

Comparative Analysis on the Improvement of Aggravate Punishment for Recidivism in Malaysia

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ABSTRACT

Recidivism, the fact that individuals re-offend after being convicted of a crime, is a significant challenge faced by criminal justice systems worldwide. The study will begin by reviewing relevant literature and legal frameworks pertaining to recidivism and aggravated punishment in Malaysia. The analysis will delve into the objectives, principles, and legal provisions that guide the application of aggravated punishment for repeat offenders in the Malaysian criminal justice system. Additionally, a comparative perspective will be adopted to examine the experiences and practices of other jurisdictions that have implemented similar punitive measures for recidivism. This comparative analysis delves into the strategies employed by Malaysia for the improvement of aggravated punishment concerning recidivism within its criminal justice system. Malaysia, like many countries, has adopted measures to address but leaves several concerns on this issue. Those concerns include the range of defining recidivism unreasonably and focusing too much on crimes that violate property and the discretion of judges for sentencing them are so huge. The study evaluates Malaysia's approach to aggravated punishment for recidivism by examining the legal framework, and sentencing guidelines, and also focuses on the rights of offenders. Furthermore, it compares Malaysia's practices with those of other nations including both civil law and common law countries to identify best practices and potential areas for enhancement. By employing a comparative research methodology, the study will explore the strengths and weaknesses of the aggravated punishment approach in deterring recidivism, ensuring public safety, and promoting rehabilitation. It will critically evaluate the legal and ethical considerations associated with imposing harsher penalties on repeat offenders, including questions of proportionality, fairness, and human rights implications. Ultimately, the study strives to provide several potential ways to address those concerns for enhancing the Malaysian criminal justice system's response to recidivism, considering the principles of proportionality, and fairness in criminal justice.

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1. The Overview of Sentencing Recidivism

1.1 The Concept of "Recidivism"

Recidivism, also named "repeat offenders". Normally, the concept of "recidivism" in the criminal justice system refers to the tendency of individuals who have previously been convicted of criminal offenses to re-offend or commit new crimes after serving their sentences or undergoing rehabilitation programs.¹ It indicates the effectiveness of rehabilitation and reintegration programs and the overall success of the system in preventing further criminal behavior. Aggravated punishment for recidivism is one of the most severe sentencing systems in criminal justice. However, the concept of recidivism is different in different jurisdictions. Thus, it is of great significance to correctly understand the concept and classification of recidivism and its constituent conditions. Scientifically using criminal punishment methods to fight against the phenomenon of recidivism is crucial for punishing criminals, reducing the rate of recidivism, and enhancing the effectiveness of prevention.²

But when it comes to defining the exact meaning of it, there are several different definitions around the world. The so-called recidivism has a broad and narrow sense, and the former one refers to those who have been sentenced and then re-offend, but there is no legislation towards the "commonly recidivism"³ in the Malaysian criminal justice system; On the other hand, recidivism in the narrow sense has other conditions specified by law, for instance, s75 and s75A in the penal code, and the punishment for them should be aggravated according to the above legislations.

Unfortunately, when the author searches the relevant legislation for the

definition through the relevant law database by using the keywords "recidivist" or "recidivism", there is no result found, which means unlike Japan, China, Italy, Thailand, Switzerland, Brazil, Russia (the above civil law countries all have clear definitions on it) and the US, UK (England and Wales), there is an unclear definition on "recidivism" in the domestic criminal justice system.

Despite the fact that there is no clear definition of it, the Malaysian Penal Code section 75 and section 75A regulate the circumstances for "special recidivism". It is well acknowledged that the polysemy of understanding leads to the existence of various forms of recidivism. Thus, it is incorrect to simply draw the definition of "recidivism" just through caselaw or common sense. It has to be defined from different views: Since there is no "common recidivism" concept in Malaysian criminal law, the study will focus on analyzing "special recidivism" in Malaysia and its improvements.

1.2 Literature Review on the Classification of "Recidivism"

Searching penalties for recidivism systems globally, it can be seen that there are three main types of recidivism systems based on their constituent conditions.

First and foremost, is the "common recidivism sentencing system", which means that the law does not distinguish the types of crimes, only considering whether they had committed crimes before.⁴ Anyone who has been criminally punished and re-offends under certain conditions constitutes a recidivist, and the punishment should be increased.

For example, section 56 of Japanese Criminal Law and section 65 of Chinese Criminal Law stipulate that when a person sentenced to prison term service completes or is exempt from execution if he re-commits a crime within 5 years he should be sentenced

¹ Weisberg, R. (2013). Meanings and measures of recidivism. *S. Cal. L. Rev.*, 87, 785.

² Schoeman, M. (2010). Recidivism: A conceptual and operational conundrum. *Acta Criminologica: African Journal of Criminology & Victimology*, 2010(sed-1), 80-94.

³ Drápal, J. (2023). Sentencing multiple conviction offenders. *European journal of criminology*, 20(1), 142-160.

⁴ Zamble, E., & Quinsey, V. L. (2001). *The criminal recidivism process*. Cambridge university press.

to fixed-term prison term service then he should be recidivism.

The second one is the "special recidivism sentencing system", which requires that the two crimes are of the same nature, or specific crimes provided for by law are established as special recidivists.⁵ Malaysian penal code s75 and s75A belongs to this special recidivism system, as both s75 and s75A, are only available for recidivism who commit some specific crimes.

Last but not least, is the "mixed recidivism system", including both common recidivism and special recidivism in one country's sentencing system. Any repetition of a crime of a different nature, in general, is an ordinary recidivist, and the repetition of a crime of the same nature or a specific offense is a special recidivism.⁶ Countries with mixed recidivism systems often have different constituent conditions and penalties for ordinary recidivism than special recidivists, but both emphasize the aggravated punishment of special recidivists.

Comparing the legislation of various countries, there are three types of provisions on the mixed recidivism system: (1) The time limitation between ordinary recidivism and special recidivism is different. Usually, for common recidivism, there is often a time limitation, but for special recidivism, there is no time limitation. For example, the Italian Penal Code on recidivism requires a certain period of time for the establishment of ordinary recidivism, and exceeding the time limit does not constitute recidivism; on the other hand, there is no time limit for the establishment of a special recidivist. In contrast, the provisions on recidivism in the current Penal Code of Macao are divided into "reincideencia" (recidivism with the same offense) and recidivism "sucessaode crimes" (recidivism with the different offense), which refers to the perpetrator committing a crime of the same nature within 8 years after the perpetrator is convicted of guilt, and within 8 years after the statute of limitations or after he

is exempted from criminal responsibility, that is, the nature of the crime before and after the establishment of the same crime is the same and the statutory time limit is the necessary requirement.

(2) The time limit for the offense before and after ordinary recidivism and special recidivism is the same, but the punishment provisions are different. Special aggravating or special penalties are provided for special recidivism. Italian penal code section 99's statement is that anyone who after being convicted of one crime, commits another, may apply one-sixth of the penalty to be inflicted for the new crime. The penalty can be increased up to one third:1) if the new offense is of the same nature;2) if the new crime was committed within five years of the previous conviction;3) if the new crime was committed during or after the execution of the sentence, or during the time in which the convict voluntarily evades the execution of the sentence.

(3) There are differences in the time limit and punishment principles for crimes committed before and after ordinary recidivism and special recidivism. For example, section 92 of the Thai Penal Code of 1956 stipulates that "a person who has been convicted of a conviction is in execution or commits another offense within five years from the date of the sentence, and the court shall impose a fixed-term imprisonment, which shall be increased by one third." "This is a rule for ordinary recidivists. Article 93 stipulates: "A person who has been sentenced to fixed-term imprisonment for more than six months for committing the following paragraphs, or who has committed another crime under the following paragraphs within three years from the date of receiving the sentence, shall be sentenced to one half of the punishment." This is a provision for special recidivism.

1.3 The Concept of "Aggravated Punishment"

The aggravated punishment usually means that compared with "normal

⁵Weisberg, R. (2013). Meanings and measures of recidivism. S. Cal. L. Rev., 87, 785.

⁶Zamble, E., & Quinsey, V. L. (2001). The criminal recidivism process. Cambridge university press.

punishment”, it would be more serious. For example, Chinese criminal law divides the crime of theft into general theft and special theft according to the amount of property and the number of crimes: According to Article 264 of the Chinese Criminal Code, if theft involves a relatively large amount (more than 3,000 RMB), the maximum penalty is not more than three years of fixed-term imprisonment. However, if theft involves a huge amount (more than 30,000 RMB) or if there are other serious circumstances, a sentence of 3 to 10 years of fixed-term imprisonment shall be imposed. If the amount is exceptionally huge (more than 3,000,000 RMB) or if there are exceptionally serious circumstances, the maximum penalty can be life imprisonment.

Meanwhile, for other countries like Malaysia, which do not have a sentencing guideline for certain crimes, give judges huge discretion in sentencing criminals.

Take “Selvaraj a/l Ganesu v Public Prosecutor”⁷ as an example. The accused person is a recidivism with a record of 42 previous convictions and he is charged with robbery at this time. Thus, in this trial, the public prosecutor appeals that the accused person should be heavily punished, and finally, the judge combines both mitigating factors and aggravating factors together, judging the accused person guilty and sentencing him to imprisonment for 10 years (for robbery, the maximum term is 14 years according to penal code s392) and 4 strokes whipping. In contrast, if he is not a “recidivism”, he may be sentenced to 8 years only, just like the case’s result: “TAMILVANAN THAYSING lwn. PP”⁸.

Through the two above cases in comparison, it can be seen clearly that aggravating punishment is a more serious degree compared with normal punishment. But for the principle of aggravated punishment for recidivism, has to be analyzed in detail, since the variety of recidivism and

different sentencing degrees of each punishment.

1.4 Current Legislation for Sentencing Recidivism in Malaysia

As the author has mentioned above, the two legislations about recidivism are located in Penal Code section 75 and section 75A. The former one is the punishment of persons convicted, after a previous conviction of an offense punishable with three years’ imprisonment, which was launched in the first original version of the penal code. The latter one is the punishment of mandatory imprisonment for persons convicted of multiple serious offenses, which was launched in the second version (PENAL CODE (AMENDMENT) ACT 2014). On top of that, section 291 in the penal code regulates the continuance of nuisance after an injunction to discontinue. Meanwhile, what is worth mentioning is that the punishment for public nuisance does not necessarily belong to the jurisdiction of the penal code, because the seriousness of their behavior may not as equal to other classic criminal behavior, like rape or robbery. But actually, this legislation in a way is a regulation for recidivism.

Thus, it can be seen clearly that the variance of aggravated punishment for recidivism system in the penal code as time passed by: Before the 20th century, only one legislation existed in legislation penal code section 75, which only regulated the offense punishable under Chapter XII (OFFENSES RELATING TO COIN AND GOVERNMENT STAMPS) or Chapter XVII (OFFENSES AGAINST PROPERTY). After that, the legislature issued another legislation named Section 75A in order to regulate other serious offenses and protect a wider range of social interests. Admittedly, both efficient legislations have some effect on protecting the whole society, because of the severe punishment for recidivism. Meanwhile, the rationality and effectiveness of the

⁷ Selvaraj a/l Ganesu v Public Prosecutor [2020] MJJU 2365

⁸ TAMILVANAN THAYSING lwn. PP.MAHKAMAH TINGGI MALAYA.KLANG/NORLIZA OTHMAN PK.[RAYUAN JENAYAH NO: BA-425-12-02/2020],26 APRIL 2021

punishment need to be further and deeper studied and analyzed in the next section.

2. Methodology

This research will use a qualitative research method which includes both library research and comparative analysis from different jurisdictions to conduct and examine the current deficiencies and potential ways to improve the sentencing system for recidivism in Malaysia criminal justice.

The author is not only limited to the physical aspect of library search but also the online law database such as e-books, online journals, official related websites, and penal codes of various countries, in order to make more deep and comprehensive discussions.

3. The Deficiencies of the Punishment for Recidivism in Malaysia

3.1 *The Range of Recidivism is Vast and Unreasonable*

According to the above classifications, punishment for recidivism in Malaysia belongs to the “special recidivism system”, which means recidivism only can be aggravated punished by specific written law or case law, instead of practicing the common principle to aggravate the punishment in criminal justice.

Thus, the range of “recidivism” includes both s75 and s75A in the penal code. If intend to find the exact definition of it, we have to analyze both legislations one by one and combine those circumstances together to clarify under what circumstances can become recidivism.

Firstly, s75 only regulates the kind of property crimes, which is the punishment of persons convicted, after a previous conviction of an offense punishable with three years’ imprisonment. The offender has to commit the behavior that is forbidden by penal code chapter 12 or chapter 17, including offenses relating to Coin and Government Stamps,

Theft, extortion, Robbery and Gang-Robbery, Criminal Misappropriation of Property, Criminal Breach of Trust, Receiving of Stolen Property, cheating, Fraudulent Deeds and Dispositions of Property, Mischief, Criminal trespass. As special and specific legislation fighting recidivism, the protection of social interests is only focused on the property.

Secondly, the notion of recidivism in this section breaks the common sense of “repeat criminal behavior”. Since there is a judge principle named territoriality of laws, people who committed a crime in one country previously, cannot be defined as an offender with former records in other countries. Nevertheless, in this legislation, people who have committed a property crime before, in the Republic of Singapore or in the State of Brunei, shall be defined as an offender with a previous record. Thus, this legislation also breaks the principle of territoriality of laws.

Furthermore, s75A defines “recidivism” depending on the definition of “serious offense”. Under this legislation, offenders who committed at least two times of serious offenses and were punished with at least two years of imprisonment for each of those convictions shall be defined as “recidivism.” While, at the same time, penal code s52B defines “serious offense” as those who will be punished with imprisonment for at least ten years. This definition has evoked much controversy.

In the case of PP v. ASRI CHE DIN (2018)⁹, the core issue is whether an offense under s. 6(1) of the CESOWA, which provides a sentence of imprisonment for a term of not less than two years and not more than ten years upon conviction, belongs to a serious offense. It means the judges have discretion on whether to sentence him to imprisonment for 10 years or below this term under this section.

On the other side, subsection 172D (4) of the CPC – for the purpose of para. (3)(a), stating “serious offense” means an offense where the maximum term of imprisonment that can be imposed is not less than ten years.

⁹ public Prosecutor v Asri Che din [2018] MLRHU 973

Thus, in conclusion, as the judge said in that case, if the court can impose a term of imprisonment of ten years or more, the offense is termed a serious offense. Meanwhile, in the author's opinion, the definition of "serious offense" in s75A should not merely depend on penal code s52B or subsection 172D (4) of the CPC because those legislations only define "serious offense" as the result of punishment. The seriousness of the crime is not equal to serious punishment, because of other factors' influence, for instance, the crime's age, and subject factor, which will come to mitigating or aggravating factors for the final sentencing result. For example, the criminal code of the Russian Federation (1996) Article 18.1, which is about "Recidivism" comes to the definition of it: The committing of an intentional crime by a person who has a record of conviction for an intentional crime committed earlier shall be classified as the recidivism of crimes. In this concept, the offender has to convict former and later crime with the intentional subject, which can be defined as "recidivism". On top of that, take another example relating to the factor of age: in the Malaysian penal code, there is no age limitation for recidivism, while in the criminal code of the Russian Federation (1996) Article 18.4: When recognizing the recidivism of crime, the following shall not be taken into account: b) convictions for crimes committed by a person of the age of fewer than 18 years; Under this legislation, teenager convict crime below 18 years will not be defined as an offender with the former record.

Last but not least, there are lots of crimes for which the maximum sentencing year is 10 years and above, for instance, "attendance at a place used for terrorist training", which is not a quite serious offense compared with abetment of suicide, attempt to murder, kidnapping or abducting a woman to compel her marriage, but they all have the same sentencing results as 10 years imprisonment, so they all belongs to serious offenses. Thus, we can see the above

interpretation enlarges the range of "recidivism" in another way.

3.2 The Social Interest Protected by s75 is Inappropriate.

As the author has discussed above, the social interest protected from s75 only contains the kind of property crime. While, as special legislation that protects the social interest and defends recidivism, it should have a reasonable ground on the reason it only protects property. Honestly, this aspect should not be specially protected compared with the crimes against persons, since crimes against persons are more harmful than crimes against property. Because the body of human beings is more valuable than property like money¹⁰.

Furthermore, when searching other countries' legislations regulating "special recidivism", we can see most of them focus on regulating crimes against a person or country's society instead of property.

For instance, the Thailand Penal Code, Section 93 regulates that Whoever, having been convicted of a prior offense by a final judgment, commits any subsequent offense as specified in the following subsections during the time he still has to undergo the punishment, or within three years as from the date of passing the punishment, both the prior and subsequent offenses falling under the same sub-section, and if the Court is to inflict the punishment of imprisonment for the subsequent offense, the punishment to be inflicted upon him shall, if the punishment inflicted by the judgment for the prior offense was the imprisonment of not less than six months, be increased by one-half of the punishment imposed upon him by the Court for the subsequent offense: 1. Offenses Relating to the Security of the Kingdom; 2. Offenses against Officials; 3. Malfeasance in Office; 4. Offenses Against Judicial Officials; 5. Malfeasance in Judicial Office; 6. Offenses Relating to Public Peace 7. Offenses Relating to Causing Public Dangers; 8.

10 Kasman, Nicole Marie.(2018)."Do We Own Our Bodies: The Legality of Body Ownership"

<https://digitalcommons.augustana.edu/cgi/viewcontent.cgi?article=1014&context=biolstudent>

Offenses Relating to Currency ,Seals, Stamps, Tickets and Documents; 9. Offenses Relating to Trade; 10. Offenses Relating to Sexuality; 11. Offenses against Life; 12. Offenses against Body and Abortion and Abandonment of Children, Sick Persons or Aged Persons; 13. Offenses against Liberty; 14. Offenses against Property.

Furthermore, the criminal code of the Russian Federation (1996) classifies recidivism into three categories: “common recidivism”, “dangerous crime recidivism”, and “special dangerous crime recidivism”. The recidivism of crimes shall be classified as a dangerous crime in the following cases: a) when a person has committed a grave crime, for which he is sentenced to a real deprivation of liberty, if earlier this person has been sentenced twice or more times to deprivation of liberty for intentional medium gravity crimes; b) when a person has committed an intentional grave crime, if he has been earlier convicted for a grave or especially grave crime to real deprivation of liberty. Recidivism shall be deemed especially dangerous: a) when a person has committed a grave crime, for which he is sentenced to a real deprivation of liberty if earlier this person has been convicted twice and sentenced to real deprivation of liberty for a grave crime; b) when a person has committed an especially grave crime if earlier he has been convicted twice for grave crimes or has been convicted for an especially grave crime.

Thus, both Russia and Thailand have legislation for special recidivism, and the specific conditions of that are varied and mostly focus on crimes against persons, instead of crimes focused on property.

3.3 Judges' Discretion on Recidivism is Huge

In today's Malaysian court system, there are two levels of court: subordinate courts and superior courts. The former includes: the Magistrates Court, the Court for Children and the Sessions Court, the latter includes the High Court, the Court of Appeal

and the Federal Court. There is no doubt that superior courts have the power to trail every criminal case. While, as for the subordinate courts, do all of them have the power to trail the criminal case of recidivism?

Take the magistrate court as an example, Its criminal jurisdiction includes hearing all criminal offenses that are subject to a fine and imprisonment not exceeding 10 years or fine and may sentence not exceeding 5 years imprisonment fine not exceeding RM 10000 and/or 12 times of whipping.¹¹ While, if someone had committed theft, according to penal code section 379: punishment for theft: Whoever commits theft shall be punished with imprisonment for a term which may extend to seven years or with fine or with both. As we all know the magistrate court has the jurisdiction to trial the offender who is convicted crime the first time. But what if the offender is a “special recidivism” defined by penal code section 75? This means the punishment for him/her may double, and as a result, the maximum final punishment may extend to 14 years (double the amount of the original punishment). Nevertheless, that sentencing result has no doubt exceeded the magistrate court's power.

Furthermore, as the statement in s75: and shall be subject for every such subsequent offense to double the amount of punishment to which he would otherwise have been liable for the same. The legislator used “shall be subject” (equal to “can”) in this legislation, instead of using “shall be punished” (equal to “have to”). Thus, this statement gives the discretion for judges¹² to use or not, which broaden the judges power in another way.

Last but not least, since s75 do not make a clear statement on what kind of punishment shall be double sentenced, the judges may have the power of discretion on sentencing the recidivism in every category, including imprisonment, whipping, penalties and even the term of police supervision.

¹¹ Professor Dr M K Majid & T M Abdul Rashid. (2010). The courts in Malaysia and their jurisdiction.

¹² PUBLIC PROSECUTOR v GOVINDNAN A/L CHINDEN NAIR, [1998] 2 MLJ 181

4. Suggestions for Improving Punishment for Recidivism

4.1 *Expand and Restrict the Constitutive Requirement of Recidivism in Different Aspects*

4.1.1 Expand the range of "common recidivism"

Since there is no clear statement in Malaysian legislation on "recidivism", the relevant legislation I have mentioned above all has some deficiencies, the author has to present suggestions on redefining the definition of "recidivism" in different aspects.

First and foremost, it is of great significance to expand the range of "recidivism". In the Malaysian criminal system, there is only legislation for "special recidivism". Thus, "common recidivism" is of great importance to add as a basic principle for punishing recidivism. The meaning of "common recidivism" is the committing of an intentional crime by a person who has a record of conviction for an intentional crime committed earlier in the same country. Furthermore, the punishment should be aggravated but the judges actually have the discretion on that. In other words, "common recidivism" should be identified as an aggravated factor when judges are concerned about the sentence for criminals. For instance, someone had committed rape (which is an offense that can be sentenced for imprisonment 20 years) before, and was punished for imprisonment for 9 years¹³, which is a minor sentencing. While, if the offenders have some aggravating factors, they may face a more severe sentencing result, like *AZMAN v. PP*¹⁴, in this case, the offender get 20 years imprisonment as a result.

Furthermore, what is worth to notice is that the definition of recidivism is not equal to multiple offenders. The latter one means someone who convicts two and above offenses at the same time before arrested. In other words, multiple offenders are offenders who are charged with more than one crime

during one hearing¹⁵, which is quite different from recidivism.

4.1.2 Restrict the range of "special recidivism"

Secondly, the range of "special recidivism" should be limited since the punishment for them is quite severe. As both s75 and s75A are legislations about "special recidivism", we have to analyze both one by one. For s75, the protection is too one-sided, which only focuses on property crime. Compared with s75A which requires the offender to have committed a crime twice before, s75 only requires once. Thus, it should be protected some interests more important, like specific body crimes or betray country crimes.

Furthermore, as for s75A, there is no clear statement on "serious offense." If we only reference s52B's definition on it, is it quite unreasonable just like the author have analyzed above. Thus, we need to redefine the meaning of "serious offense." Literally, there are some ways to define the word in different aspects. For example, we can use the enumeration method to specify and enumerate all of the categories of serious offenses. This method is an effective method for identifying the serious offense in the circumstance of crime instead of in the result of punishment. Despite the fact that we cannot regulate and enumerate serious offenses in every aspect, just like criminal law is not a code including every aspect of crime, we have to clarify the definition in order to make the punishment more reasonable.

4.1.3 Add the concept of "legal person" to recidivism

On top of that, we also need to identify recidivism in the aspect of the subject of crime. Can a legal person like companies be a suitable subject of recidivism? Until now the definition of "recidivism" in Malaysia is only appropriate for human beings since all the crimes in s75 and s75A only can be committed by people and punished by imprisonment. While, in theory, if a legal person is convicted

¹³ NORHADI MINHAT lwn. PP/JA-42 JSKH-1-07/2019]

¹⁴ AZMAN v. PP [CRIMINAL APPEAL NO.: JB-425-7-08/2019]

¹⁵ Austin Lovegrove 2004 Sentencing the Multiple Offender: Judicial Practice and Legal Principle

of some crimes that are deemed as serious or unrepentant offenses, it is possible to regulate them by the aggravated punishment for recidivism principle. The following is why it is necessary to add the legal person to "recidivism."

Establishing a legal person for recidivism is a realistic requirement for preventing reoffending. Since penal code section 11 already presents the qualified subject for the legal person as the statement: the word "person" includes any company or association or body of persons, whether incorporated or not. There are some legislations in the penal code that may be suitable for legal persons like s491: Breach of contract to attend to and supply the wants of the helpless. Furthermore, the companies act 2016 has lots of legislation to regulate illegal acts.

The law is rooted in real life, thus whether to add a legal person for recidivism should first depend on whether there are facts in real life that some of the legal persons are convicted of the crime for the first time and convicted of the crime again. With the development of the market economy and the increased number of units, legal person's crimes have become increasingly serious, especially since 1983, unit crimes have developed faster than before. Many units are not just the first offenses, but after paying the fines imposed, they continue to commit profit-making or economic crimes, and they even regard the fines imposed as mere normal expenses paid for their own criminal acts. The reality of recidivism by a legal person provides the target and prevention goal for the establishment of recidivism in additional units so that the additional unit recidivism system is targeted and of practical significance. Therefore, the addition of recidivism in legal persons is a realistic requirement for adjusting the fact that the companies have repeatedly convicted crimes.

Secondly, it is a concrete embodiment of the principle of equality in criminal law. It is well known that criminal law establishes both legal persons and natural persons as eligible targets for punishment. Since the re-

offending of intentional crimes convicted by the natural person can be punished more severely, why should the re-offending of a legal person's crimes not be punished more severely? This is the natural logical conclusion that a legal person's crime deserves after legalization.

Last but not least, the establishment of additional legal person recidivism is determined by the nature of the crime committed by the unit. The legal person also has their own volitional activities, and if the criminal unit commits a new crime within a certain period of time after being sentenced to a criminal punishment, it also indicates that its subjective knowledge is deeper and the social danger is greater. In addition, as a social organization, the unit has and controls a large number of human, material, and financial resources, and its re-offending has a stronger material basis, and we have to admit that the legal person criminal will after being programmed and integrated is more stubborn than that of natural persons, so the possibility of re-offending after receiving criminal punishment is huge, and the harm caused by its re-offending is also immense. Therefore, it is necessary to set up additional legal persons for recidivism and impose heavier penalties on eligible criminal units in order to combat and prevent unit recidivism. Moreover, it is foreseeable that with the deepening of our country's economic structural reform and the further development of the market economy, the criminal activities of legal persons and unincorporated organizations will continue to increase, and the phenomenon of recidivism in units will not be bridged. If we do not set up additional units for recidivism, and the recidivists of eligible units will only be treated as first-time offenders, it is bound to be impossible to better crack down on and prevent unit crimes, and further affect or even hinder the development of China's market economy.

To sum up, the criminal law should add legal person recidivism, which is not only the inevitable logical conclusion after the legalization of unit crimes, but also the practical need to crack down on and prevent

unit recidivism, and it is also the need to escort the development of the country's market economy.

4.1.4 Exclude the teenager offense in identifying recidivism.

Our current recidivism system only limits the scope of recidivism in terms of criminal conditions, time conditions, punishment conditions, subjective conditions, etc., and does not make special requirements for the eligibility of recidivists. In other words, teenagers who have reached the age of criminal responsibility but are below 18 years also seems to a qualified subject of recidivism, and if a juvenile delinquent meets the requirements for the establishment of recidivism, he may be recognized as a recidivist and will be given a heavier punishment

Then, does the criminal law regard the youth below 18 as the eligible subject of recidivism, does it take into account the characteristics and the spirit of the special protection of minors in our law, which is in line with the original intention and purpose of the establishment of the recidivism system?

We can analyze this by examining the rationality of juvenile delinquency from its characteristics. The physical and psychological development of minors is not yet mature, and the ability to distinguish between right and wrong and self-control has certain limitations, is unstable in thinking, and is more prone to repetition, so minors who re-offend are not necessarily more subjectively malignant and physically dangerous. Therefore, even if a minor who meets the conditions for recidivism reoffends, his subjective character and psychological plasticity are still strong, and the possibility of correction and reform is still greater than that of adults who re-offend, and the policy of education as the main and punishment as the second should still be adhered to. Treating minors like adults, as qualified subjects for recidivism, will be given heavier punishments as long as they meet the requirements, and

deprive them of the opportunity to apply probation and parole, which obviously does not take into account the psychological and physiological characteristics of juvenile offenders, and is not conducive to the correction and reform of juvenile recidivists. Fortunately, Malaysian criminal law has already noticed the factor of age for punishing offenders, as prison act 1995 section 2 makes the definition of "young prisoner", which means a prisoner who is below twenty-one years of age, and affirm that young prisoners shall, so far as local conditions permit, be kept apart from adults under detention. Currently although the legislator does not realize the factor of age for the influence of recidivism, the relevant legislations will be launched as they already have the foundation of the young prisoners in prison act.

4.2 Clarify the Judge's Discretion on Sentencing Recidivism

In legal terminology, "shall be punished" in s75A means if the judges intend to exercise this legislation, they have to obey the detailed meaning of it, which means they have no discretion on whether to use the result of the punishing or not. Thus, if someone convicts the offense and being considered as "special recidivism" under s75A, the judges have to punish him with mandatory imprisonment for the third and subsequent offenses and the term of imprisonment shall not be less than double the term of the longer term of imprisonment imposed for the previous convictions. While, "shall be subject" in s75 does not have the exact meaning of "shall be punished".¹⁶ Since "shall be subject" gives the judge's discretion to use the aggravated sentence or not. The judge in PUBLIC PROSECUTOR v GOVINDNAN A_L CHINDEN NAIR declared that it must be noted that just because the provisions of the section are attracted in a particular case, it does not mean that the extreme punishment provided by the section must be inflicted. The provisions of the section are only permissive and not

¹⁶ PUBLIC PROSECUTOR v GOVINDNAN A_L CHINDEN NAIR, [1998] 2 MLJ

obligatory. This is borne out by the use of the words '... shall be subject ...' in the section. The section only provides for a maximum sentence; it does not provide for a minimum sentence.¹⁷

Despite the fact that the judge's interpretation of this legislation is reasonable, because of the phrase "... shall be subject ..." in the section. Meanwhile, when we analyze the rationality and practicability of this section, we have to acknowledge this legislation in some degree endow judges a lot of discretion. Just like the result of the sentence: *v GOVINDNAN A_L CHINDEN NAIR*, the appeal judge exercises his power endowed by s75, sentence a person with 11 previous convictions and convict theft in this time for imprisonment for 3 years since he plea of guilty. Thus, judges do not sentence the aggravated punishment for him.

From this point of view, we have to limit the judges' discretion in this circumstance in case of resulting in different sentences for the same case. Thus, in my view, the legislator may amend the statement in this section, using the same word in s75A "shall be punished" instead of "shall be subject". In this way, not only limits the judges' discretion on recidivism but also clarifies the aggravated punishment for them, letting offenders afraid of the severe sentencing result to prohibit offensive behavior.

4.3 Affirm Recidivism's Right to Parole

When it comes to exploring whether recidivism can be released on parole, the prison law does not explicitly prohibit the parole rights of recidivists. However, Article 46 of the in prison act lists the crimes that criminals cannot be released on parole, which is in the FOURTH SCHEDULE, including the penal code: The whole of Chapter VI, The whole of Chapter VIA, Section 194, Paragraph 225(e), Paragraph 304(a), Section 364, Section 374A, Section 376, Section 376B, Section 377B, Section 377c, Section 377E, Section 388, Section 460, Kidnapping Act 1961 [Act 365] Section 3, Firearms (Increased Penalties) Act 1971 Section 3, Section 3A, Section 4, Section

5, Section 7, Dangerous Drug Act 1952 [Act 234] Section 6B, and Internal Security Act 1960 [Act 82] Section 57, Section 59.

In other words, criminals who commit the above-mentioned crimes must not be entitled to parole. Since the above-mentioned crimes do not include all crimes of penalty code s75 and s75A, it means that recidivism may be eligible for parole.

But at the same time, Prison Act 46E stipulates the eligibility for parole, and 46F stipulates the matters that the parole board needs to consider. Among them, 46F(b)(iv) mentions the requirement to check the criminal record of the criminal, which means that as a recidivist, this item becomes a deduction when the parole board considers it, which is also in line with common sense.

After all, compared with non-recidivists, recidivists are more subjectively vicious and physically dangerous. If the parole conditions for recidivists are the same as those for non-recidivists, it will not reflect the spirit and principle of strict punishment of recidivists in criminal law. In addition, it is precise because of the above reasons that the evaluation of parole for recidivists needs to go through a longer period of consideration, reform, and education before an authoritative and effective conclusion can be drawn to determine whether the recidivist has met the conditions for parole. In this regard, the Brazilian Penal Code is worthy of reference. Article 60 of it stipulates that the time condition for parole of first-time offenders must be already imprisonment for more than half of the sentence, and the time condition for parole of recidivism must be already imprisonment for more than three-quarters of the sentence. It not only clearly endows recidivists with the right to parole, but also treats first-time offenders and recidivists separately, reflecting the principle of fairness and proportionality in criminal law.

CONCLUSION

In conclusion, the comparative analysis of aggravated punishment for

¹⁷ Harmohan Deb Nath v Jaha Baksha Patwari AIR 1943 Cal 25

Malaysian recidivism has shed light on various aspects of this approach within the context of the criminal justice system. Through an examination of relevant caselaw and comparative experiences from other countries' jurisdictions, this research has explored the effectiveness and implications of imposing harsher penalties on repeat offenders.

The findings suggest that aggravated punishment for recidivism can potentially serve as a deterrent, sending a strong message about the seriousness of repeat offenses and aiming to protect public safety. However, it is crucial to consider the legal and ethical dimensions associated with this approach. In Malaysia, according to Penal Code, there still exists some deficiencies in the legislation regulating recidivism. Proportionality, fairness, and human rights considerations must be carefully evaluated to ensure that the punishment aligns with the principles of justice and rehabilitation. Moreover, the comparative analysis has highlighted the need for a multifaceted approach to addressing recidivism, combining punitive measures with rehabilitative efforts.

By advancing our understanding of the implications of aggravated punishment for recidivism, this research contributes to the ongoing efforts to refine the Malaysian criminal justice system. It underscores the significance of evidence-based policies and a holistic approach that balances punishment, rehabilitation, and societal reintegration to effectively address recidivism and ensure a just and safe society.

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