The Nature Reorientation and Systematic Construction of the Collateral Consequences of Criminal Convictions

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Abstract. Collateral consequences arise from a criminal record and restrict or even deprive the offenders and their family members or relatives of specific rights or qualifications through legal or non-legal means. Against the criminal policy backdrop of expanding misdemeanor legislation and the gradual contraction of the felony structure, the institutional defects of collateral consequences have become increasingly prominent: overbroad application, indefinite duration, and weak correlation with the nature of the offense. Given the difference in nature between criminal law and collateral consequences, the legitimacy of the collateral consequences system lies in its purely preventive function as security measures. On this theoretical basis, the construction of the collateral consequences system should follow four fundamental principles: the principle of appropriateness requires distinguishing between intentional and negligent crimes; the principle of necessity restricts the content of collateral consequences to those substantially related to the offense; the principle of proportionality reasonably limits the duration of application; and the principle of individual criminal responsibility explicitly prohibits undue expansion of the scope of application to others. Meanwhile, it is necessary to establish a mechanism for expungement of misdemeanor records to avoid the hidden effects of collateral consequences. Specifically, the criteria for determining misdemeanors, the review period, and the responsible authorities should be clarified. In addition, to address the persistent social discrimination, measures from social assistance and restorative justice can be adopted to protect persons with criminal records. Only in this way can a dynamic balance between crime prevention and human rights protection be achieved, responding to the urgent need for reforming the misdemeanor governance system in the modernization of state governance.

Keywords: Collateral consequences of criminal convictions; security measures; principle of proportionality; expungement of misdemeanor records.

1. Introduction

Collateral consequences of criminal convictions refer to the restrictions imposed on offenders and their family members or relatives regarding specific rights or qualifications by legal (in a broad sense) or non-legal means, arising from the existence of a criminal record. The collateral consequences system has long suffered from excessive scope and overgeneralized application, issues that have become increasingly prominent with the expansion of misdemeanor legislation and the gradual contraction of the felony structure. In 2025, misdemeanor cases accounted for over 80% of the cases reviewed for prosecution by the People's Procuratorate [1]. This means that the price most misdemeanants pay for atonement far exceeds the punishment they deserve, creating a phenomenon of "disproportionate severity between punishment and collateral burdens." The analysis of the problems with the collateral consequences system can be divided into practical and theoretical dimensions.

1.1. Judicial Application Issues of Collateral Consequences

Explicit collateral consequences are widely scattered across laws, administrative regulations, local regulations, rules, and even industry provisions. Their content mainly includes occupational prohibitions, reporting obligations of criminal records, restrictions on military service, household registration restrictions, restrictions on children's school enrollment qualifications, deprivation or restriction of welfare benefits, revocation of honorary titles or awards, among others [2]. Occupational prohibitions alone involve numerous professions, such as civil servants, notaries,

teachers, accountants, food safety management personnel, auctioneers, bankruptcy liquidators, physicians, lawyers, etc [3.4.5.6.7.8.9.10.11]. Due to the public's hatred toward crime, offenders are also discriminated against in employment, marriage, and other social interactions. The overgeneralized criminal label invisibly becomes another form of punishment, greatly affecting offenders' self-perception, potentially pushing them to the opposite side of society, hindering their reintegration, and exacerbating social risks.

Moreover, extending collateral consequences to offenders' family members and relatives clearly violates the principle of individual criminal responsibility under criminal law. For instance, the "Ten Uniform Measures" issued by Yong'an City, Fujian Province, to combat telecommunications and online fraud stipulated that children of those involved in such crimes would be subject to strict scrutiny in matters such as joining the Youth League, the Party, military service, civil service examinations, public institution hiring, and employment background inquiries [12]. This overbroad application has aroused public and intensified resistance against such injustice. From a social utility perspective, restricting individuals unrelated to the offense also hinders labor development and economic progress.

Furthermore, the application of collateral consequences to entities deserves attention. When an enterprise is convicted, deprivation of its business qualifications or other interests may lead to operational difficulties, reputational damage, and stock price declines [13]. However, if the restricted enterprise is a leading player in its industry regionally or nationally, such restrictions could significantly impede local economic development or even damage the national image.

1.2. Theoretical and Institutional Problems of Collateral Consequences

The application issues of collateral consequences are closely related to their theoretical deficiencies, most notably the lack of the principle of proportionality.

The principle of proportionality includes three sub-principles: appropriateness, necessity, and proportionality [14]. In the criminal law context, appropriateness means that the punitive measures adopted can achieve the purpose of punishing crime and maintaining social stability. Necessity (the least intrusive means) requires that among multiple means that can achieve the purpose, the judicial authority adopts the one causing the least harm. Proportionality requires that the harm caused by the adopted measure should not exceed the benefits it brings. Applying the principle of proportionality to evaluate collateral consequences reveals the following:

First, failing to distinguish subjective culpability violates appropriateness. For example, occupational prohibitions under laws such as the Civil Servants Law, the Judges Law, the Certified Public Accountants Law, and the Organic Law of Village Committees uniformly disqualify any person who has received criminal punishment from holding the relevant position. Such prohibitions are based on the concern that the offender's subjective malice may not have been completely eliminated. However, negligent crimes are not subjectively desired by the offender; they involve weaker personal dangerousness and lower recidivism risk. Imposing the same consequences on negligent offenders as on intentional offenders creates unfairness.

Second, the lack of correlation with the offense violates necessity. Suppose an offender is held criminally liable for conduct related to accounting duties; then restricting him from accounting work under the Accounting Law would suffice. Imposing additional restrictions on other employment channels clearly exceeds the minimum impairment threshold. This not only hinders the offender's reintegration but may also violate the constitutional spirit of equal employment rights.

Third, unreasonable duration lacks proportionality. On one hand, the duration lacks discretion. For example, Article 37-1 of the Criminal Law of the People's Republic of China (amended in 2023) sets the occupational prohibition period at three to five years. For serious intentional crimes, this period may be too short. But laws like the Soil Pollution Prevention and Control Law and the Work Safety Law stipulate or even default to lifetime bans on related business, forming the opposite extreme. Moreover, lower-level laws are inconsistent with upper-level laws. According to the Legislation Law, lower-level provisions must not contravene upper-level provisions and can only refine them for

implementation. Nevertheless, local regulations and rules sometimes set occupational prohibition periods that exceed the upper-level legal limits, violating the Legislation Law.

2. Rectifying and Redefining the Nature of Collateral Consequences

Collateral consequences are not a legally defined concept; therefore, understanding their proper nature is key to defining their content and assessing their legitimacy. Based on an analysis of the current provisions, purposes, implementation methods, and actual effects of collateral consequences, we must reorganize and establish a standardized system for collateral consequences.

2.1. Rectifying Misconceptions about the Nature of Collateral Consequences

In academia, there are four main theories regarding the nature of collateral consequences: qualification punishment theory, administrative liability theory, macro-policy theory, and security measures theory.

2.1.1. Qualification Punishment Theory and Its Critique

Proponents of qualification punishment theory argue that to resolve unreasonable collateral consequences in non-criminal fields, one should first eliminate those provisions and integrate them into the qualification punishment content of criminal law [15]. If qualification punishment is defined as "punishment that deprives the offender of certain rights or qualifications"[16], occupational prohibitions could indeed fall under this concept. However, China's criminal law does not establish a systematic qualification punishment system. Moreover, although qualification punishment can compensate for the defects of retributive punishment in preventing recidivism, merely subsuming all collateral consequences under qualification punishment "changes nothing in terms of balancing interests, and moreover wastes legislative resources" [17]. Furthermore, qualification punishment alone cannot produce the same punitive pain as criminal punishment, failing to meet the requirements of criminal law. Therefore, it is inappropriate to treat collateral consequences as qualification punishment at this stage.

2.1.2. Administrative Liability Theory and Its Rejection

Proponents of administrative liability theory contend that collateral consequences are mostly associated with administrative acts such as administrative permits and administrative penalties [18]. However, from the constitutive elements of administrative acts, administrative decisions are made and executed by administrative organs, whereas collateral consequences can be determined by administrative organs or people's courts. Administrative penalties presuppose that the administrative counterpart has violated administrative order, whereas collateral consequences arise from an assessment of personal dangerousness.

Moreover, administrative liability theory treats collateral consequences as punitive measures. Yet criminal law, as the most severe legal sanction, should intervene as a "last resort" only when other laws cannot effectively protect legal interests. A court judgment already constitutes the final punishment of the offender. Applying collateral consequences after the execution of punishment—if viewed as punitive—would fundamentally negate the primacy of criminal law.

2.1.3. Macro-Policy Theory and Its Doubts

Proponents of macro-policy theory argue that current collateral consequences exceed the scope of narrow security measures and represent concrete manifestations of national macro-criminal policy, i.e., policy-based security measures [19]. However, this perspective is biased. Tracing the proper nature of collateral consequences should return to their original state, rather than defining them from the current perspective. We should not forcibly interpret them with new concepts merely because existing theories fail to explain currently improper collateral consequences. At the same time, understanding security measures under a macro-policy concept actually deviates from the relativity of security measures, violating the requirement of human rights protection.

Professor Liu Xia holds that collateral consequences are "preventive measures taken to prevent crime, safeguard public security, and maintain public interests, which in substance are equivalent to security measures" [20]. Professor Wang Zhiyuan also argues that collateral consequences initially emerged as isolation-type security measures but evolved into additional punitive sanctions as their punitive nature intensified [21]. The author concurs with this view.

2.2. Defining the Security-Measures Nature of Collateral Consequences

Security measures emerged with the rise of criminal positivism and became a typical representative of diversified responses to crime. In a broad sense, security measures are state sanctions based on the offender's dangerousness for the purpose of special prevention; criminal-law security measures are narrow security measures [22]. Regarding the relationship between punishment and security measures, there are mainly monistic and dualistic views [23] The former holds that both are means of social defense with no essential difference; the latter argues that punishment aims at retribution for the past offense, while security measures aim at special prevention for the future. That is, punishment is backward-looking, based on the offense, whereas security measures are forward-looking restrictions based solely on personal dangerousness. Given the distinction, the dualistic view is more appropriate and is commonly adopted in criminal legislation worldwide.

Although China has not explicitly adopted the concept of "security measures," community correction as a non-custodial measure already exhibits characteristics of security measures. Article 37-1 of the Criminal Law places occupational prohibitions under "non-punitive measures," indicating that legislators also believe occupational prohibitions alone cannot produce the same punitive pain as punishment and thus cannot be punitive measures. This suggests that collateral consequences focus more on the isolation effect rather than deterrent effect. Moreover, treating collateral consequences as punitive measures would undermine the status of criminal law in the entire legal system. Therefore, the essence of collateral consequences is that they are restrictive measures based on social public interest, for the purpose of preventing recidivism, and assessed on the offender's personal dangerousness—they possess the nature of security measures.

3. Normative Construction and Mechanism Safeguards of the Collateral Consequences System

After clarifying the security-measures nature of collateral consequences, their application conditions should be determined based on the special-prevention purpose of security measures. In light of the above analysis, the following sections propose targeted amendments and improvements to collateral consequences and further consider systematic reconstruction of protection mechanisms for offenders.

3.1. Reconstructing the Application Standards for Collateral Consequences

3.1.1. Observing the Principle of Appropriateness: Distinguishing Intentional and Negligent Offenses

As analyzed above, compared to intentional offenses, negligent offenses involve less subjective malice and lower personal dangerousness. For example, subjective malice in arson by negligence is significantly less than in intentional arson. A person who accidentally burns down a shop while setting off firecrackers will learn caution after punishment. By contrast, a person who intentionally sets fire for revenge poses unpredictable dangerousness, making restrictions necessary to prevent recidivism.

However, special consideration should be given to offenses involving national security or specific positions and skills. If the offense seriously harms national interests, restrictions should be imposed regardless of intent or negligence. For offenders in specific positions with specific skills, their personal dangerousness is controllable, such as in medical malpractice due to inadequate skills or traffic accidents due to novice driver errors. In such cases, a fixed-term restriction may be imposed on the offender to improve skills until they can avoid risks.

3.1.2. Observing the Principle of Necessity: Ensuring Correlation between Collateral Consequences and Offense Nature

Collateral consequences aim at future prevention but should not crudely presume offenders to be societal risks. Article 178 of the Company Law details negative qualifications for directors, supervisors, and senior managers who have received certain criminal penalties. Such occupational prohibitions strengthen the link between collateral consequences and the offense, confining them to necessary limits and minimizing undue restrictions—an approach that should be optimized.

A nuance is whether revoking an offender's honorary title or pension is necessary [24.25.26.27]. This article argues that honorary titles, as commendations, affirm contributions and serve as role models. If an offender commits a crime after receiving an honorary title, even if unrelated to the title, from the public's perspective, it not only reflects personal moral failure but also damages the image of honor models, undermines positive social energy, and hinders the promotion of social virtues. Therefore, revocation is justified. Regarding pensions, normally they are funded by personal wages and are rightful returns for legitimate labor. In some impoverished families, pensions support the entire household. Unless it can be proved that the pension contributions derived from illegitimate channels related to the offense, the right to pension should not be deprived.

3.1.3. Observing the Principle of Proportionality: Regulating the Duration of Collateral Consequences

As noted, most collateral consequences ambiguously define duration, effectively permitting permanent disqualification in practice. Therefore, duration should be determined by comprehensively considering the offender's subjective malice, nature and seriousness of the offense, and other factors, adding more flexibility. Meanwhile, to comply with the absolute legal reservation requirement of the Legislation Law, provisions in lower-level regulations and rules that exceed the statutory duration limits should be declared invalid; in conflicts, the higher-level law or administrative regulation should prevail.

When applying collateral consequences to entities, special attention should be paid to the potential impact of inappropriate duration on the entity itself and local economic development. Entities should be given opportunities to resume lawful operations, avoiding blanket permanent consequences.

3.1.4. Observing the Principle of Individual Criminal Responsibility: Limiting Joint Application of Collateral Consequences

Criminal liability can only be borne by the offender for their own offense; personal dangerousness should not be presumed to extend to their associates. Although "benefits do not extend to children" is a common saying, it should be viewed objectively. For example, some offenders may not have lived with their children, or the children may not have benefited from the offense. Proceeds may have been squandered or concealed. Of course, strict adherence to individual responsibility does not absolutely preclude restrictions on family members. For serious offenses endangering national security, stricter thresholds may be justified.

In sum, future laws, administrative regulations, and other relevant documents should be reviewed and consolidated improper collateral consequences to form a coherent and integrated system. However, perfecting provisions alone cannot fully eliminate the negative effects. Further establishing a misdemeanor record expungement system can fundamentally promote reintegration and protect offenders' human rights.

3.2. Establishing a Mechanism for Expungement of Misdemeanor Records

3.2.1. Necessity of Establishing a Misdemeanor Record Expungement System

Literally, expungement means destroying all criminal records. This article attempts to understand it normatively as "permanent sealing." The experience of juvenile criminal record selling is substantial, but it mainly targets records held by state authorities and administrative penalties, while ignoring the rapid and widespread dissemination of information in the internet age. Moreover, in

practice, requests for certificates of no criminal record are common, and many entities do not safeguard confidentiality. Expungement is stricter than sealing, requiring absolute prohibition of inquiries except for criminal investigation and judicial proceedings.

Of course, expungement must be limited to misdemeanors. On one hand, since the Eighth Amendment to the Criminal Law, misdemeanor expansion has been a legislative trend, with a surge in misdemeanor cases and lenient sentencing, making the social discrimination caused by criminal labels most conspicuous. On the other hand, public tolerance varies. For misdemeanants, society may grant trust for rehabilitation; for felons, expungement would likely cause social unrest, and their high subjective malice means expungement does not guarantee reform. Thus, confining expungement to misdemeanors is reasonable and may gradually reduce public prejudice.

3.2.2. Criteria for Determining Misdemeanors

Academically, three views exist: (i) "substantive criterion" based on offense seriousness; (ii) "formal criterion" based on penalty severity, including "statutory penalty" and "imposed penalty"; and (iii) "comprehensive criterion" combining both [28].

The substantive criterion assesses multiple aspects such as offense nature and circumstances. The comprehensive criterion, though incorporating formal elements, is in practice similar to the substantive approach. Both problems lie in the need for subjective discretion, leading to inconsistent judicial decisions and possible different outcomes in similar cases. The lack of objective standards also prolongs criminal proceedings and increases judicial burden.

In contrast, the author supports the "statutory penalty" under the formal criterion and proposes a three-year threshold. Although the imposed penalty reflects a comprehensive evaluation after trial, expungement should consider whether the offender's dangerousness has been eliminated after punishment or collateral consequences end, not at the time of sentencing. Moreover, for natural offenses, e.g., attempted murder with a light sentence, ignoring the offense nature when expunging would likely be unacceptable to the public. The formal criterion provides more efficient and objective standards, avoiding the drawbacks of the substantive approach.

The view that offenses with a statutory maximum punishment of three years or less imprisonment are misdemeanors is mainstream [29]. In the Criminal Law, three years is the lower limit of the first statutory penalty range for most offenses and also a threshold for probation, jurisdiction, etc., inherently implying a division between minor and serious offenses. Except for voluntary surrender and major meritorious service, sentencing is conducted within the statutory range, so misclassification is unlikely. Moreover, the existence of such circumstances does not necessarily indicate reduced dangerousness.

3.2.3. Setting a Review Period for Misdemeanor Record Expungement

A review period is necessary to assess the offender's dangerousness. Since statutory penalties may be overly rigid, using the statutory maximum is only the first step; subsequent review periods and criteria can further mitigate adverse effects. Specifically, the review period should commence upon completion of punishment, as that is when the offender regains freedom, and observing their reintegration performance from then on best reflects their dangerousness. For misdemeanors with a statutory maximum of three years, the review period could be set at half the sentence length. Review should focus on personal dangerousness: re-offending should result in a new criminal judgment; violations of law should, subject to relevance, lead to extension or termination of the review period.

3.2.4. Responsible Authorities for Misdemeanor Record Expungement

The expungement process involves initiation, review, and execution. First, it can be initiated ex officio by public authorities, or the offender, their legal representative, close relatives, or defender may apply to the public authority upon expiration of the review period. This both urges authorities to act and protect the offender's rights. Then, the original trial court, familiar with the case, can review the offender's circumstances, subjective malice at trial, conduct during imprisonment, and post-reform dangerousness. After review, the decision is executed by the public security authority. The

procuratorate should supervise the entire process, including notifying the court and police upon expiration of the review period and following up on execution, to ensure thorough and swift expungement.

3.3. Mechanisms to Eliminate Implicit Collateral Consequences

In reality, implicit collateral consequences are more entrenched than explicit ones. Even if an offender is ultimately acquitted in criminal proceedings, the stigma persists. To eradicate the notion that "offenders are enemies," besides establishing expungement, we can strengthen the offender's presence in criminal proceedings [30]. Some American scholars suggest that the court consider the possibility and extent of social negative consequences in arguments, and judges may use discretionary deferred sentencing plans, potentially leading to dismissal of charges and expungement of arrest records, thus replacing imprisonment [31] Additionally, establishing organizations for re-entry assistance, conducting community restorative corrections, and promoting human rights, equality, and fairness can help offenders develop positive self-perception and social positioning. Finally, providing judicial relief channels for offenders: when their employment, marriage, privacy, or other rights are still not effectively protected, they may seek judicial assistance, further limiting implicit collateral consequences.

4. Conclusion

The predicament of the collateral consequences system essentially reflects a deep misalignment between punitive consequences and modern governance logic. Through systematic analysis of its nature, this article clarifies that collateral consequences belong to security measures and proposes four reconstruction principles: appropriateness, necessity, proportionality, and individual responsibility. Meanwhile, the misdemeanor record expungement mechanism and measures to eliminate implicit collateral consequences run in parallel: the former provides a predictable pathway for misdemeanants to reintegrate, while the latter strives to eliminate implicit social discrimination.

The institution in this article aims to provide theoretical references for the legislature in amending Criminal Law, the Criminal Procedure Law, and related administrative regulations, promoting a modern collateral consequences system that distinguishes culpability, limits duration, prohibits collective punishment, and allows expungement. Of course, issues such as how to calculate the review period, how to set recidivism risk assessment standards for different offenses, and the feasibility of eliminating implicit consequences remain for future research. Hopefully, this discussion can lay a cornerstone for the refined construction of this system, allowing the law to retain compassion beyond punishment.

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