



Case Report

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Rethinking Protection of the Rights of the Child through Criminal Law in China

Na Jiang^{1*}, FU, Yifang²

¹Professor of Law, Beijing Normal University (BNU), China

²L.L.M Candidate of College for Criminal Law Science, Beijing Normal University, China

Abstract

This study examines the developments of juvenile protection through criminal law in China. A comparison of such protection between domestic law and international standards suggests that the latest trends of protection on juvenile rights through criminal law deviate from the requirements of relevant international human rights. In well implementing the Program, it is necessary for China to mend flaws in protecting them.

Keywords: Children's Rights, Juvenile Protection, Criminal Law

Corresponding author: Na Jiang

Professor of Law, Beijing Normal University (BNU), China.

Email: na.jiang@bnu.edu.cn

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Introduction

Protection on children's rights is an essential part of human rights protection in any country. Such protection is in line with the basic spirit of the Universal Declaration of Human Rights and international human rights treaties, but also the priority area of the Program for the Development of Chinese Children (2011-2020) in China. Given the importance of starting a new journey of comprehensive consummation of criminal law protection for the best interests of children, it is significant to rethink and survey real gaps between juvenile protection in criminal law and in international standards.

This paper begins from an overview of developments of juvenile protection through criminal law in China at first, and then proceeds to compare domestic law and international standards on such protection. Finally, it will evaluate the latest trends of protection on juvenile rights through criminal law from the legislative level in China.

The development of juvenile protection through criminal law

Amendment to the Criminal Law of the PRC (Amendment) includes

new general provisions on a lenient punishment for juvenile crime. Among it, Article 6 excludes juvenile from composition of recidivist, Article 11 (1) provides that probation shall be granted if criminals are under the age of 18 and Article 19 exempts them from the duty of reporting their criminal record. This further promotes the development of China's juvenile protection systems through criminal law, with its general provisions to gradually increase the scope and the strength of protection on juvenile.

Specifically, Article 65(1) of the Criminal Law of the PRC (CL) has been revised by Article 6 of the new Amendment as, "If a criminal who is sentenced to fixed-term imprisonment or heavier punishments commits another crime punishable by fixed-term imprisonment or heavier punishments within five years after serving his/her sentence or receiving a pardon, he/she is a recidivist and shall be subject to a heavier punishment, with the exception of negligent crimes and crimes committed by a criminal under the age of 18." In essence, juvenile shall not constitute a recidivist. Furthermore, Article 11(1) of the Amendment also provides that "probation may be granted to a criminal who is sentenced to criminal detention or fixed-term imprisonment of less than three years" and shall be granted if the said criminal under the age of 18. This means in juvenile cases that the effectiveness of probation should be reinforced. The new amendment focuses on penalty discretion, aiming to protect juvenile for the better, improve their human rights situation and maintain social harmony and stability. Due to the particularity and limitation of their mental, physical, identifying and control abilities, their subjective viciousness and personal danger are less than those of adult offenders. Therefore, an aggravated punishment imposed on juvenile as that on adult ones, will be contrary to the basic principle of lenient punishment required for juvenile crime in the CL. Hence, this will bring more difficulties in realizing the ultimate goal of protecting their legal rights.

In addition, Article 19 of the Amendment newly added the second paragraph to Article 100 of the CL as its Article 100(2). This means that those "below the age of 18 at the time of committing crimes and sentenced to a fixed-term imprisonment of less than five years", "shall be exempted from the reporting obligation prescribed in the preceding paragraph" of Article 100. Since the preceding paragraph provides

for the obligation of a person who was given a criminal punishment by law, to truthfully report it when joining the army or getting a job, the modified Article 100(2) aims at exempting part of juvenile offenders' reporting obligation. Such offenders with this exemption, are only limited to the category of "those sentenced to a fixed-term imprisonment of not more than five years". This partly exempted obligation not only contributes to educating and transforming juvenile offenders to make them successfully back to society, but also can prevent them from aggravating pessimistic emotions and even increasing difficulties in returning society, by reducing the possibility of such juvenile encountering social discrimination. But different from the system of destroying juvenile's criminal record, after all, exemption of the reporting obligation cannot eliminate the juvenile offenders' criminal label with them for life. Even so, the Amendment reflects the developing trend of criminal law protection on juvenile, namely, promoting lenient systems to better protect their human rights.

A comparison between domestic law and international standards

With approval and implementation of the Convention on the Rights of the Child, the international community pays more and more attention on the largest interests' protection of juvenile by criminal law. In comparison with international convention standards, the relevant domestic legislation appears decentralized and deficient, which renders an inadequate and ineffective protection on the relevant rights and interests. Thus, remaining problems and deficiencies can be mainly demonstrated as follows:

1. The limited scope and insufficient strength of protection

Juvenile protection system in the latest domestic legislation mainly limited to the scope of lenient punishment and penalty discretion, instead of relating to the relevant aim of legislation, criminal policy, punishment kinds or punishment elimination, etc. Even if on the penalty discretion, it only deals with an exclusion of constituting recidivist and probation that shall be applied in contents and not such lenient systems as commutation, parole, surrendering or rendering meritorious service on juvenile. Even worse, there is no broadening of the conditions for applying discretion systems, such as probation, commutation and parole, to juvenile as a special group of persons. Obviously, it is against the basic spirit of ensuring the maximum benefit of juvenile.

Insufficient protection is also the important factor that influences the level of protecting juvenile's rights and interests, which reasons from the aspect of lenient discretion of penalty. Although there are new terms that probation shall be granted to juvenile in the general provisions of the current criminal law, this does not relate to the issue of whether the necessary conditions of applying probation to juvenile can lower than the applying standards of general adult offenders. In the aspect of eliminating criminal punishment, a relatively perfect system on exemption reporting criminal record has neither been built up in the CL, nor the system of destroying criminal record for juvenile as a vulnerable group of persons. Thus, this kind of system is rather limited in its protection force, which would certainly weaken its effect of education and reform on juvenile and make against a comprehensive and adequate protection on the rights and interests of juvenile offenders.

2. Improper approach and unsystematic system for protecting juvenile

The protection way that China adopts is traditional and dispersive. It has advantages of simple operation and disadvantages such as small capacity, dispersive distribution and unsystematic formation. However, as China continues strengthening protection on the rights and interests of juvenile by criminal law, both addition of the relevant provisions and expansion of systems have become the necessary trend of human rights developments. The dispersive legislative mode cannot satisfy the increasingly objective demand of protecting juvenile's rights and interests any more. Its protection means and system defects also come up against some questions and criticism. First, the dispersive legislation is of relative small capacity, and the way of protecting juvenile is not proper. The shortage of important rights and interests concerned in criminal law protection, certainly will go against fulfilling human right obligations regulated in international conventions and would be difficult to realize a comprehensive protection on juvenile's rights and interests. Second, the dispersive mode of legislation is excessively scattered and unsystematic, with an inappropriate way of protection. The means of dispersive protection on juvenile offenders appear to be contrary to the international trend of reforming juvenile justice and lead to more difficulties to implementation of the relevant criminal policy in China.

Conclusion

The recent developments of juvenile protection through criminal law seem to be promising in China's long march towards the rule of law and human rights protection. Particularly through a comparison of juvenile protection between its domestic law and international standards, a lot of problems or deficiencies still remain in law, which is clearly detrimental to human rights protection. In order to properly implement the above Program from now to 2020, it is very necessary for China to mend flaws in protecting juvenile. At the core of the flaws, the limited scope, insufficient strength, improper approach and unsystematic system need to be fixed for the better protection.

References

1. See The Universal Declaration of Human Rights, <http://www.un.org/Overview/rights.html> (visited on January 13, 2015)
2. There are several conventions and laws that address children's rights around the world, including the United Nation's 1989 Convention on the Rights of the Child and the Vienna Declaration and Programme of Action.
3. See [zhongguo ertong fazhan gangyao (erling yiyi zhi erling erling)], (Program for the Development of Chinese Children (2011-2020)), <http://www.bjwomen.gov.cn/a/fuerguihua/gygh/gjgy/2011/1026/10421.html>
4. See Zhang Xianbing et al., [ertong quanli guan de heli yiyun ji qishi], (2) Journal of Northeast Normal University (Philosophy and Social Sciences) (2014)
5. See Standing Committee of the National People's Congress, Amendment (VIII) to the Criminal Law of the People's Republic of China [Effective], <http://en.pkulaw.cn/display.aspx?cgid=145719&lib=law>
6. See National People's Congress, Criminal Law of the People's Republic of China [Revised] <http://www.lawinfochina.com/display.aspx?lib=law&id=3>
7. See Convention on the Rights of the Child, <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>
8. See JIANG Na et al., [ertong quan baohu xingfa guifan de zuixin dongtai pingxi], 1 Issues on Juvenile Crimes and Delinquency (2012)