligation of the state. It is necessary and possible to interpret these principles when realizing those political and moral requirements. [14]

Prof. Gong appreciated these judicial approaches to realize social rights; however, some scholars may have different evaluation of these judicial remedies as the first opposite idea listed above. For example, Prof. Nie argued that judicial remedy of social rights is not a wise choice. When people suggest judicial remedy of social rights, they indeed presuppose a smart judge, that judge behaves neutral to evaluation, the court is the ideal places to realize social rights, and each judgment could be effective. But all of these presupposing is wrong. [15] According to his research, based on the separation of powers, some American jurists insisted that the social rights, different from liberty, cannot be realized directly through judicial enforcement. And in Germany, the common

[13] The case cited and discussed in his article is Numerus Clausus I. BVerf. GE 33,303,1972.
[14] 龚向和：《社会权司法救济之宪政分析》，《现代法学》2005年第5期。
[15] 聂鑫：《宪法社会权及其司法救济——比较法的视角》，《法律科学》2009年第4期。

idea on constitutional court is to judge whether the law conform or violate the constitution, but not directly supply the judicial remedy to social rights. Although the direct judicial remedy was made by constitutional court, such as the case Grootbroom in South Africa,[16] the government did not make any effective progress on the housing of the poverty indeed. [17]

Anyway, the arguments based on comparative law are not strong enough to justify or oppose constitutional remedy of social rights considering different legal traditions.

B. THE ARGUMENT OF STATE OBLIGATIONS

As stated above, some scholars insisted that the social rights prescribed in our constitution are not those substantial, justifiable rights, which cannot be interpreted as there is a direct obligation of the state to realize social rights. Then citizens can not appeal to the court directly because of the special character of these constitutional provisions. [18] To clarify this idea, they stated that those directive norms should have three patterns: norms to empower, norms on "ought to do", and norms on prohibition. But the social rights in general principles cannot give a clear direction on how to do. That means these provisions are the political claims and just prescribe the political or moral obligations, but not a real legal obligation, even in those provisions of substantial social rights.[19] They insisted that those rights can not be appealed directly to the judge, if the constitution does not prescribe specific obligations of the state.

For instance, the provision of article 42 of the constitution is as follows:

(a)Citizens of the People's Republic of China have the right as well as the duty to work.

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[16] Government of the republic of South Africa and others v. Grootboom, 2001(1) SA 46(CC).
[17] 聂鑫：《宪法社会权及其司法救济——比较法的视角》，《法律科学》2009年第4期。
[18] 谢立斌：《宪法社会权的体系性保障——以中德比较为视角》，《浙江社会科学》2014年第5期。
[19] 薛小建：《论社会保障权的宪法基础》，《比较法研究》2010年第5期。

(b)Through various channels, the State creates conditions for employment, enhances occupational safety and health, improves working conditions and, on the basis of expanded production, increases remuneration for work and welfare benefits.

(c)Work is a matter of honor for every citizen who is able to work. All working people in State-owned enterprises and in urban and rural economic collectives should approach their work as the masters of the country that they are. The State promotes socialist labor emulation, and commends and rewards model and advanced workers. The State encourages citizens to take part in voluntary labor.

(d)The State provides necessary vocational training for citizens before they are employed.

Besides the dissenting opinion of judicial remedy stated above, although article 42(a) prescribes the right to work, it only states as "the state creates, enhances, improves, promotes, or increases the possibility of employment"in article 42 (b). It looks like the constitution already limits the way to protect the right to work and excludes the direct judicial remedy. Other provisions related to social rights are the same. For instance, in the article 45 of the constitution related to the right to survive, although people have the right of material assistance from the state and society when they are old, ill or disable, there is still no possibility of direct judicial remedy prescribed. Thus, they insisted that, it can conclude that the state does not have the duty to realize social rights of a single person based on a judicial claim and judgment. The state will develop social insurance, social relief and medical, health services to realize ordinary people's rights. The state "helps" to make arrangements for the work, livelihood and education of the disabled. But all of these things depend on the enacting of legislation and administrative policy.

However, the thesis that some constitutional rights cannot be realized directly because the provisions are not suitable for judicial judgment may confront with some objections. For example, Prof. Zhao refuted whether the constitutional norms can be applied in judicial process does not depend on the characteristic of provisions but on the

necessity. Even the preamble of constitution could be used to justify the judgment in Case Goldberg v. Kelly, why cannot those substantial rights provisions work in judicial area? [20]

Prof. Huang suggested another argument for the justifiability of social rights, which is the levels of state's obligation to realize constitutional rights. From the point of his view, most people, when they were against justifiability of social rights, they always insist the difference between the liberty and social rights: the former means the negative obligation of the state, while the latter means the positive obligation of the state. But the protection of the liberty also needs the positive action of the state. The dualism between negative and positive is not sound enough to divide the right to liberty and social rights or define the way to protect these rights. He cited the arguments of Stephen Holmes and Cass R. Sunstein [21]to support that each constitutional rights costs a lot whatever it is negative or positive. Then, the more reasonable way is to differentiate levels of state obligations. He cited three levels of state obligations of Henry Shue[22] and Asbjorn Eide: the obligation to respect, to protect, and to fulfill. [23]That to respect means the state can make a big progress on protection of social rights without a big cost of tax at least. Then, although the state cannot realize the obligation to fulfill social rights entirely because of the limit of public finance, it still has the duty to respect and protect social rights.[24] And there is a very case happened to support his idea, which is the case "Wu Fen-Nue v. Municipal Engineering Administration Office of Chang-ning District, Shanghai", in 1996. In the judgment, the judge declared that Wu had the right to have retired pension refer to the right of social security prescribed in the article 44 of constitution. [25]In this case, the judge did not want to fulfill the right directly, but just demanded the employer respect Wu's right. At the level of to respect and to protect social rights, negative rights and

[20] 赵娟：《中国宪法的成文性质与司法适用》，法律出版社2015年版，第254页。
[21] The book he cited is: Stephen Holmes and Cass R. Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes*, W.W. Norton & Company, 2000.
[22] The book he cited is: Henry Shue, Basic Rights: Subsistence, Affluence and U.S. Foreign Policy, second edition, Princeton University Press, 1996.
[23] The book he cited is Kitty Arambulo, Strenthening the Supervision of the International Covenant on Economic, Social and Cultural Rights: Theoretical and Procedural Aspects, Intersentia-Hart, 1999.
[24] 黄金荣：《司法保障人权的限度》，北京大学出版社2009年版，第366页。
[25] 上海市第一中级人民法院 （1997）沪一中民终字第2531号。

positive rights are the similar. If the former could be claimed directly, the later could be, too

4. THE ARGUMENT OF "VERFASSUNGSKONFORME AUSLEGUNG"

The third dissent of constitutional judicial remedy owes to the judicial self-restriction proposed by the People's Supreme Court given our constitutional system, which is the most difficult to overcome.

There are two judicial interpretations(司法解释) [26] issued by the People's Supreme Court that have deep influence on whether constitutional norms can be stated in judgment as direct legal reasons. The first one is the reply to the High Court of Xinjiang Uygur Autonomous Region made in 1955.[27]In that reply, Supreme Court said that the constitution was not a good reason to settle the disputes on crime and penalty in criminal lawsuits. It was obviously that constitutional norms were not good reasons to deal with criminal cases do not mean they could not be applied directly in judgment as reasons. Then, there would be the second reply, which made by Supreme Court in 1986.[28] The People's Supreme Court listed all possible legal norms judges could apply to justify a judgment, in which constitutional norms were not included.

In fact, Supreme Court did not express clearly that judges could not use constitutional norms as direct reasons to make a judgment. And judges still use constitutional norms to make a judgment sometimes when there are no suitable legal norms in some cases. For instance, in the case "Wang Yu-lun and Li Er-xian v. Vegetable Village Committee", the judge declared that, the convention, based on which the

[26] This Judicial Interpretation is very special interpretation that is only made by the supreme court of China. According to the empowerment of standing committee of people's congress in 1981, the Supreme Court was empowered to promulgate those judicial interpretations, which have formal validity each court shall obey. The judicial interpretation may be a restatement of legal rules, a formal reply to local courts on special cases, some decisions, and guiding cases.

[27] 1955年7月30日最高人民法院研字第11298号对当时的新疆省高级人民法院曾经作过一个批复。

[28] 法（研）复［1986］31号。

Vegetable village committee refused to give equal profit of the land, has infringed the right of equality of women referring to the article 33 of the constitution.[29]

Although there are some cases, in which the constitutional norms were used as the judicial reasons, anyway, the Supreme Court did not confirm this judicial remedy openly and officially. The reason why the People's Supreme Court insisted its self-restriction is not because the constitution is too abstract to clarify a certain meaning of substantial rights, but the constitutional system. The article 67 of constitution prescribes that only the standing committee of people's congress has the power to interpret the constitution. Therefore, Supreme Court of China does not have the power to interpret the meaning of constitutional norms along with judgments. To understand and to interpret constitutional norms are always necessary in judicial process, and although to interpret constitutional norms does not logically mean the constitutional review or quasi-legislation of judges, there still is a political danger of expanding the power of courts.

In the case "Qi Yu-Ling", the famous case once named as the first case of constitutional rights,[30] a tiny step indeed made as a reply to the case by the People's Supreme Court, abolished without sufficient reasons finally in 2008. In the judgment of this case, the judge wrote that the defendant infringed the constitutional right to be educated by the way of infringing the right of name, which is a sort of civil rights. In fact, it was even not a real interpretation of constitutional right. Around 2008, along with the failure of case QI Yu-Ling, in Chinese constitutional legal theory, there boomed another effort to promote the possibility of judicial remedy of constitutional rights by the way of German "Verfassungskonforme Auslegung".

[29] **新津**县人民法院（1995）**新民初字第118号民事判决**书。

[30] **法**释（2001）25**号**，**最高人民法院2001年作出《关于以侵犯姓名**权的手段侵犯宪法保护的公民受教育的基本权利是否应承担民事责任的批复》。

Scholars divided different meanings of constitutional interpretation to avoid the risk of constitutional review and the political risk of expanding judicial branch.[31] In their words, the constitutional interpretation is a way to help to justify the interpretation of legal norms. But anyway, Verfassungskonforme Auslegung, when it just narrows itself as a reason to justify the interpretation of legal norms, will lose its real meaning in the scope of constitutional review. [32]That is clear, so the thing left is to make a decision, where the different opinions among scholars still exist, whether or not to neglect this possible meaning, constitutional review, intentionally. That is a tactical choice based on different judgments on the constitutional justificatory fate given contemporary political-legal structure.

4. PRACTICAL JUDICIAL REMEDY OF SPECIFIC LEGAL RIGHTS

Although in academic area, there are at least three arguments to support the judicial remedy of constitutional positive rights as stated above, constitutional remedy of social rights still is not a common sense, and the Chinese courts still incline to keep the self-restriction and avoid the political risk.

But it does not mean there are no any other judicial approaches to protect social rights. Social rights are prescribed in legal codes and administrative orders, which give judges enough reasons to make a decision. Therefore, although there are adversarial opinions on the justifiability of constitutional social rights, there exist some cases

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[31] 张翔：《**两种**宪法案件——**从合**宪性解释看宪法对司法的可能影响》，《**中国法学**》2008**年第4期**；**上官丕亮**：《**当下中国**宪法司法化的路径与方法》，《现代法学》2008**年第2期**；**王**书成：《论**合**宪性解释方法》，《**法学研究**》2012**年第5期**；**蔡琳**：《**合**宪性解释及其解释规则——**兼与**张翔博士商榷》，《**浙江社会科学**》2009**年第10期**；**黄卉**：《**合**宪性解释及其理论检讨》，《**中国法学**》2014**年第1期**。

[32] **黄卉**：《**合**宪性解释及其理论检讨》，《**中国法学**》2014**年第1期**；**柳建**龙：《**合**宪性解释的本相与争论》，《**清**华法学》2011**年第5期**；**王**书成：《论合宪性解释方法》，《**法学研究**》2012**年第5期**。

appealing with a supplementary of constitutional rights as follows. They are mostly administrative cases.

According to the research on cases in this area, the most popular approaches are as follows.

A. Claim to anti-discrimination

The most severe dilemma of social rights protection in China nowadays is the problem of unfairness depending on different social status. Then the unfair treatment is a first and urgent reason to ask for judicial remedy.

Unfairness happens in several aspects, urban and rural, male and female, able and disable, etc. There might be different understandings of unfairness or inequality. Some even tend to be the extreme. For example, some scholars argued that the name of "Law on Protection of women and children of the People's Republic of China" (1992) confers that women and children are both disadvantage groups in Chinese society. They said that the more important thing is to commit the right of women, but not just focus on some special interests of the disadvantaged; that the law focuses on women's interests presupposes women shall be in charge of the family work and need compensation of others but not have the same social status and rights as men in society. [33]

The first typical case on anti-discrimination is "Jiang Tao v. Chengdu Branch of Chinese People's Bank" in 2001. [34] The recruitment advertisement of Chengdu Branch of Chinese People's Bank claimed that the height of the man they wanted to hire should be over 168cm; the height of woman should be over 155cm. Jiang Tao appealed to the court and argued that the recruitment had infringed the right of equality of constitution, which also meant the invasion of the right to work. And he did win the lawsuit. Although the case confronted the critiques on whether it is necessary to ask for the protection based

[33] **黄金荣主**编：《<经济、社会、文化权利国际公约>**国内**实施读本》，**北京大学出版社2011年版**，**第32-33**页。

[34] **四川省成都市武侯区人民法院（2002）武侯行初字第3号。**

on labor law with a justification through an interpretation of related constitutional norms,[35] the case is still treated as the first case claiming for constitutional equality.

However, the appropriate legal meaning of equality is not clear enough to make a judgment for judges, so some scholars began to use "anti-discrimination" to classify those cases from 2006.[36] According to Prof. Zhou, a specialist on anti-discrimination cases, discrimination means the unlawful and unjustified effect that confers privileges on specific group members or individuals that differentiates, denies, or limits privileges to specific group members or individuals. If a differentiation is justified and lawful, it is not a sort of discrimination but a reasonable differentiation approved by law. [37]

The anti-discrimination cases in administrative lawsuits present a big progress on judicial remedy of social rights. Ever since the first typical case happened, according to a research on anti-discrimination cases in 2013, there are 116 important cases at least. [38]For instance, in a judgment happened in Wuhan in 2004, the judge declared that the defendant claimed that there was not any obligation to supply social insurance for peasant-workers, was a sort of discrimination to a special group. [39]

The reason why anti-discrimination cases became more and more popular nowadays may be that laws prescribed fairness and anti-discrimination clauses. For instance, in the chapter of fair employment of the Employment Promotion Act (2008), there are five different sorts of discrimination related to women's right, all ethnic groups, the disabled, the sick person, rural workers. It prescribes the fairness clearly and detailed as the article 30:

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[35] The employee in people's bank is not a normal worker regulated by labor law. But in this case, the complaint appealed to the court referring to the labor law first.

[36] 李成：《平等权的司法保护——基于116件反歧视诉讼裁判文书的评析与总结》，《华东政法大学学报》2013年第4期。

[37] 周伟：《论禁止歧视》，《现代法学》2006年第5期。

[38] Because there is not full database of judgments, the research focused on the cases published by Supreme Court of China and cases collected by the judgments database sponsored by Peking University. 李成：《平等权的司法保护——基于116件反歧视诉讼裁判文书的评析与总结》，《华东政法大学学报》2013年第4期。

[39] 胡敏洁：《转型时期的福利权实现路径——源于宪法规范与实践的考察》，《中国法学》2008年第6期。

"When an employing unit recruits a person, it shall not use as a pretext that he is a pathogen carrier of an infectious disease to refuse to employ him. However, before a pathogen carrier of an infectious disease is confirmed upon medical test that he is cured or before the suspicion that the disease is infections is expelled, he shall not take up the kind of jobs which may easily cause the disease to spread and which a person is prohibited from taking up by laws and administrative regulations and by the administrative department of health under the State Council."

But not all of unfairness could have effective judicial remedy especially because of the social structure and historical influence. For example, the cases related to the unfair treatments between the urban and rural people are not suitable for judges to make a decision. Since 1958 when household registration system (i.e. Hu-kou System) was implemented, Chinese people began to be labeled as "rural" or "urban" officially. But in fact, we even could find the legal gap between urban and rural earlier. In the first Constitution (1954), there were four provisions ensuring sorts of social rights, which included the right to work (article 91), the right to rest (article 92), the right of social security (article 93, which included social welfare, medical care and retire pension), and the right of education (article 94). [40] The right to rest and social security only belonged to workers. The "worker" only meant those people lived in urban and mostly worked in state-owned enterprises at that time. [41]It is clearly there was a big gap of social rights between workers and non-workers, which mostly lived in the rural places.

Besides, the status of social welfare was also not equal among different urban people, which depended on different "Dan-wei" they worked for. And social welfare of different Dan-wei was even prescribed in different legal rules and policies.

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[40] **凌**维慈：《**比**较法视野中的八二宪法社会权条款》，《华东政法大学学报》**2012年第6期**（总第**85期**），**第**102页。

[41] In urban, the people who could enjoy social rights which cover workers, their family members and those elder or juniors who had not any financial supports. But the rural people had different fate. The difference between the urban and rural people on social welfare is tremendous. During the period of planning economic policy, urban people enjoyed the policy of full-employment, who enjoyed the profits of the policy and social welfare more or less with the support of public finance of state; but the rural people, whose social welfare only depended on the production of collective agricultural economic organization.

Since 1990s, Chinese government began to promote the reform on extensive coverage of social welfare based on the public finance support and the influence of ICESCR. That did make a big progress. Until now, the comprehensive coverage of social security for all populations has been realized, which includes basic old-age pensions, basic medical care and the minimum living standard scheme.[42] Free compulsory education has been realized referring to the law and policy.[43]

This is the progress of legislation. But in judicial area, the remedy is not so easy to be urged further.

For instance, some retired workers from enterprises in Shenzhen once appealed to the court to argue for the fair treatment of retire pension in 1995. They did not have the same "special district weighting" and " reserved allowance"(保留津贴) as other retired persons from governmental agencies. Besides, they did not have living subsidies (生活补贴), but those retired from governmental agencies had. At first, they appealed to the social security bureau of Shenzhen, without any reply, they then appealed to the local court. The court made an order to let the social security bureau make a reply in six months. The social security bureau made a reply, in which they refused to pay that money claimed. And finally the court refused to support the appeal of those retired workers according to different policy of retire pension based on different jobs.[44]

In a word, those cases related to social rights mostly were anti-discrimination claims, but rarely on the positive duty of the state to fulfill social rights with diligence.

B. Claim to due process

[42] Huang Jingrong, "A Comment on the ESCR Committee's Consideration of the Second Chinese Report", The Journal of Human Rights, vol. 14, No. 1. 2015, Pp.87-88.
[43] 国发【2005】43号， 国务院关于深化农村义务教育经费保障机制改革的通知，2006年西部地区义务教育免除学杂费，2007年中部地区和东部地区农村义务教育阶段免除学杂费。
[44] 广东深圳市中级人民法院行政判决书， （2000）深中法行初字第65-92、94-119、121号。《广东省高级人民法院行政判决书》（2001）粤高法行终字第171-226号。

In addition to the anti-discrimination cases, there are several cases appealed referring to the administrative litigation law, especially in those cases, where the complaint asks for social insurance or other social assistance, and the administrative agencies did not obey the rule of due process prescribed in administrative litigation law.

There is a typical case discussed popularly in academic area:

In the case "Mr. liu v. Weihai Road sub-district office" on applying for minimum standard of living in 2002, the sub-district office of civil administration department did not make any research on economical status of Mr.Liu's family before refusing the application. The court declared that the sub-district office should make a thorough investigation of economical status of Mr.Liu's family before refusing the application according to due process administrative litigation law prescribes.[45]

C. Claim against administrative omissions

The typical case about administrative omission is the case "Wu Fen-Nue v. municipal engineering administration office of Chang-ning district, Shanghai" introduced briefly above.

Wu Fen-Nue was an employee in the municipal engineering administration office and retired in 1982. In 1989, she was sentenced to imprisonment for seven years for fraud. The defendant decided to fire Wu and began to stop paying the retire pension from 1991. After Wu was released in 1996, she appealed to the court because the defendant refused to recover the retire pension. The judge declared that Wu should have the right to enjoy the retire pension according to the article 44 of constitution and article 3 of the labor law after she was released. [46]

[45] **朱建奎**、孙洪辉：《一桩**"低保"**诉讼案》，《中国民政》**2003年第5期**，**第38**页。
[46] **(1997) 沪一中民**终字第**2531号**。

5. CONCLUSION

From the discussed above, it is clear that the main means to protect social rights relies on the legislation and state social policy in nowadays China. Because it is impossible to realize social rights by a way of constitutional lawsuits, the administrative lawsuits especially on anti-discrimination play an effective role to realize social rights. Therefore, some scholars suggested that the future of anti-discrimination cases should promote the standard of disparate impact originated from American constitutional cases. If a law or a policy do not embody an overwhelming public interest and cause the severe negative effect on the disadvantaged group, the law or the policy should be abolished. But clearly it may need a progress of the constitutional review in the future.