

The Legislative Protection of the Equal Employment Right of Individuals With Criminal Records Based on the International Human Rights Law

SHI Hui^{[a]*}

^[a]Institute for Human Rights, China University of Political Science and Law, Beijing, China.

*Corresponding author.

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Abstract

Individuals with criminal records should be considered as vulnerable group in the labor market and desire special arrangements with the aim to fulfill their equal employment right. With a view of International Human Rights Law, this article illuminates the principles to protect and promote their equal employment right, analyzes the legislations related to the equal employment right of individuals with criminal records in China and proposes a potential path to improve the legislative protection of the equal employment right of individuals with criminal records complying with the requirements of International Human Rights Law.

Key words: Equal employment right; Equality and non-discrimination; International human rights law; Criminal records; China

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INTRODUCTION

Equal Employment Right (EER) exists primarily to protect individuals from harmful employment discrimination and unfair treatment and ensure the equal opportunity and fair treatment to seek jobs in the labor market. According to the human rights theory, the EER performs as the starting point of one's professional life, which is considered as the first guard of adequate living standards and human dignity

in the modern society characterized by social division of labor. Besides, the provision of the EER could be found in the instruments of the UN and International Labor Organization (ILO), as well as in the documents of other regional human rights organizations.

As human beings, individuals with criminal records undoubtedly fall within the scope of the EER. It is undeniable that certain groups of people are more vulnerable than others to employment discrimination directly or indirectly. However, different from the discrimination based on traditionally protected characteristics such as gender, race, religion or belief, the discrimination on the ground of criminal records could be easily justified by the legitimate requirement of public security or social order. According to the International Human Rights Law, the legislation in China is quite insufficient to offer appropriate protection of EER of the individual with criminal records. Consequently, the ex-offenders, after their long-term life isolated from the normal society in prisons, tend to find themselves stuck into a seriously 'vulnerable positions' in the labor market (Wang, 2009).

1. THE PRINCIPLES TO PROTECT THE EER OF INDIVIDUALS WITH CRIMINAL RECORDS ACCORDING TO INTERNATIONAL HUMAN RIGHTS LAW

1.1 The Principle of Equal Protection and Non-Discrimination

The EER reflects the values and requirements of the right to equality. Thus, the principle of equal protection could be considered as the extension of the right to equality in the field of employment, which applies to all the employees including the individuals with criminal records. It mainly indicates that every employee should

be granted the same protection of their equal opportunity and fair treatment in employment, despite of their gender, religion, belief, social status or background. Concerning the EER of the individuals with criminal records, it is required that the ex-offenders should be granted the same protection from the normal employees despite of their convicted background.

The principle of equal protection is also called the principle of non-discrimination, the aim of which is to prevent employment discrimination and unfair treatment in employment. To fully understand the principle of non-discrimination, it is necessary to give a brief discussion of the employment discrimination. Article 1 of the ILO No.111 Convention states that employment discrimination could be defined as "*any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation*". To identify the employment discrimination and unfair treatment, several elements should be taken into account. Firstly, the employment discrimination leads to a distinguishing treatment. Secondly, the distinguishing treatment is based on unreasonable grounds. Thirdly, the distinguishing treatment impairs the equality of opportunity or treatment in employment (Zhou, 2006).

According to the EER of the individuals with criminal records, it could be concluded that the core requirement of the principle of equal protection and non-discrimination lies on protecting the equal employment opportunity and fair treatment of ex-offenders in the labor market and preventing any distinction, exclusion or preference based on the convicted background.

1.2 The Principle of Special Protection

With the development of the economy and labor market, the principle of equal protection and non-discrimination cannot provide sufficient protection for the vulnerable groups. The principle of special protection, based on the specific feature of certain groups such as gender, race, religion or disability and social status which weakens their competence in seeking for employment, has gained more popularity. It should be clarified that the vulnerable groups in the field of employment do not only embody the "*traditional*" ones, e.g., the female, the elderly, the disabled and the religion-minority, but also include the groups of individuals who suffer from employment discrimination due to their special social status or background, such as the criminal records (Qi, 2006). This thesis argues that the individuals with criminal records should be regarded as a vulnerable group in the labor market and the protection of the EER should take their disadvantaged situation into consideration.

The principle of special protection is proposed to offer special measures to improve their disadvantaged situation

in the labor market and to promote the substantive fulfillment of the EER. Compared with the principles of equal employment, the principles of special protection contain more active aspects, which could be regarded as a further reflection of substantive equality in the field of employment. The special arrangements required by the principle are called "*positive action*" or "*reverse discrimination*", which mainly includes the measure of quotas system, automatic priority system and the reasonable accommodation discrimination. While, it is worthy to notice that the attitudes towards the reverse discrimination differ widely among states. For instance, the UK holds the opinion that the affirmative action constitutes a branch of the right to equality, but the EU takes the positive action as an exception to the prohibition against discrimination. Besides, Canada, South Africa and India view the active protection as an aspect of equality to fulfill the principle of equal protection and non-discrimination and achieve the substantive equality (Fredman, 2011). This approach is also taken by an increasing number of human rights instruments.

The principle of special protection in fulfilling the EER of individuals with criminal gives a particular consideration of their vulnerable situations arising from their convicted background. Since the ex-offenders cannot access to the equal opportunity to fulfill their EER, the principle of special protection proposes the favorable measures to compensate their incapability in order to achieve the substantive equality of opportunity and treatment in employment.

1.3 The Principle of Reasonable Restrictions

It should be acknowledged that, the criminal records reflect one's harmfulness and potential threat to the society. Thus, to protect the public interests and public order, the legislation could provide restrictions on the employment qualifications to ban individuals with criminal records from engaging in certain occupations. The restrictions are based on reasonable grounds, which should not be identified as a branch or violation of the principles of equality and special protection or the EER, as long as such restrictions have persuasive grounds. The similar provision could also be found in the article 4 of the ILO No.111 Convention which states that "*any measures affecting an individual who is justifiably suspected of, or engaged in, activities prejudicial to the security of the State shall not be deemed to be discrimination*".

However, one should pay careful attention to the balance between the EER of individuals with criminal records and the protection of public interests. On one hand, to protect the adequate living standards and human dignity, it is necessary to ensure the legislative protection of their EER. On the other hand, the law should protect the public order and interests from any possible harm or violations related to the criminal records. In practice, however, the state tends to ignore the balance

between the EER of ex-offenders and the public order of the legislative work, which exposes the ex-offenders to potential violations by unreasonable restrictions on employment qualifications. To examine whether or not the legislative restrictions on employment qualifications comply with the requirement of reasonable restrictions, the aspects of relevance, necessity and proportionality of the restrictions should be examined. To make it clear, the legislation should ensure the restrictions on the employment qualifications are closely relevant and necessary to the protection of the public interests. And when the restrictions are regarded as indispensable means, the derogation of the employment qualifications based on criminal records is required to be minimized and the arbitrary violation against the EER of ex-offenders should be avoided.

2. THE LEGISLATIONS CONCERNING THE EER OF INDIVIDUALS WITH CRIMINAL RECORDS IN CHINA

2.1 The Limited Achievement in the Constitution and Related Legislation

The “*Constitution of China*” performs as the constitutional foundation of the protection of the EER. Article 33(2) states “*all citizens.....are equal before the law*” and the Article 42(1) states “*citizens.....have the right as well as the duty to work*”. Then, the *Labor Law of China* establishes the legal framework of the EER. Article 3 states “*laborers shall have the right to be employed on an equal basis, choose occupations, and obtain remuneration for their labor*” and Article 12 states “*laborers shall not be discriminated against in employment, regardless of their ethnic community, race, sex, or religious belief*”. To make the provisions above more specific, Article 3 of the “*Law on Promotion of Employment of China*” states that, “*the workers enjoy the employment rights on an equal footing and to choice of jobs on their own initiative in accordance with law*”.

Beside the provisions specific on this issue, the protection of the EER also exists in the legislation concerning certain vulnerable groups in society, such as women and the disabled. The individuals with criminal records who fall in the scope of the specific legislation surely should enjoy the protection accordingly. For instance, Article 2 of *Law on the Protections of the Rights and Interests of Women of China* states that women shall enjoy the same economic and social rights with man and the discrimination against women shall be prohibited. Article 22 states that the state shall guarantee that women enjoy the equal rights to work with men. The *Law on Protection of Disabled Person of China* contains similar provisions. Article 3 states that the disabled persons shall enjoy equal rights with other citizens in the economic

and social field and discrimination against disabled persons should be prohibited. Article 38 states that no discrimination shall be practiced against disabled person in employment.

When seeking for employment, the ex-offenders should not be subject to any discrimination or unfair treatment based on their criminal records. However, the special provision regarding the EER of individuals with criminal records is only simply mentioned in the *Prison Law of China*, e.g., Article 38 states that “*a person released after serving his sentence shall enjoy equal rights with other citizens in accordance with the law*”. The limited legislative provision is far from completed to protect and fulfill the EER of individuals with criminal records.

2.2 The Defects in the Related Legislation

2.2.1 The Insufficiency of the Related Provisions

The provisions of the legislation are quite limited to deal with the EER of workers, especially the EER of individuals with criminal records. The insufficiency of the related provision derogates its effectiveness in protecting and promoting the EER.

On one hand, the clear and unambiguous definitions, concepts and standards of the EER are still missing in the current legislation. The Insufficiency forces the labors, employers and local authorities to rely on their experience rather than the statutes to deal with issues of the EER in practice (Yu, 2005). Besides, the over-general provision and the blank in the legislation compel the administrative agencies to adopt administrative regulations, decisions or even non-binding employment policies to deal with practical issues. These documents only have an insufficient effect due to their low position in the legislative hierarchy. Moreover, the potential conflicts in the legislation and administrative regulations not only weaken the effectiveness in protecting and promoting the EER, but also arises a substantive danger to derogue the unity of the legislative system in China.

On the other hand, concerning the specific issue we talking about, the individuals with criminal records are not recognized as the vulnerable group in the labor market. The Article 3 of the *Labor Law of China* only prohibits the discrimination based on ethnic community, race, sex, or religious belief and the *Labor Contract Law* and *Law on Promotion of Employment of China* make the same provision. As a result, the discrimination on the ground of criminal records does not be prohibited by the related legislation. Besides, there are no special provisions concerning the protections of the EER of individuals with criminal records. And the *Prison Law of China*, as the only legislation touching the equal employment of ex-offenders, stays in quite an accessorial position. This ignorance indicates unconsciousness towards the need for ex-offenders to be protected against discrimination in employment. This insufficiency in the legislative system

performs as the primary barriers faced by the individuals with criminal records to fulfill their EER.

2.2.2 The Unreasonable Restrictions of Employment Qualifications Based on Criminal Records

The legal restrictions of employment qualifications could be considered as the reflection of the normative evaluation of criminal records institution in the civil field. According to the theory of criminal justice, the guilty of offence has already been paid during the implementation of penalties. The restrictions on the employment qualifications should be regarded as equivalent to additional punishment. Therefore, to avoid the violation against the basic rights and freedom of the ex-offenders, the restrictions should be imposed cautiously. When the state attempts to impose legislative employment restrictions on ex-offenders, it is required to observe the principle of reasonable restrictions and keep a balance between the EER of ex-offenders and the public interests to avoid the arbitrary violation against the former.

In China, there is 14 current legislations providing the restrictions on employment qualifications based on criminal records. These provisions cover the professions of registered accountant, doctor, judge, prosecutor, police, civil servant, lawyer, notary, auctioneer, commercial bank director and senior manager, cooperation director and senior manager, and military service. Based on an analysis of the related legislation, we should recognize that the legislative restrictions on employment qualifications move beyond the principle of reasonable restrictions.

First of all, the legislative restrictions of employment qualifications fail to take the subjective malignancy and transformation degree of ex-offenders into account, which violates the basic principle of “*temper justice with mercy*” in Criminal Judicature and runs against the educational function of criminal penalty. To a considerable extent, this failure may initiate the negative emotions of ex-offender and block the way of social rehabilitation. Secondly, the legislative restrictions of employment qualifications fail to examine the relevance between the nature of the crime and the profession. The indifferent restrictions may impose a life-long pain of persons with non-related criminal records and spoil their chance to return back to the professional community. Thirdly, since the prior conviction elimination institution (PCEI) still waits to be established in China, the infinite legislative restrictions of employment qualifications depose the possibility of ex-offenders from engaging into the so-called “*elite professions*”, such as judges, doctors or high-managers in corporations. The unreasonable restrictions force the individuals with criminal records to engage in the professions without employment restrictions. Although the ex-offenders may equip with high qualifications and working skills, most of the non-restricted professions have quite a low requirement,

which may cause a waste of the human resources in the labor market, block the realizations of the personal values and violate the EER of individuals with criminal records.

2.2.3 The Incomplete Criminal Records Institution

The criminal record indicates the fact that a person is convicted of criminal offence he or she committed. The criminal records institution is established on the consideration of the personal danger of the criminal offenders, the necessity to prevent further criminal offences, and the requirement to protect the judicial integrity and social order. According to article 100 of the *Criminal Law of China*, “anyone who has been subjected to criminal punishment shall, before being recruited in the army or employed, report to the unit concerned about the fact may not conceal it”. This article serves as the basis of the “*criminal records report institution*”, which is also called the “*conviction records report institution*” or the “*faithful duty of convicted individuals*”. The criminal records report institution requires the individuals with criminal records, who seek for employment, to report their conviction situations.

The criminal records report institution was established in the 1990s, when there was a difficulty in communication among the judicial hierarchies due to the uncompleted inner information and inquiry system. The NPC established the criminal records reports institution in the revised *Criminal Law of China* in 1997, which imposed the duty to report the criminal background on the individuals with criminal records. The criminal records report institution suffers widespread criticism since the very beginning. The criticism argues that, according to the principle of “*presumption of innocence*”, it is absolutely forbidden to force a person to prove his guilt or innocence. However, the criminal records report institution requires the individual to bear the burden to prove his or her innocence, which reverses the burden of proof and duty to inquiry about criminal records on ex-offenders instead of the public authority. As a result, it substantially presumes that all the individuals seeking for employment have criminal conviction background, which leads to the illegal presumption of guilt. Thus, a considerable number of scholars argue that the criminal report institution as a transitional and temporary arrangement should be abolished and replaced by a completed criminal records inquiry system (Yu, 2009).

It is worthy to notice that the PCEI is still waiting to be established in China. The PCEI grants a chance for ex-offenders to get rid of the criminal records, with an aim to remove the label of criminal offenders and provide an institutional protection against the potential social discrimination based on criminal records. The lack of the PCEI forces the individuals to bear the criminal records for indefinite duration. Combined with the legal restrictions of employment qualifications and the criminal

records report institution, it precludes the possibility to get equal employment and exposes the ex-offenders to unfavorable employment situations and social discrimination endlessly. Moreover, the negative effects of the forever-lasting criminal records may keep ex-offenders isolating from the normal society and delay their social rehabilitation process, which leaves a great potential for them to stand opposed against the social order again and brings a harmful impact on the public interests.

3. THE STRATEGIES TO IMPROVE THE LEGISLATIVE PROTECTION ACCORDING TO INTERNATIONAL HUMAN RIGHTS LAW

3.1 Complete the Related Provisions in Legislation

According to the international human rights law, a clear and unambiguous legislation is essential to protect and promote human rights and fundamental freedom. Article 2(1) of the ICESCR states that “*each State Party to the present Covenant undertakes to take steps...including particularly the adoption of legislative measures*”. As a civil law system dominated state, China should put adequate emphasis on the legislative improvement to protect the EER of individuals with criminal records.

Firstly, to protect the EER of typical groups, e.g., the individuals with criminal records, accurate and clear provision on definitions, concepts and standards of the EER should be provided according to the requirements of international human rights instruments ratified by China. Besides the general equal employment provisions, there should be a paragraph giving practical details on the connotation, classification, accurate criteria, justification standards, legal responsibility and the remedy methods regarding the employment discrimination. The *Law on Promotion of Employment of China* focuses more on the field of employment and makes positive provision in Chapter 3: Equal Employment to regulate the equal employment, especially the vulnerable groups in the labor market. Therefore, it is workable to add a paragraph about the definitions, concepts, standards of the EER into Chapter 3.

Secondly, the EER also requires eliminating all forms of discrimination in employment. To protect the EER, the anti-discrimination articles of related legislation should thoroughly cover the vulnerable groups in the labor market. It should include not only the traditional groups with characters of gender, region or belief, ethnic or race, but also the new vulnerable groups with other social backgrounds, such as the individuals with criminal records (Wang, 2009). The anti-discrimination provision is firstly provided in the *Labor Law of China*. And the Chapter

3 of the *Law on Promotion of Employment of China* is considered as a highlight of the legislation system concerning the prevention of employment discrimination and the protection of the EER in China. Therefore, it is suitable and reasonable to add anti-discrimination provision, even a general one, to the related legislation to protect the EER of any potential vulnerable group, such as the individuals with criminal records.

3.2 Amend the Legal Restrictions of Employment Qualifications

Legal restrictions on employment qualifications should reflect the balance between the EER of individuals with criminal records and the public interests. Although individuals should be judged only on the basis of their personal qualities and abilities in employment, not every restriction of employment qualifications would be considered as discriminatory, as long as the restrictions on certain occupations could be objectively justified. However, as we analyze above, the restrictions of employment qualifications based on criminal records in China move beyond the reasonable boundary. To protect and promote the EER of individuals with criminal records, certain amendments should be made (Wang, 2009, pp.48-49).

Firstly, legal restrictions of employment qualifications on individuals with criminal records could find its foundations in preventing personal danger of ex-offenders. The degree of the derogation in the EER should be justified by the necessity to prevent potential damages to the public interests occurring from the engagement of ex-offenders in certain careers. However, the difference between voluntary crime and involuntary crime should be emphasized. The offenders of involuntary crime indicate a low level threat to the public order. Since the subjective culpability shown by the involuntary crime is not serious enough to justify the legal restrictions of employment qualifications in certain careers, such restrictions should exclude the individuals with involuntary criminal records.

Secondly, despite the convicted criminal offence, the all-covered restrictions of employment qualifications imposed on the individuals with criminal records lack objective foundations and justification. The arbitrary exclusion of all ex-offenders from certain careers has great potential to harshly violate their equal opportunity to get employed. And the negative influence may damage, rather than protect, the public security and social order. Thus, to draw a balance between the protection of public interests and the protection of the EER of individuals with criminal records, a better arrangement is needed. The restrictions of employment qualifications for certain careers should be tightly connected to the criminal offence committed.

Thirdly, since the PCEI is still missing in China, the legislation containing restrictions of the employment

qualifications should take the expiration period into consideration. In practice, some of the legislations have already added the expiration paragraph into the related articles, such as Article 10 of the *Law on Certificated Public Account of China* and Article 15 of the *Law on Licensed Doctor of China*. The expiration paragraph encourages the individuals with criminal records to behave themselves after being released and go through the process of social rehabilitation actively during the period of restrictions. Besides, it offers an opportunity for ex-offenders to equally participate in the competition of the labor market and to fulfill their personal values.

3.3 Amend the Criminal Record Institution

The duty to report criminal record is provided in Article 100 of the *Criminal Law of China*. The initial aim of the duty is to meet the need to control the personal danger of ex-offenders and to prevent recidivism with limited financial budget and personnel resources. Since the public administration and judiciary system keep improving rapidly in recent two decades, there are considerable scholars insisting that it is a high time to change the unreasonable duty to report criminal records and establish the official criminal check institution. Considering the authority of the criminal check institution, the balance between the public need in background inquiry and the personal privacy of the individuals with criminal records, as well as the potential cost incurred by the inquiry service, it is more preferable to grant the Department of Public Security the power to examine the applications of inquiry and to offer the related service.

And as we have discussed above, to protect the EER of the individuals with criminal records, limit the negative influence of the “label effect” and prevent unreasonable social discrimination imposed on these individuals, there lies an urgent necessity to establish the PCEI. The PCEI “ensures the fair administration of justice for those offenders who have committed minor crimes and are unlikely to re-offend”, grants a chance for these convicted individuals to get rid of the “continued discrimination throughout their lives due to the continued threat of exposure to past offences”, and “allows offenders who have paid their dues to society to put their past behind them” (Wells & MacKinnon, 2001). The PCEI designate a philosophy that the criminal records should be eliminated after a certain period, during which if no new conviction should be issued, to ensure the rehabilitation of ex-offenders to the normal social and economic life. Once the decision on elimination of the prior convictions is made, the individuals should be considered as without any convictions of guilty or sentences and any restrictions or discrimination based on his or her criminal records in the labor market should be seen as ungrounded.

CONCLUSION

In the perspective of human rights, the EER protects one’s equal access to get employed without discrimination or unfair treatment. As a duty-holder of the international human rights instruments, China bears the responsibility to fulfill the EER within its territory. Although certain efforts have already been made to assist individuals with criminal records to get equal employed in the labor market, the legislation in China hardly meets with the requirements of the international human rights instruments. Individuals with criminal records still find themselves as one of the vulnerable groups in the labor market. Therefore, to improve the vulnerable situation of the individuals with criminal records, it is a sound time to amend the current legislation with a reference of the international human rights standards and the successful practice of other states. While, even the most cheerful optimists should admit that to improve the employment situation of individuals with criminal records and complete the amendment of the legislation, a lengthy process is definitely needed. However, considering the fair development and achievements in the issue during the last decade, one could expect a better, if not ideal, improvement of the EER of individuals with criminal records in China.

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