

“Aufheben” : disabled children's rights, education, and future in China

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Abstract: The rights of the disabled children in China, especially the right to education, has not been fully protected so far. In order to solve these problems, China's National People's Congress (NPC) and the government have established a lot of laws and regulations. China's governments at all levels have also formulated policies to support these laws and regulations. Nevertheless, China still has many flaws or deficiencies in the national human rights mechanism, which limits the effectiveness of the legislation. Therefore, a reform of the following human rights mechanism will be a prerequisite for the full protection and realization of the rights of disabled children in China in the future.

1. Introduction

This is an essay that concerns the human right conditions, related laws, regulations, and human rights mechanisms about the disabled children in China; meanwhile, this article is to some extent a contemporary annotation of Hegel's philosophy of history or philosophy of rights. This article consists of five parts. The first part gives an overview of the human right conditions of disabled children in China, including the quantity, quality, and some existing issues. Through this introduction part, "An external phenomenon is translated into an internal conception." [1] The second part and the third part introduce the legislation of the protection of disabled persons and their rights to education in China. Therefore, these two parts can be regarded as the feedback of the ideas to some social phenomena. And the aim of the legislation is to fully respect the rights of disabled children in China. The fourth part introduces the mechanism of the protection of the rights of disabled persons in China as well as the flaws or deficiencies of the mechanism. In other words, the content of this part is the way to realize the rights or the solution to the problem. And this section is also a response to the questions reflected in the first three sections of the current article, although there exist considerable limitations in such feedback. The fifth part is a summary of the whole essay, in which the author points out that respecting, protecting and realizing the rights of disabled children in China, especially their rights to education, is a kind of "Aufheben".

2. Overview of children with disabilities in China

On the protection of the rights of children with disabilities, though the status in China has been somewhat improved by far, the problems and challenges remain quite prominent. Firstly, China has a huge number of disabled children. According to the statistics published by the China National Bureau of Statistics, the total number of disabled people in China was 82.96 million in 2007, accounting for 6.34% of the total population of the country. Among them, the total number of disabled people aged 0-14 was 3.87 million. [2] Secondly, the human right situation of disabled children in China is of much concern. According to the data released by China Disabled Persons' Federation, in 2013, the proportion of Chinese disabled children aged between 6 and 14 receiving the compulsory education was 72.7%. [3] The proportion of disabled children receiving the compulsory education is much lower than the national average proportion of school-age children receiving the compulsory education. According to a report on the Nanfang Daily, even in Guangdong, the most economically developed province in China, the proportion of disabled people

receiving basic rehabilitation services was still less than 40 percent.[4] Thirdly, there is a significant urban-rural gap in the protection of the rights of children with disabilities. Although the government has made many policies to protect disabled children and obtained some achievements, disabled children in rural areas are not treated as equal as those in urban areas. This difference is reflected not only in the distribution of social resources but also on social concerns. First of all, the large urban-rural disparity in resource allocation in China is well known. However, unlike many other countries, China uses an economic strategy-led social policy, "which did not pay attention to the bottom of the society led to a widening of the gap between the rich and the poor as a relatively small part of the economy continues to grow at much faster pace than the rest". [5] The serious problems in the protection of the rights of disabled children is that national policies are insufficient to pay attention to the disabled children in the countryside. For example, Campbell and Uren pointed out that "there is little evidence of the impact of Chinese disability policy on the built environment in China outside the major cities, and the disabled are still largely invisible in public spaces". [6] What is even more worrisome is that the number of disabled people in rural areas accounts for 70.38% of the total number of disabled people in China. [7]

Overall, on the protection of the disabled children's rights, the issues are about not only a number but also the quality. And the general solution to these issues in most countries is to improve legislation.

3. Laws, politics, regarding rights of persons with disabilities in China

For the rights and benefits of disabled persons, the legislature of China has established many laws and regulations. At the constitutional level, the provisions concerning the rights of persons with disabilities, mainly focus on Article 45, Paragraphs 1 and 3 of the Constitution (1982). Article 45, Paragraph 1, of the Constitution, stipulates that "Citizens of the People's Republic of China have a right to material assistance from the State and society when they are old, ill or disabled"; and, Article 45, Paragraph 3, of the Constitution, stipulates that "The state and society help makes arrangements for the work, livelihood, and education of the blind, deaf-mutes and other handicapped citizens". In the 2004 amendments to the Constitution, the National People's Congress ("NPC") of China enshrined the human rights provisions in the Constitution. Article 33, Paragraph 3, of the Constitution (2004) explicitly states that "the State respects and protects human rights". The confirmation of the human rights provision of the NPC marks the improvement of the legal basis for the protection of the rights of disabled persons in a macro sense. At the level of the national law, China has a law to protect the rights of persons with disabilities, namely, the Law of the People's Republic of China on the Protection of Disabled Persons (1990, 2008). The NPC enacted this new law in 2008 and abolished the previous one enacted in 1990, which has the same name as the existing one. There is a certain continuity between the existing law and the old law. For example, Article 2 of the existing law inherits the definition and classification of disabled persons in the old law. However, the existing law has made a lot of improvements and amendments based on the one enacted in 1990. These improvements and amendments include the following key points. (1) The existing law clearly prescribes the main body of state obligations and the assignment of definite tasks. For example, Article 6, Paragraph 1, of the law in 1990 states that "The people's governments at various levels shall incorporate undertakings for disabled persons of the national economy and social development plans, funds into the budget, overall planning, strengthen leadership, comprehensive coordination, take measures to make the undertakings for disabled persons and economic and social harmonious development". While, Article 5 of the existing law on the protection of disabled persons stipulates that "the State Council shall formulate the outline for the development of China's disabled persons, and the local people's governments at or above the county level shall, in accordance with the outline of the development of disabled persons in China, formulate the development plan and annual plan for the development of disabled persons in the administrative region" and "should include the financing of disabled persons in the financial budget and establish a stable funding mechanism". (2) In comparison with the old law, the existing law respects the participation of non-governmental

organizations by adding the provision of "The state shall encourage the social organizations and individuals to provide disabled persons with donations, assistance, and services. In the provision of Article 8 of the existing law, special emphasis is also given to social organizations including not only the China Disabled Persons' Federation which has strong official background but also other social organizations of self-govern. (3) The existing law has undertaken to respect the individual rights and choices of disabled people. Article 9 of the law in 2008 stresses that "the guardians of disabled persons must fulfill their duties of guardianship and respect the wills of persons under guardianship. (4) The existing law summarizes the experiences of disability rights protection and pays more attention on the protection and realization of the rights of disabled persons. For example, Article 3 of the law in 2008 added to the clause "prohibiting the use of mass media or other means to derogate disabled persons' dignity. Furthermore, Article 9 of the existing law added the provision about "prohibition of domestic violence against disabled persons"; and, Article 11 of the law added that "the State should establish maternal and infant health care mechanisms, and improve the prevention of birth defects and early detection and early treatment mechanisms".

At the level of regulation and policy, the State Council and local governments of China have enacted a number of regulations and policies to protect the rights of disabled persons. In terms of content, the regulations of the protection of disabled persons consist of the following categories. (1) For the prevention of disability and rehabilitation of disabled persons, the State Council formulated the Regulations on Disability Prevention and Recovery of the Disabled (2017).

In order to ensure that local governments at all levels can fully implement the protection and realization of the rights of disabled persons, the departments of the State Council and provincial governments have also established relevant policies to support these laws and regulations. For example, The Shanghai municipal government established the Measures of Shanghai Municipality for the Implementation of the Law of the People's Republic of China on the Protection of Disabled Persons (2013).

4. Legal guarantee for rights to education of children with disabilities in China

The rights to education of disabled children is the prerequisite and indispensable part of implementing the protection of the rights of persons with disabilities, and the China's Constitution, laws, and regulations have relevant provision to protect these rights. At the constitutional level, Article 46 of the Constitution (1982) stipulates that "citizens of the People's Republic of China have the rights and obligations of education".

At the level of the national law, Article 19 of the Compulsory Education Law of the People's Republic of China (2006) and Chapter 3 of the Law of the People's Republic of China on the Protection of Disabled Persons (2008) has a comprehensive respect and protection of the right to education of disabled children. In addition, Article 19 of the Compulsory Education Law stipulates that "the local people's governments at or above the county level shall set up corresponding schools (classes) to implement special education in accordance with the requirements and shall be responsible for the implementation of education for children and adolescents with visual disability, hearing language disability and mental disability." Chapter 3 of the Law of the People's Republic of China on the Protection of Disabled Persons (2008) has also made quite a comprehensive provision on the protection of the right to education of disabled persons. These laws also basically cover the four principles of the right to education, namely, availability, accessibility, acceptability, and adaptability. Among them, Paragraph 2 of Article 21, Article 24, 25 and 26 of the Law of the People's Republic of China on the Protection of Disabled Persons (2008) embodies the availability of education. Article 21, Paragraph 2 states that "the people's government at various levels shall, as the components of the national education business, plan and strengthen the leadership to accept education for the disabled". Article 24 stipulates that "people's governments at or above the county level shall rationally set up educational institutions for disabled persons and encourage social forces to run schools and donate funds according to the number, distribution and disability categories of disabled persons"; Article 25 and 26 of the Law mainly stipulate that both special education and

ordinary education institutions should provide sufficient education resources. Furthermore, the provisions concerning the accessibility of education are provided in Paragraphs 1, 3 and 4 of Article 21 of the Law. The three legal provisions shall be prohibiting discrimination against people with disabilities in educational activities, and the State shall provide financial aids for students to receive compulsory education and other help. Article 23 and 28 of the Law are relating to the acceptability and adaptability of education. Among them, Article 23, Paragraph 1 stipulates that education can provide "enhanced physical and psychological compensation and professional education" according to the needs of disabled persons. Article 23, Paragraphs 2 and 3 emphasize that textbooks and teaching methods should make adjustments according to the needs of the disabled. Article 28 of the Law stipulates that the State has an obligation to cultivate special education teachers and sign language interpreters.

Moreover, at the level of regulation, the Regulation on the Education of the Disabled (2017) formulated by the State Council of China is mainly the interpretation and concretization of Chapter iii of the Law on the Protection of Disabled Persons. Compared with previous laws, the Regulation on the Education of the Disabled has made a certain degree of improvement and supplement. For example, Article 24 of this regulation allows parents of disabled students to negotiate with schools about the curriculum and teaching methods.

From Part two and Part three of this article, it can be seen that China's legislation on the protection of disabled persons is quite comprehensive. However, this is not the whole story. After all, the participation of governmental power is inevitably associated with many economic and social rights. Therefore, how to supervise governmental power is the key to the protection and realization of human rights in China.

5. National mechanism for the protection of rights of persons with disabilities in China

In China, the flaws and deficiencies of the human rights mechanism are the biggest obstacles to the protection and realization of the rights of disabled persons. These obstacles affect not only the disabled but also everyone, because, strictly speaking, the national mechanism for protecting human rights in China is extremely weak.

In the context of human rights theory, the procedures of the human rights mechanism include these two parts – reports and complaints. In the procedure of reports, there are no national human rights institutions or the Ombudsman' office in China, which is a major flaw of the mechanism. Secondly, non-governmental organizations (NGOs) in China are not allowed to submit reports to international human rights organizations or other NGOs in other countries due to strict state restrictions. There are two main reasons for this problem: first, the Chinese government strictly restricts the registration and activities of many foreign NGOs in China. Yin pointed out that "Notwithstanding the increasing presence of foreign NGOs in China, currently, only foreign foundations may register as international NGOs in China. This lag in legislation is largely due to the Chinese government's concerns about foreign NGOs that try to broach politically sensitive subjects such as democracy, human rights, labor, or religion".[8] On the other hand, the perception of the Chinese government on the role of local NGOs also restrains these NGOs from submitting their reports. After all, in the eye of the Chinese government, "NGOs are seen as gap fillers due to the decreasing ability and capacity of the State to provide welfare to many of its citizens".[9] Thirdly, the Chinese government's censorship and control of the media eliminates the supervision of medias on the human rights protection in China. Although the Chinese government's censorship of the media focuses on the areas of political and civil rights, contents that could trigger collective activities will also be censored. After all, "Censorship is oriented toward attempting to forestall collective activities that are occurring now or may occur in the future". [10]

In the procedure of complaints, the national mechanism of disabled people in China also has a lot of problems. First of all, there is no constitutional court in China, and the Supreme Court Judge has no right to interpret the Constitution. Because Article 67 of the Constitution of the People's Republic of China (1982) stipulates that only the standing committee of the NPC is responsible for interpreting

the Constitution, which means that persons with disabilities cannot directly protect their rights through litigation procedures in accordance with the Constitution, and the judges cannot judge whether local regulations are illegal even though they have essentially violated the Constitution. Secondly, because of the vague legal status of the existing Public Institutions, also known as Shiye Danwei (Chinese: institution) in China, a series of disputes are difficult to be solved through litigation procedures. Public Institutions of China or Shiye Danwei refers to the organizations that are involved in the cultural, educational, sporting and medical care sectors, providing social services and welfare to the public under the sponsorship of the State and local governments. The institutions usually include media, publishing houses, public schools and hospitals. The definition of Public Institutions discloses at least one such message: they, in fact, can enjoy a lot of power similar to that of local governments. However, the staff of Public Institutions are not civil servants of the government, which means that if the staff of a Public Institution abuse their power to infringe upon the human rights of citizens, the parties cannot obtain an appropriate legal protection according to the administrative procedure law, because Article 2 of the Administrative Litigation Law of the People's Republic of China (2017) stipulates that "A citizen, a legal person, or any other organization which deems that an administrative action taken by an administrative agency or any employee thereof infringes upon the lawful rights and interests of the citizen, legal person, or other organization shall have the right to file a complaint with a people's court in accordance with this Law".

In order to solve these problems, China's Supreme Court has made corresponding reforms. For example, a guiding case published by China's Supreme People's Court provides some explanation for the lawsuit involving students' right to education. The Supreme People's Court in the case of Tian Yong v. University of Science and Technology Beijing (SPC) (2014), pointed out: "Where an institution of higher education refuses to issue the academic certificate or degree certificate to an educated who have violated the school rules and disciplines and the educatee raises an objection thereto, the educatee may file an administrative litigation according to the law". In this case, a university can be regarded as an administrative agency. This guiding cases does provide an alternative to protect the rights of persons with disabilities to a certain extent. However, the significance of this guidance case is diminished because the case only involves the acquisition of a student's diploma. In other words, the protection of the case is the right to receive the education rather than the right to education.

6. Summary

The status quo in China is very intriguing with regard to the protection and realization of the rights of children with disabilities. In order to improve the human rights situation of disabled children, China has enacted fairly comprehensive legislation. But these laws are not adequately protected and fulfilled because the relevant mechanisms are defective or even do not exist. Therefore, the reform of human rights mechanism is a prerequisite for the realization of the rights of disabled children in China. And there will be a beginning of a new cycle. And, the whole process of the development of the rights of disabled children in China can be expressed in a German classical philosophical term, which is "Aufheben".

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