The Habitual Criminal — A Comparative Study

An issue devoted to the study of the habitual criminal would not be complete without reference to various approaches taken by other jurisdictions to this problem. We have therefore selected at random eleven jurisdictions and obtained brief summaries of the substantive and case law dealing with the habitual offender in those jurisdictions, together with statements concerning the frequency of its application and contemplated reforms. Cross references to these different legal systems as well as an overall comparison with the Canadian situation will enable the reader to derive a fuller appreciation of the subject under consideration.

The McGill Law Journal Editorial Board would like to take this opportunity to express its appreciation to those scholars without whose contributions this comparative study would have been impossible.

Contents

The Maine Habitual Offender Statute

Harry P. Glassman*

Maine has had an habitual offender statute since 1824.[1] Although the statute has been amended several times, it remains in substantially the same form as originally adopted.[2] It presently provides:

> When a person is convicted of a crime punishable by imprisonment in the State Prison, and it is alleged and proved in a trial, or admitted in a trial, that he has been before convicted and sentenced to any state prison, by any court of this State, or of any other state, or of the United States, unless pardoned therefor, he may be punished by imprisonment in the state prison for any term of years. Allegation of such prior conviction and sentence shall be by indictment separately found, and upon which the defendant shall not be arraigned until after such time as he shall have been convicted upon the current principal offense.[3]

The most recent amendment to the statute ocurred in 1961.[4] This amendment accomplished two changes: First, it relieved from the burden of the statute a person who had been pardoned for his previous conviction. Second, it required that the charge of being an habitual offender be contained in a separate indictment upon which the defendant could not be arraigned until after he had been convicted upon the current charge. Prior to the adoption of this amendment the charge of being an habitual offender was generally joined as a separate count in the indictment charging the defendant with the current offense.[5]

The constitutionality of the habitual offender law was upheld in 1949 against an allegation that it denied equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.[6]

A defendant convicted of being an habitual offender does not receive a separate sentence on that conviction. The statute is inter-

---

* Professor of Law, University of Maine.

[1] Me. Laws 1824, ch. 282, §18.

[2] The history of Maine's habitual offender law is discussed in *Jeness* v. *State*, 144 Me. 40, 64 A. 2d 184 (1949).

[3] Me. Rev. Stat. Ann., tit. 15, §1742 (1964).

[4] Me. Laws 1961, ch. 268, §2.

[5] The Maine Court had characterized the prejudice te a defendant resulting from this practice as "incidental". *Ingerson* v. *State*, 146 Me. 412, 82 A. 2d 407 (1951).

[6] *Jeness* v. *State*, 144 Me. 40, 64 A. 2d 184 (1949).

preted as increasing the maximum sentence which may be imposed for the offense of which the defendant is currently convicted.[7]

Apparently the statute is not used with very much frequency. At the present time, of the approximately 240 inmates of the State Prison who have previously been committed to a state prison only one is serving a sentence pursuant to the habitual offender law.[8] Of course, it is possible that many indictments charging a defendant with being an habitual offender are filed and then dismissed in exchange for a plea of guilty to the current offense. There are no statistics available on the extent to which this plea-bargaining device may be employed; it would be safe to assume that the practice would vary from county to county depending upon the attitude of the particular county attorney. Since the Maine Rules of Criminal Procedure do not permit the filing of a dismissal without permission of the court,[9] any use of the habitual offenders statute for plea-bargaining must have court approval.

Recidivist Punishment in Georgia

John F. T. Murray *

For over a hundred years, the criminal code of the State of Georgia has included a statute which requires that a second offender who has previously been sentenced to confinement and labor in the penitentiary shall be sentenced to the longest period of time and labor prescribed for the punishment of the second offense. The statute has been revised several times and the present version is found in section 27-2511 of the criminal code of Georgia.[1] Georgia practice

---

[7] *Austin* v. *State*, 158 Me. 292, 183 A.2d 515 (1962); *State* v. *Small*, 156 Me. 10, 157 A.2d 874 (1960).

[8] Letter dated February 27, 1967 from Allan L. Robbins, Warden, Maine State Prison.

[9] Me. R. Crim. P. 48(a); Glassman, *Maine Practice, Rules of Criminal Procedure*, §48.1 (1967).

* Professor of Law, University of Georgia.

[1] *Conviction of second offense, longest time; service of sentences by fourth offenders.* — If any person who has been convicted of an offense and sentenced to confinement and labor in the penitentiary shall afterwards commit a crime punishable by confinement and labor in the penitentiary, he shall be sentenced to undergo the longest period of time and labor prescribed for the punishment

requires that the indictment for the current offense include the former conviction and punishment, and like any other allegation in the indictment, this former conviction and punishment must be proven in open court.[2] Unless waived, the indictment is read by the judge or the prosecutor and referred to again in the charge to the jury. In addition, the jury takes a copy of the indictment into the jury room when it begins deliberations. In this state, the jury is also responsible for adjudging the sentence. The judge does not necessarily impose such sentence, for he may delay sentencing until he has had an opportunity to review the recommendations of a probation officer on his staff. At the time of sentencing, he may impose the sentence of the jury or he may suspend or probate any portion of the sentence.[3]

An informal check with the Solicitor General (prosecutor) and several defense counsel in the Western Judicial Circuit and a review of the cases in other circuits indicate that the option to include previous convictions in the indictment is rarely exercised. Various reasons are given for this state of affairs. Often the previous conviction will be in another jurisdiction making it inconvenient, if not difficult, to obtain the necessary authentication before proceeding to trial on the current case. The presence of the other conviction in the indictment is believed by some to confuse the present issue or to lead the jury to believe that unreasonable retribution is being exercised against the accused. There has also been a feeling of doubtful constitutionality in that the defendant's character is put into issue by the state. This doubt may, of course, be considered as having been resolved in favor of the state by the case of *Spencer* v. *Texas* decided on January 23, 1967, by the United States Supreme Court.[4] The decision in that case, however, was by the narrow margin of five to four and the strong dissent by Mr. Chief Justice Warren gives comfort to prosecutors who already have doubts of their own.

---

of the offense of which he stands convicted: Provided, however, any person who, after having been three times convicted under the laws of this State of felonies, or under the laws of any other State or of the United States, of crimes which, if committed within this State would be felonies, commits a felony within this State other than a capital felony, must, upon conviction of such fourth offense, or of subsequent offenses, serve the maximum time provided in the sentence of the jury or the judge based upon such conviction, and shall not be eligible for parole until the maximum sentence has been served. For the purpose of this section conviction of two or more crimes charged on separate counts of one indictment or information or in two or more indictments or information consolidated for trial, shall be deemed to be only one conviction.

[2] *Reid* v. *State*, 49 Ga. App. 429 (1934).

[3] Georgia Code Sec. 27-2502.

[4] 27 S. Ct. 148 (1967).

Significantly, the proposed revision of the criminal procedure code of Georgia, presently being studied by the legislature, would repeal section 27-2511 and substitute therefore a new section 27-1701(b), which states as follows:

> If a defendant is convicted of a third or subsequent felony, under the laws of this State, or of any crime under the laws of the United States or of any other State which if committed within this State would be a felony under the laws of this State, the judge may disregard the sentence of the jury and impose punishment of imprisonment up to the maximum provided by law. *Previous convictions shall not be alleged in the indictment nor shall the jury be charged as to them.*[5]

Missouri Habitual Criminal Statute

Edward H. Hunvald, Jr.*

The Missouri "habitual criminal" statute, § 556.280 R.S. Mo., 1959,[1] is perhaps not typical of habitual criminal statutes. The only significant effect of the statute is that sentences given under it are determ-

---

[5] (Italic supplied). See Tentative Draft of the Proposed Criminal Procedure Code of Georgia. The Harrison Company, Atlanta.

* Professor of Law, University of Missouri.

[1] R.S. Mo., 1959, § 556.280. *Second offense, how punished.* — If any person convicted of any offense punishable by imprisonment in the penitentiary, or of any attempt to commit an offense which, if perpetrated, would be punishable by imprisonment in the penitentiary, shall be sentenced and subsequently placed on probation, paroled, fined or imprisoned therefor, and is charged with having thereafter committed a felony, he shall be tried and if convicted punished as follows:

(1) If the subsequent offense be such that, upon a first conviction, the offender could be punished by imprisonment in the penitentiary, then the person shall receive such punishment provided by law for the subsequent offense as the trial judge determines after the person has been convicted.

(2) Evidence of the prior conviction, sentence and subsequent imprisonment or fine, parole, or probation shall be heard and detormined by the trial judge, out of the hearing of the jury prior to the submission of the case to the jury, and the court shall enter its findings thereon. If the finding is against the prior conviction, sentence and subsequent imprisonment or fine, parole or probation, then the jury shall determine guilt and punishment as in other cases.

(3) If the prior conviction is appealed then this section does not apply until after the judgment is affirmed or the appeal is dismissed; except, that a subsequent offense committed after a conviction in the trial court but prior to affirmance of the conviction or dismissal of the appeal shall, after the affirmance or dismissal, be pleadable and provable as a prior conviction under the provisions of this section.

ined by the trial judge. Sentences of those tried as first offenders are determined by the jury.

Prior to the 1959 revision, evidence of a defendant's prior felony conviction, imprisonment and discharge was presented to the jury, and if the jury found these necessary facts, and found the defendant guilty of the offense charged, then they were required to set the punishment at the longest term of imprisonment allowed for the offense charged.[1]

Under the present law, if a defendant is charged as a "second offender", the trial judge holds a hearing out of the presence of the jury, and determines if the necessary prior criminal record exists. If he finds that the defendant comes under the statute, then if the jury finds the defendant guilty of the offense charged, the judge imposes the sentence. There is no requirement that the judge impose the most severe sentence allowable.

The State of Washington's Habitual Criminal Statutes

George E. Small *

Washington law provides that an habitual criminal is one convicted "of a crime in which fraud ... is an element, or of petit larceny, or of any felony, who shall previously have been convicted, ... of any crime which ... would amount to a felony, or who shall previously have been twice convicted ... of petit larceny, or of any misdemeanor ... of which fraud or intent to defraud is an element ..."[1] Under this section of the statute, imprisonment for not less than ten years is directed.

This statute also provides that a life sentence may be imposed for two prior convictions "of any crime of which fraud ... is an element, or of petit larceny or of any felony," or for four convictions for "petit larceny, or of any misdemeanor ... of which fraud ... is an element ..." [2] Although the sentence imposed is mandatory, the State Board of Prison Terms and Paroles actually determines the term of imprisonment.

---

[1] See *State* v. *Morton*, 338 S.W. 2d 858, 861 (Mo. 1960).

* Third year Law student, Gonzaga University.

[1] Washington Revised Code 9.92.090.

[2] Washington Revised Code 9.95.115.

Habitual criminal statutes of the State of Washington have been challenged in its supreme court on approximately forty-five occasions without significant success. The statute has withstood challenges to its constitutionality on grounds of lack of due process, denial of equal protection, denial of the right to a speedy trial, double jeopardy, being an *ex post facto* law, imposing double punishment and constituting cruel and unusual punishment. The discretionary power of a prosecuting attorney to charge a convicted citizen of being an habitual criminal is held to be a question of policy and not one of constitutionality.

Status as an habitual criminal is acquired only after being first convicted of a substantive crime. A subsequent jury trial then determines whether the accused is an habitual criminal and if a verdict of guilty is returned, a more severe sentence is imposed for conviction of the substantive crime, not for the "crime" of being an habitual criminal. It is reversible error to convict a person of being an habitual criminal before he has been convicted of a substantive crime, or to sentence a criminal for the substantive crime before he has been tried on the habitual criminal charge.

Habitual criminal convictions are based upon evidence of prior convictions consisting of certified records supplied by the State Bureau of Criminal Identification. Fingerprint experts may be called upon to assist in verifying that the accused is the individual convicted of the crime charged in the supplemental information. The granting of a pardon does not blot out a prior conviction under the habitual criminal statute but merely restores that individual's civil rights.

The habitual criminal charge may be included on the same information charging the substantive crime. However, it must be upon a separate sheet of paper and must not be called to the attention of the jury during the trial for the substantive offense.

An anomaly in the law subjects habitual criminals to an operation for the prevention of procreation. A single case reached the appellate level in 1912 in which an order directing such an operation was sustained.

Summary of California Habitual Criminal Law

Jeanne L. Arthur and H. Kenneth Branson *

While California provides generally for increased penalties upon conviction of various crimes if the offender has certain prior convictions,[1] Penal Code Section 644 limits the term "habitual criminal" to those persons convicted of one of the list of serious crimes who have either two or three prior convictions for crimes of similar gravity. The law provides that an habitual criminal shall be punished by imprisonment for life.[2] Penal Code Section 644 is an expression

---

* Jeanne L. Arthur, Associate Editor of *The Santa Clara Lawyer*.
H. Kenneth Branson, Law Student, University of Santa Clara.

[1] Cal. Pen. Code §666 (Prior Petit Theft); Cal. Pen. Code §667; Cal. Pen. Code §3051; Cal. Veh. Code §23102 (Drunk Driving); Cal. Pen. Code §314 (Indecent Exposure); Cal. Hlth. & Safety §11500 et. seq. (Narcotics Violations); Cal. Pen. Code §3024 (Crimes committed with a deadly weapon).

[2] Cal. Pen. Code §644, set forth below. The lists have been amended from time to time. For a prior conviction to be counted toward a section 644 determination, it must have been on the section 644 list at the time it was committed. *In re Harincar*, 29 Cal. 2d 403, 407, 176 P.2d 58 (1946). Penal Code §644. Habitual criminals; life imprisonment; exceptional cases; discretion of court; effect upon death penalty.

(a) Every person convicted in this State of the crime of robbery, burglary of the first degree, burglary with explosives, rape with force or violence, arson as defined in Section 447a of this code, murder, assault with intent to commit murder, train wrecking, felonious assault with a deadly weapon, extortion, kidnaping, escape from a state prison by use of force or dangerous or deadly weapons, rape or fornication or sodomy or carnal abuse of a child under the age of 14 years, or any act punishable under Section 288 of this code, conspiracy to commit any one or more of the aforementioned felonies, who shall have been previously twice convicted upon charges separately brought and tried, and who shall have served separate terms therefor in any state prison and/or federal penal institution either in this State or elsewhere, of the crime of robbery, burglary, burglary with explosives, rape with force or violence, arson, murder, assault with intent to commit murder, grand theft, bribery of a public official, perjury, subornation of perjury, train wrecking, feloniously receiving stolen goods, felonious assault with a deadly weapon, extortion, kidnaping, mayhem, escape from a state prison, rape or fornication or sodomy or carnal abuse of a child under the age of 14 years, or any act punishable under Section 288 of this code, conspiracy to commit any one or more of the aforementioned felonies, shall be adjudged a habitual criminal and shall be punished by imprisonment in the state prison for life;

(b) Every person convicted in this State of the crime of robbery, burglary of the first degree, burglary with explosives, rape with force or violence,

of the theory that penal laws are for the protection of society, rather than for punishment of the offense; that a persistent and hardened offender is more dangerous to society than one with fewer offenses.[3] It does not create a substantive offense, but merely provides for more severe punishment of those who have proved immune to punishment.[4]

For a person to be declared an habitual criminal, the prior convictions must be charged in the indictment or information, and proved as a matter of fact for the jury.[5] The prior convictions must have been determined at separate proceedings.[6] Convictions in states other than California will be counted in the determination of habitual criminality,[7] but the offense must meet the definition of the corres-

---

arson as defined in Section 447a of this code, murder, assault with intent to commit murder, train wrecking, felonious assault with a deadly weapon, extortion, kidnaping, escape from a state prison by use of force or dangerous or deadly weapons, rape or fornication or sodomy or carnal abuse of a child under the age of 14 years, or any act punishable under Section 288 of this code, conspiracy to commit any one or more of the aforementioned felonies, who shall have been previously three times convicted, upon charges separately brought and tried, and who shall have served separate terms therefor in any state prison and/or federal penal institution, either in this State or elsewhere, of the crime of robbery, burglary, burglary with explosives, rape with force or violence, arson, murder, assault with intent to commit murder, grand theft, bribery of a public official, perjury, subornation of perjury, train wrecking, feloniously receiving stolen goods, felonious assault with a deadly weapon, extortion, kidnaping, mayhem, escape from a state prison, rape or fornication or sodomy or carnal abuse of a child under the age of 14 years, or any act punishable under Section 288 of this code, conspiracy to commit any one or more of the aforementioned felonies, shall be adjudged an habitual criminal and shall be punished by imprisonment in the state prison for life;

(c) Provided, however, that in exceptional cases, at any time not later than 60 days after the actual commencement of imprisonment the court may, in its discretion, provide that the defendant is not an habitual criminal, and in such case the defendant shall not be subject to the provisions of this section or of Sections 3047 and 3048 of this code;

(d) Nothing in this section shall abrogate or affect the punishment by death in any and all crimes now or hereafter punishable by death. (Added Stats. 1923, c. 111, p. 237, §1. As amended Stats. 1927, c. 634, p. 1066, §1; Stats. 1931, c. 482, p. 1052, §1; Stats. 1935, c. 602, p. 1699, §1; Stats. 1939, c. 198, p. 1443, §1; Stats. 1941, c. 106, p. 1082, §10; Stats. 1945, c. 934, p. 1747, §1; Stats. 1950, 1st. Ex. Sess., c. 28, p. 470, §1.)

[3] *People* v. *Richardson*, 74 Cal. App. 2d 528, 169 P.2d 44 (1946).

[4] *In re McVickers*, 29 Cal. 2d 264, 176 P.2d 40 (1946). See also, *People* v. *Dunlop*, 102 Cal. App. 2d 314, 227 P.2d 281 (1951); *People* v. *DiMichele*, 149 Cal. App. 2d 277, 308 P.2d 365 (1957).

[5] *People* v. *Dunlop*, 102 Cal. App. 2d 314, 227 P.2d 281 (1951).

[6] *People* v. *Ebner*, 64 Cal. 2d 297, 411 P.2d 578, 49 Cal. Rptr. 690 (1966).

[7] *People* v. *Morton*, 41 Cal. 2d 536, 261 P.2d 523 (1953).

ponding California crime.[8] Pleas of guilty are convictions for the purposes of Ssection 644.[9] The allegations of prior convictions must be responded to by the defendant[10] and must be proved by the people with competent evidence.[11] The pardon of a prior felony does not obliterate the offense for purposes of the habitual criminal act, unless the pardon was expressly granted on the basis that the defendant was not guilty of the prior offense.[12]

The State need not allege that the defendant has served separate terms of imprisonment if they are proved at the trial,[13] though a term may count toward a Section 644 determination, if it was only partially served by the defendant.[14] If a man is convicted of a crime while on parole from a previous conviction, the time served prior to parole will count as a separate term.[15] Section 644 requires that the prior terms of imprisonment be served in a state prison or federal penal institution. For California confinement, not only are state prisons included, but also the State Medical Correctional Institution[16] and the State Vocational Institution, Deuel.[17] For terms served in states other than California, the character of the institution, its inmates, and the proceedings leading up to confinement will be examined by the court to determine the character of the institution.[18] Since the statute requires that the defendant be shown to have served a term under the prior conviction, convictions followed by probation will not satisfy the statute.[19] Section 644 is not applicable to juveniles committed to the California Youth Authority as a result of a wardship proceeding in juvenile court.[20]

Section 644(c) provides that sixty days after the commencement of sentence which resulted from a determination of habitual criminality, the court may, upon proper motion, determine that the prisoner is not an habitual criminal for the purpose of determining

---

[8] Cal. Pen. Code §668.

[9] *People* v. *Ebner*, 64 Cal. 2d 297, 411 P.2d 578, 49 Cal. Rptr. 690 (1966).

[10] *People* v. *King*, 64 Cal. 338, 30 Pac. 1028 (1883).

[11] *People* v. *Bryson*, 172 Cal. App. 2d 536, 342 P.2d 274 (1959).

[12] Cal. Pen. Code §3045.

[13] *In re Ponce*, 65 A.C. 375, 54 Cal. Rptr. 752 (1966).

[14] *People* v. *Keilly*, 54 Cal. App. 2d 764, 129 P.2d 939 (1942); 1 Ops. Cal. Atty. Gen. 516 (1943).

[15] *Ex parte Brady*, 5 Cal. 2d 224, 53 P.2d 945 (1936).

[16] Cal. Pen. Code §6127.

[17] Cal. Pen. Code §2037.

[18] *Ex parte Locaric*, 71 Cal. App. 2d 144, 162 P.2d 313 (1945).

[19] *In re Brady*, 5 Cal. 2d 224, 53 P.2d 945 (1936).

[20] *In re Smith*, 64 A.C. 437, 412 P.2d 804, 50 Cal. Rptr. 460 (1966). Cal. Welf. & Inst. Code §1755.5.

parole.[21] The refusal of the court to rule that the man is not an habitual criminal is appealable.[22] A successful appeal on the ground that the evidence did not support a finding of prior convictions may result in a remand to try only the issue of priors.[23] Use of prior convictions to establish habitual criminality or to enhance punishment may be attacked for lack of representation by counsel in the prior proceedings.[24]

The California Supreme Court has held, in a case in which the priors were not challenged on the basis of denial of the right to counsel, that *habeas corpus* may be used to challenge adjudication of habitual criminality even after the time for appeal has expired.[25]

A person convicted as an habitual criminal under section 644 is subject to an increased minimum as well as a maximum term under California's indeterminate sentence law.[26] It is expressly provided that parole may not be granted until the increased minimum is served. The minima currently provided are 9 years for convicts with two priors and 12 years for those with three priors.[27]

The number of persons who have been adjudicated habitual criminals in California does not constitute a very sizeable group. As of December 31, 1966, 103 male prisoners were serving time in state prisons as habitual offenders, with 99 on parole.[28] Habitual criminals are generally handled in the same manner as other long-term prisoners by the California Department of Corrections. When an habitual criminal's case is reviewed for parole, he is dealt with as an individual with no special consequences attached to his status.[29] The number of persons adjudged habitual criminals has decreased in past years.[30]

---

[21] Cal. Pen. Code §644(c); *In re Ponce*, 65 A.C. 375, 54 Cal. Rptr. 752 (1966).

[22] *People* v. *Stein*, 31 Cal. 2d 630, 191 P.2d 409 (1948).

[23] *People* v. *Morton*, 41 Cal. 2d 536, 261 P.2d 523 (1953).

[24] *People* v. *Espinoza*, 241 Cal. App. 2d 718, 50 Cal. Rptr. 879 (1966).

[25] *In re McVickers*, 29 Cal. 2d 264, 176 P.2d 40 (1946).

[26] Cal. Pen. Code §1168.

[27] Cal. Pen. Code §§3047.5, 3048.5.

[28] Conversation with Miss Vita Ryan, Statistician, California Department of Corrections, Sacramento, March 27, 1967. The woman habitual criminal is very rare; as of December 31, 1965, only one woman habitual criminal has been received by the Dept. since 1959. Male habitual criminals presently comprise 0.05% of the male inmate felon population of California.

[29] *Ibid.*

[30] Reception of habitual criminals by the Department of Corrections (source: conversation with Miss Vita Ryan, of the Department of Corrections, March 27, 1967): 1950-54, 18 men; 1955-59, 20 men; 1960-65, 9 men.

The Law of Recidivism in Texas

W. Royal Furgeson *

Recidivist statutes in Texas are designed generally to deter an offender from further participation in criminal activities.[1] Texas prosecutors sometimes employ these statutes strictly to provide for the specific enhancement of punishment.[2] However, since the operation of the criminal justice system depends upon the bargaining process to insure that the court dockets do not become hopelessly clogged,[3] prosecutors more often use the habitual offender laws as a bargaining tool to strengthen their position in negotiations with defense attorneys on the plea and the sentence.[4]

Although the types of recidivist statutes in Texas are quite diverse, for purpose of analysis they can be divided into four broad

---

* Associate editor of the *Texas Law Review*, University of Texas.

1 Comment, 36 *Texas L. Rev.* 63, 69 (1957).

2 If the state seeks to enhance the penalty under a recidivist statute, it must allege the prior conviction in the accusatery pleading and then prove the prior conviction at trial. *Armendariz* v. *State*, 163 Tex. Crim. 515, 294 S.W.2d 98 (1956). Such a burden gives some balance to the bargaining positions of the prosecutor and the defense counsel. See note 4 *infra*. Before the 1966 revision of the Texas Code of Criminal Procedure, the allegation and the proof of a prior conviction were heard by the jury before determining the verdict and sentence. Although this practice has been held permissible in light of the requirements of due process, *Spencer* v. *State*, 87 Sup. Ct. 648 (1967), the Code of Criminal Procedure now provides that if the jury is to render the sentence, prior convictions may only be introduced in a separate hearing after the verdict. *Tex. Code Crim. P. Ann.* art. 36.01 (1966). However, the jury might be informed of prior convictions before the verdict, when they must be alleged and proved to establish the jurisdiction of the district court. This is so in those offenses which are made felonies only by prior convictions. See note 15, *infra*, and accompanying text.

3 Interview with William F. Alexander, Assistant District Attorney for Dallas County, in Dallas, Texas, July 27, 1966; Interview with Neil McKay, Assistant District Attorney for Harris County, in Houston, Texas, August 15, 1966. See Newman, *Conviction: The Determination of Guilt or Innocence Without Trial*, (1966) p. 4.

4 Bargaining in this area is somewhat predictable. If a second offender (non-capital) has a prior conviction that can be used to enhance his penalty, the prosecuter will usually recommend te the court a sentence equivalent to half the maximum term in exchange for a plea of guilty. If a third offender (non-capital) has two prior convictions that can be used to enhance his penalty, the prosecuter will usually recommend to the court a sentence equivalent to the maximum term in exchange for a plea of guilty. Interview with Frank J. Maloney, in Austin, Texas, March 11, 1967.

categories. The most widely utilized habitual offender laws are those of general applicability. Under Article 61 of the Penal Code, an offender convicted a second time for the same misdemeanor is to have his punishment doubled, while one convicted three or more times is to have his punishment quadrupled.[5] Under Article 62, an offender convicted a second time for a non-capital felony which is at least similar to the first offense is to receive the maximum penalty set for the felony [6] while, under Article 63, one convicted three or more times for a felony less than capital is to receive a sentence of life imprisonment.[7] Under Article 64, an offender convicted a second time for a capital felony is to receive, as a minimum, a sentence of life imprisonment.[8] Interpretation of these four articles has been rather restrictive. For example, a prior conviction which has been employed to enhance punishment under the "second offender" provisions of Articles 61 and 62 cannot be employed again to enhance punishment under those same provisions [9] even though it can be employed again to enhance punishment under the "third or subsequent offender" provisions of Articles 61 and 63.[10] Furthermore, Article 62 cannot be used to enhance punishment in the open-ended crimes,[11] *i.e.*, those which have only a minimum sentence.[12] Also, if this policy of restrictive

---

[5] *Tex. Pen. Code Ann.* art. 61 (1953) reads: If it be shown on the trial of a misdemeanor that the defendant has been once before convicted of the same offense, he shall on a second conviction receive double the punishment prescribed for such offense in ordinary cases, and upon a third or any subsequent conviction for the same offense, the punishment shall be increased so as not to exceed four times the penalty in ordinary cases.

[6] *Tex. Pen. Code Ann.* art. 62 (1953) reads: If it be shown on the trial of a felony less than capital that the defendant has been before convicted of the same offense, or one of the same nature, the punishment on such second or other subsequent conviction shall be the highest which is affixed to the commission of such offenses in ordinary cases.

[7] *Tex. Pen. Code Ann.* art. 63 (1953) reads: Whoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary.

[8] *Tex. Pen. Code Ann.* art. 64 (1953) reads: A person convicted a second time of any offense to which the penalty of death is affixed as an alternate punishment shall not receive on such second conviction a less punisbment than imprisonment for life in the penitentiary.

[9] *Ex parte Loggins*, 167 Tex. Crim. 450, 321 S.W.2d 319 (1959); *Kinney* v. *State*, 45 Tex. Crim. 500, 79 S.W. 570 (1904).

[10] *Mayo* v. *State*, 166 Tex. Crim. 470, 314 S.W.2d 837 (1957).

[11] *Ex parte Davis*, No. 39, 935, — S.W.2d — (Tex. Crim. App. 1967).

[12] An example of an open-ended crime is assault with intent to rape which carries a penalty of confinement "for any torm of years not less than two." *Tex. Pen. Code Ann.* art. 1162 (1961).

interpretation continues, Article 64 might not be applicable to prior convictions where the state failed to seek the death penalty.[13]

Application of the other three categories of recidivist statutes is not difficult. One type relates to specific crimes and, for a subsequent conviction for the same offense, either increases the penalty or elevates the classification from misdemeanor to felony. For instance, the sentence under the narcotic drug act for a first conviction is from two years to life imprisonment while the sentence for a second conviction is from ten years to life imprisonment.[14] On the other hand, the sentence under the statute prohibiting driving while intoxicated for a first conviction is classified as a misdemeanor while the sentence for a second conviction is classified as a felony.[15] Another type of recidivist statute places certain disabilities on one formerly convicted of a crime. For example, if an offender has been convicted of a felony involving the use of firearms, any subsequent possession of a firearm is a felony offense.[16] The final group of recidivist statutes are statute crimes involving habitual conduct. A bookmaker, for example, is subject to criminal sanctions only after he has commited three acts which are prohibited under the bookmaking statute.[17]

In conclusion, the habitual offender laws in Texas focus strictly on the number of offenses rather than the offender in the enhancement of punishment. Unlike the comparable provisions of the Model Penal Code,[18] the court is given no discretion to balance other relevant sentencing considerations with the prior convictions and is consequently prevented, at times, from rendering a desirable and rational sentence.

---

[13] Under the 1966 revision of the Texas Code of Criminal Procedure, unless the state formally declares its intention to seek the death penalty fifteen days prior to trial a "capital" crime is treated like any other felony and the death sentence may not be imposed. See Onion, *Special Commentary*, 1 *Tex. Code Crim. P. Ann.* 79 (1966). See also *Tex. Code Crim. P. Ann.* art. 1.14 (1966).

[14] *Tex. Pen. Code Ann.* art. 725b (1953). For other examples of this type of recidivists law see *Tex. Pen. Code Ann.* art. 945 (1961) (seining in salt water); *Tex. Pen. Code Ann.* art. 1426a (1953) (stealing cotton).

[15] *Tex. Pen. Code Ann.* art. 802b (1953). For other examples of this type of recidivist law see *Tex. Pen. Code Ann.* art. 602a (Supp. 1966) (child or wife desertion); *Tex. Pen. Code Ann.* art. 719e (1961) (sale of horsemeat for human consumption); *Tex. Pen. Code Ann.* art. 1525f, §3 (1953) (foot and mouth disease quarantine).

[16] *Tex. Pen. Code Ann.* art. 489c (1957). For another example of this type of recidivist law see *Tex. Const.* art. I, §11a (bail).

[17] *Tex. Pen. Code Ann.* art. 652a, §2 (1953). For other examples of this type of recidivist law see *Tex. Pen. Code Ann.* art. 300 (1953) (habitual truant); *Tex. Pen. Code Ann.* art. 607 (1953) (vagrancy); *Tex. Pen. Code Ann.* art. 695 (1961) (nuisances).

[18] See *Model Penal Code* §7.03 (P.O.D. 1962).

La récidive en droit français

Christiane Dangeard *

En droit pénal français, l'expression «récidive» a un sens bien précis. Est « récidiviste », celui qui, lorsqu'il commet une seconde infraction, a déjà été condamné définitivement pour la première. Dans notre législation, l'état de récidive comprend donc deux *termes*:

— une condamnation définitive pour une première infraction,

— une seconde infraction indépendante de la première.

Avant d'examiner en détail ces deux éléments rappelons qu'en vertu du principe de la légalité des délits et des peines (*nullum crimen, nulla poena sine lege*),[1] le Code pénal a expressément prévu tous les cas de récidive. On distingue deux sortes de récidives: la récidive cause d'aggravation des peines, différente selon qu'il s'agit de la récidive criminelle, de la récidive correctionnelle ou de la récidive de contravention, et la récidive cause de relégation (loi de 1885).

Examinons maintenant:

I) Les conditions générales de la récidive punissable

II) La récidive cause d'aggravation des peines

A — la récidive criminelle

B — la récidive correctionnelle

C — la récidive de contravention de police

III) La récidive cause de la relégation

I — Les conditions générales de la récidive punissable

Pour qu'il y ait récidive punissable il faut qu'il y ait:

A — Une première condamnation pénale définitive (non susceptible de voies de recours). Cette condamnation doit avoir été prononcée par un tribunal français.

Ainsi une infraction qui a abouti à un acquittement, une mesure de rééducation à l'égard d'un mineur (ce n'est pas une condamnation), ou une condamnation prononcée par un tribunal étranger ne constituent pas le premier terme de la récidive.

---

* Assistante à la Faculté de Droit de Paris.

[1] Ce principe a été consacré par le Code pénal dont l'article 4 dispose: «nulle contravention, nul délit, nul crime, ne peuvent être punis de peines qui n'étaient pas prononcées par la loi avant qu'ils ne fussent commis».

B — Il faut une deuxième *infraction* commise après que la condamnation concernant la première soit devenue définitive.

C — Il faut enfin qu'il y ait une certaine correspondance entre ces deux premiers termes:

1) en ce qui concerne *la nature* de l'infraction qui doit présenter une certaine similitude, sinon il n'y aurait pas de récidive.

2) en ce qui concerne *le délai* qui sépare les deux termes de la récidive. Ce délai varie selon les différentes hypothèses de récidive. Il devient de plus en plus court à mesure qu'il s'agit d'infractions moins graves et peut être perpétuel pour les infractions les plus graves.

II — La récidive cause d'aggravation des peines

A — La récidive criminelle

C'est celle qui a pour premier terme une condamnation à une peine criminelle et pour second terme un crime qui donne lieu à l'application d'une peine criminelle.

Cette récidive est *générale* (les deux crimes peuvent être totalement différents) et *perpétuelle.*

Effet de la récidive criminelle: elle permet d'augmenter la durée des peines prévues pour les délinquants primaires sauf s'il s'agit d'une peine perpétuelle qui ne peut être aggravée (en peine de mort, par exemple).

B — La récidive correctionnelle

Ce peut être ou bien:

— celle qui a pour premier terme une condamnation à une peine criminelle ou une condamnation à plus d'un an d'emprisonnement pour crime, et pour second terme une infraction punie d'une peine d'emprisonnement.

— celle qui a pour premier terme une condamnation à plus d'un an d'emprisonnement pour délit et pour second terme une infraction punie d'une peine d'emprisonnement *(grande récidive correctionnelle).*

— celle qui a pour premier terme une condamnation à moins d'un an d'emprisonnement pour délit et pour second terme un délit puni d'une peine d'emprisonnement *(petite récidive correctionnelle).*

Cette récidive est tantôt *générale,* tantôt *spéciale* (il doit s'agir de deux infractions à une même disposition) et toujours *temporaire* (la rechute doit avoir lieu dans le délai de 5 ans).

Effet de la récidive correctionnelle: la peine applicable sera plus élevée. Ou bien elle aura pour minimum et pour maximum le double de la peine normale, ou bien elle sera le double de la peine effectivement prononcée pour la première infraction.

C — La récidive de contravention de police

La récidive de contravention obéit à des règles particulières:

1) elle est *temporaire* (la rechute doit avoir lieu dans le délai d'un an).

2) elle est *spéciale*

3) elle est *locale* (car la preuve de la récidive ne résultera que de la consultation des archives du tribunal de police).

Ces trois sortes de récidive (criminelle, correctionnelle ou de contravention) peuvent naturellement se combiner avec les circonstances atténuantes, les circonstances aggravantes et les excuses légales, si bien que le juge conserve une très grande liberté d'appréciation pour fixer la durée de la peine.

III — La récidive cause de relégation

Pour les délinquants incorrigibles qui devenaient un fléau en France la loi de 1885 a institué une peine éliminatoire spéciale: la relégation. Il s'agissait à l'époque d'éloigner de France les individus dangereux; ceux-ci étaient donc tout simplement éloignés dans une colonie pour le restant de leur vie et ils y vivaient dans un état de liberté à peu près complète. Mais lâcher dans une colonie ces «relégués» et les y laisser sans ressources ni travail c'était les encourager à commettre de nouveaux crimes. Aussi très rapidement la relégation se transforma-t-elle en un *internement* à vie dans les pénitenciers coloniaux.

Des protestations s'élevèrent contre cette mesure que certains trouvaient trop rigoureuse et l'on cessa d'envoyer les relégués aux colonies dès 1936. Depuis, nos pénitenciers coloniaux ont été fermés et cela a complètement changé le visage de la relégation:

— à l'origine mesure d'élimination, elle est devenue une mesure de traitement (en France).

— à l'origine mesure obligatoire, elle est devenue facultative depuis 1954.

Examinons successivement: les cas de relégation, comment s'exécute actuellement cette mesure, et ce que vaut cette mesure.

A — Cas de relégation

Il faut:

— ou bien *deux* condamnations à des peines criminelles.

— ou bien *trois* condamnations dont une est une peine criminelle.

— ou bien *quatre* condamnations à des peines correctionnelles.

— ou bien *sept* condamnations dont un certain nombre contenues aux paragraphes précédents.

Ces condamnations doivent être intervenues dans un délai de 10 ans non compris le temps passé en prison.

Il s'agit d'une peine complémentaire qui s'ajoute à la peine principale. La relégation n'est pas applicable aux femmes, aux mineurs et aux vieillards. Enfin le Code de procédure pénale recommande au juge d'instruction de recourir à un examen médico-psychologique pour essayer de savoir si le délinquant présente un état dangereux incorrigible. La relégation étant en effet une peine *perpétuelle* il convient de s'entourer d'un certain nombre de garanties avant de la prononcer; il est vrai qu'en pratique elle est souvent réduite à un certain laps de temps (pour remédier à l'encombrement des prisons).

B — Exécution de la relégation

Elle comporte trois stades:

I) *Premier stade:* à l'expiration de la peine principale les relégués sont dirigés vers les centres de Saint-Martin de Ré et Mauzac. Mais le régime de ces établissements est si corrupteur que l'on n'y envoie même pas les condamnés qui ont bénéficié pendant l'exécution de leur peine principale d'un régime progressif appliqué dans les maisons centrales réformées.

II) *Deuxième stade:* c'est un stade d'épreuve au cours duquel les relégués sont transférés dans un centre d'observation. Le séjour y dure de 6 à 9 mois pendant lequel les relégués subissent l'action des éducateurs, de l'assistante sociale et d'un médecin psychiatre. Puis ils sont admis à «sortir» pour de courtes promenades, et enfin placés sous le régime de la semi-liberté.

III) *Troisième stade:* — ceux des relégués qui ont donné satisfaction au stade précédent peuvent obtenir leur libération conditionnelle. Celle-ci dure de 5 à 10 ans et pendant ce délai les conditions pour la libération conditionnelle peuvent être adoucies ou aggravées. Passé ce délai la révocation de la libération conditionnelle n'est plus possible.

— ceux des relégués qui n'ont pas donné satisfaction au stade précédent sont renvoyés dans des établissements spéciaux (Lure et Gannat) où l'on reçoit les anti-sociaux les plus redoutables. Si la conduite du relégué est satisfaisante il peut être envoyé à nouveau dans un centre d'observation pour bénéficier d'une nouvelle chance d'obtenir une libération conditionnelle.

C — Appréciation critique de la relégation

1° — L'Ancien Régime: la relégation dans les colonies n'a jamais eu aucun effet bienfaisant sur le condamné, mais au point de vue *élimination* cette formule a rendu d'importants service à la France en éloignant par milliers les malfaiteurs de profession.

2° — Le Nouveau Régime: il est incontestablement meilleur que le précédent en ce qui concerne l'amendement des relégués, et plus conforme aux conceptions criminologiques et pénitenciaires modernes. Mais il en est tout différemment du point de vue de l'élimination car chaque session dans un centre d'observation est à l'origine de nouvelles infractions et certains regrettent la relégation Outre-Mer au moins pour les malfaiteurs anti-sociaux.

Projet de réforme

Le régime actuel de la relégation ne correspondant plus du tout à sa conception originaire, un projet de réforme est à l'étude. Etant donné que les récidivistes n'appartiennent pas tous à la même catégorie de délinquants (alcooliques, caractériels, anormaux mentaux ou délinquants professionnels), il serait souhaitable de prévoir un éventail de peines applicable aux modes d'exécutions très divers plutôt que la peine unique actuelle.

Germany and the Habitual Criminal

Dr. Hermann Blei *

Criminal law in Germany governing the consequences of a criminal offence is founded on the dual track system. Side by side with retributive punishment based on the guilt of the accused, the law lays down specific "measures of safety and rehabilitation" which may be ordered by the Court to prevent the occurrence of a danger manifested by the act committed by the accused. Art. 20(a) of the Criminal Code contains provisions for an aggravation of the sentence (*infra* 2) in the case of a dangerous habitual criminal (*infra* 1) and Art. 42(e) empowers the Court to order protective custody (*infra* 3) as a measure of safety and rehabilitation.

(1) The term "dangerous habitual criminal," even if variously defined in legal theory and case law, essentially refers to a person who, as a result of a rooted propensity, has repeatedly committed crimes, and from whom, at the time of sentence, it may reasonably be expected that, because of this propensity, he will, in future, also commit offences likely to cause serious breaches of the peace. This judgment must be based on an overall examination of the record of the accused. In theory, three convictions are sufficient. However in practice, the courts only tend to consider a person a dangerous habitual criminal after numerous convictions. The number of offences which finally condemn a person as a dangerous habitual criminal would on an average be estimated as being nearer ten than five.

(2) If the accused is given an aggravated sentence on being condemned as a dangerous habitual criminal, this implies confinement to a penitentiary, which is the gravest form of punishment known to German criminal law. Maximum periods will depend on whether or not the offence committed carries with it a penitentiary term or not. The formal requirement, i.e. either two previous convictions carrying specific minimum sentences or a total of three, are laid down in Art. 20(a), sec. 1 and 2. These need not be more accurately described here as (*c.f. supra,* 1) a conviction as a dangerous habitual criminal ought in practice hardly to arise if only the minimum provisions are fulfilled. The provision has been criticized, and rightly so, by commentators as it makes imposition or otherwise of an aggravated sentence dependent not on the guilt but on dangerousness of the accused. However, the severety which in theory is imposed by law is mitigated by the fact that in practice a person is only sentenced

* Professor of Law, Juristische Fakultat, Freie Universitat — Berlin.

as a dangerous habitual criminal if, for the majority of convictions, he was served with sentences which bore out in full the aspect of guilt.

(3) On conviction as a dangerous habitual criminal the Court may, pursuant to Art. 42(e), order protective custody if it is in the interest of public safety. This will be done if, in the period after serving the sentence, the prognosis referred to in 2 *supra* indicates that the individual, because of his propensity, will still be inclined to crimes which would represent a serious breach of the peace. If such circumstances exist, the Court shall order protective custody. This would begin to run after the sentence has been served and will last as long as it is necessary to accomplish its purpose (Art. 42(f) sec. 1, and 3). However, the Court shall determine every three years (but may do so at any time) whether the purpose of the confinement has been accomplished. The Court may then order a discharge which would only amount to a conditional suspension of the confinement. This may be coupled with the imposition of special conditions and the suspension shall be revoked if the discharged person evidences by his conduct while he is at large that the object of the measure requires his renewed confinement (Art. 42(h) sec. 1).

Protective custody, insofar as its execution is concerned, is also a matter of some dispute. As it is not a punishment, but rather an imposition of deprivation of liberty on the individual in the common interest, a clear distinction must be drawn between its imposition and that of confinement in a penitentiary. However, this is not the case; all the more so because, up to the present time, there are no special institutions with executive authority which could undertake this particular task. Moreover, this may be one of the reasons why courts are reluctant to condemn an accused as a dangerous habitual criminal.

Not much can be said with certainty at the moment on the provision in a new *Criminal Code* which is now pending. The draft Code of 1962 is the subject of parliamentary discussion and expert advice, and, as the matter now stands, it is already certain that the new Code will be appreciably different from the draft.

1. The 1962 draft drops the special aggravation of sentence for dangerous habitual criminals. However, they would be dealt with under the general provision granting severer sentences for repeated recidivism (Art. 61). Protective custody as a measure of rehabilitation and safety shall be kept, (Art. 85) with the provision that at least one offence must have been committed after the accused had reached his 25th year. (This in point of actual fact was the practice in law and will continue to be.) Side by side with protective custody, the draft introduces a new measure, that of preventive detention (Art. 86) against young offenders, i.e. those committing themselves

before ending their 27th year. Among the requirements shall be that an overall evaluation of the offender and his past record indicate the danger that he will develop criminal propensities.

2. An alternative draft drawn up in 1966 by 14 German and Swiss teachers of Criminal law has attracted considerable attention. This ought to influence future legislation. It abandons the rather controversial preventive detention and reduces considerably the provision for protective custody contained in the present law and in the 1962 draft.

Australian Habitual Offender Legislation

Duncan Chappell *

Legislation relating to habitual offenders exists in each Australian State. While the general aim of this legislation is to provide the courts with power to sentence persistent criminals to periods of preventive detention, the methods adopted to achieve this aim vary somewhat from State to State.

In New South Wales, the Habitual Criminals Act of 1957 grants power to the courts to sentence on habitual offender to a term of preventive detention of not less than five years nor more than fourteen years. Before an offender becomes eligible for such a sentence, he must be of or above the age of 25 years and have, on at least two occasions, previously served separate terms of imprisonment for offences dealt with on indictment. An offender sentenced to a term of preventive detention may be released on licence after serving two-thirds of that sentence.

Persistent criminals in Victoria may be sentenced, under the provisions of the Crimes Act of 1958, to a maximum term of ten years preventive detention. Where any such sentence is passed, the courts are also required to fix a minimum term during which the offender is not eligible to be released on parole. To qualify as a persistent criminal in Victoria, an offender must be at least 25 years of age, stand convicted of an offence punishable with imprisonment for a term of two years or more, and have been so convicted on at least two previous occasions since the age of 17 years.

---

* B.A., LL.B. (Tas.), Ph.D. (Cantab.), Lecturer in Law within the Institute of Criminology at the Sydney University Law School.

The qualifications for and period of detention of persistent criminals are not as narrowly defined in the habitual offender legislation of the other States. In South Australia, the Criminal Law Consolidation Act of 1935-1952 permits a person, declared by a court to be an habitual offender, to be detained for an indefinite period at Her Majesty's pleasure. While no age limit is mentioned by the Act, before such a declaration can be made, an offender must stand convicted on information of an offence falling within a number of specified classes of crime (which include most types of offence against property and the person), and have been previously so convicted on at least three occasions (or two occasions if it is a sexual offence, wounding, poisoning or abortion) of an offence of the same class. When an habitual offender is released from preventive detention, he remains on licence for a further period of three years.

With the exception of the requirement that any previous conviction must be for an offence of the *same* class, the provisions of the Queensland Criminal Code dealing with habitual offenders are substantially the same as those contained in the South Australia Criminal Law Consolidation Act. In Western Australia, a person may, under the provisions of the Criminal Code of that State, be declared by a court to be an habitual offender if, being aged 18 years upwards, he stands convicted of any indictable offence not punishable by death, and has been previously so convicted on at least two occasions. Habitual offenders are detained during the Governor's pleasure in a reformatory prison. When released, offenders remain on licence for a further period of two years.

The Tasmanian Criminal Code provisions dealing with persistent criminals are, in substance, the same as those contained in the Western Australia Criminal Code.

While Australian courts undoubtedly possess sweeping powers to sentence persistent criminals to long periods of preventive detention, these powers appear in practice to be seldom exercised. While comparative statistics are not available to show the number of persons sentenced to preventive detention in each State, it seems that only three States (New South Wales, Tasmania and South Australia) still use this form of sentence, and one of these States (New South Wales) uses it very infrequently. It is known that sentences of preventive detention, and particularly those which are completely indeterminate, are not regarded with favour by Australian Prison Administrators. Their views have apparently influenced judicial opinion on the subject. It now remains to be seen whether members of State legislatures can be persuaded that there is a need to review Australian habitual offender legislation in the light of more advanced and humane methods of dealing with persistent criminals.

A Note on the Law and Practice Relating to Habitual Criminals in India

N. R. Madhava Menon *

As in every other country, recidivism is an important factor in the incidence of crime in India. In spite of several preventive and deterrent provisions in the Law,[1] the number of habitual criminals continued to increase posing difficult problems in the matter of prison administration and prevention of crime. Out of 475,059 convicts admitted to Indian jails in 1961, as many as 26,705 were prisoners with previous convictions.[2]

Definition and Classifications:

While a previous conviction is a necessary condition for classification as a 'habitual' under s. 75 Indian Penal Code (I.P.C.),[3] for purposes of jail administration, a wider definition is given in Jail Manuals and Prison Acts of the various States in India.[4] According to them the following persons shall be liable to be classified as "habitual criminals", namely: —

i) Any person convicted of an offence punishable under Chapter XII, XVI, XVII or XVIII of the I.P.C.[5] whose previous conviction or convictions taken by themselves, or with the facts of the present case, show that he habitually commits an offence or offences punishable under any or all of those chapters.

---

* M.A., B.Sc., LL.M., Lecturer, Faculty of Law, Delhi University.

1 The important among them are: S. 75 Indian Penal Code (I.P.C.), s. 110 and S. 565 Criminal Procedure Code (Cr. P.C.); Habitual Offenders Act and Habitual Offenders (Reform & Control) Act. (State enactments).

2 Statistical Abstract of the Indian Union (1965), Central Statistical Organization, Government of India, s. 33, Table 229.

3 However, the term "previous conviction" in this context would include an order to provide security under s. 118 read with s. 110 Cr. P.C.

4 For example, the Bombay Jail Manual (1955), The Manual for the Superintendence and Management of Jails in the Punjab (1963) etc.

5 The relevant Chapters of the Indian Penal Code discuss offences relating to Coin and Govt. stamps (Chapter XII), Offences affecting the human body (Chapter XVI); offences against property (Chapter XVII) and offences relating to documents and to property marks (Chapter XVIII). The reason why persons repeatedly convicted for other offences are excluded from the category of 'habituals' is that they are relatively minor offences not involving "such depravity of character as those punishable under the Chapters above specified" — Report of the Indian Jails Committee, (1919-20) Chapter VII.

ii) Any person committed to or detained in prison under c. 123 (read with s. 109 or s. 110) of the Criminal Procedure Code (Cr. P.C.).[6]

iii) Any person convicted of any of the offences specified in *(i)* above when it appears from the facts of the case, even although no previous conviction has been proved, that he is by habit a member of a gang of dacoits,[7] or of thieves,[8] or a dealer in slaves[9] or in stolen property.[10]

iv) Any member of a Criminal Tribe[11] subject to the discretion of the local Government concerned. The Jails Committee (1919-20) also held the view that members of Criminal Tribes are not necessarily to be taken as "habituals".

The proper authority to classify convicts as 'habituals' is the convicting court itself, and, on its failure to do so, the District Magistrate.

Preventive Measures:

The Criminal Procedure Code provides for preventive measures of two types against habitual offenders. Under s. 110, security can be taken for their good behaviour, while under s. 565, they can be ordered to be placed under police surveillance for a period extending up to five years in the event of their conviction for certain offences. The object of such proceedings is to deter and not to punish, and, as such, "a convict just released from jail is not, as a rule, to be put upon security until there has been a fair opportunity of judging whether the punishment he has already undergone is not in itself a sufficient deterrent against relapse into evil courses." Under s. 110 proof of habitual misconduct will ordinarily justify the conclusion that security is necessary, but the magistrate has a discretion, and only in deserving cases would he order for security.

Besides the above two measures, there are other preventive and remedial steps provided in legislation of different States.[12] Thus,

---

[6] Sections 109 and 110 relate to the circumstances under which security for good behaviour can be demanded from vagrants and suspected persons (s. 109) and habitual offenders (s. 110) — Section 123 prescribes the punishment for failure to give security.

[7] S. 400 I.P.C. makes "belonging to a gang of dacoits" an offence.

[8] S. 401 I.P.C. punishes for "belonging to a gang of thieves".

[9] S. 371 I.P.C. punishes habitual dealing in slaves.

[10] S. 413 I.P.C. punishes those habitually dealing in stolen property.

[11] Although a member of a Criminal Tribe is not necessarily a habitual offender, the presence of about five million of them in the country obviously makes the problem more complicated.

[12] Under Art. 246 of the Indian Constitution read with item 4 of List II (State List) and items 1 and 2 of List III (Concurrent List) Criminal Law and Procedure is a Concurrent subject in which Parliament and Stato Legislatures can legislate. Prison, reformatories, etc. are exclusively State subjects.

Restriction of Habitual Offenders (Punjab) Act, 1918 provides that an habitual offender may be restricted in his movements to a certain area or required to report himself at times and places in the manner prescribed in the Order. An order of restriction may be passed in the same circumstances in which an order for security for good behaviour may be passed. An order of restriction may be passed in addition to an order for security for good behaviour. The procedure to be followed in proceedings under this Act is substantially the same as that in proceeding under s. 110 Cr. P.C. Under the Bombay Habitual Offenders Act 1959, and the rules framed thereunder the State Government may, in lieu of an order of restriction made against any person, make an order directing such person to be placed in an industrial, agricultural or reformatory settlement established by the Government for a period not exceeding the period for which the order of restriction has been made. Again, the Punjab Habitual Offenders (Control and Reform) Act of 1952 provides for registration of habitual offenders and for their reformation. Similar legislative measures have been adopted in other States of the Indian Union with minor changes here and there.

The general judicial practice in dealing with habitual offenders is to award a moderate sentence coupled with an order under s. 565 Cr. P.C. or an order of restriction under the Habitual Offenders Act and avoid imposition of long terms of imprisonment. An order of restriction is especially adopted in the case of habitual offenders who are not in a position to furnish security and in whose case an order for security under s. 110 Cr. P.C. would necessitate their commitment to Jail.[13]

Punitive Measures:

The neo-classical theory that the problem of recidivism could be met by enhanced sentences finds its place in s. 75 of the I.P.C. which reads:

> 75. Whoever, having been convicted, — *(a)* by a Court in India of an offence punishable under Chapter XII or Chapter XVII of this Code with imprisonment of either description for a term of three years or upwards, shall be guilty of any offence punishable under either of these Chapters with like imprisonment for the like term, shall be subject, for every such subsequent offence to imprisonment for life, or to imprisonment of either description for a term which may extend to ten years.

This section, which has been sparingly used in administration of Criminal Justice, imposes a liability to enhanced punishment on

---

13 *Vide* Rules and Orders of the Punjab High Court, Vol. III, Chapter 23.

the ground that the punishment undergone by the person had had no effect in preventing a repetition of the crime. From the Judicial interpretation of s. 75, the following formulation may be made:

i) Enhanced punishment not obligatory in every case of this description: Ordinary cases of a petty nature should not be made the basis for enhanced punishment, unless the nature, number and sequence of previous convictions and the sentences previously undergone clearly show the necessity of enhanced punishment. The general principle to be borne in mind is that s. 75 is meant to be used as deterrent only when the puuishment provided for the offence itself is considered to be inadequate in view of the antecedents of the offender. Recourse should not be had to the section unless the previous convictions indicate a criminal habit or instinct which needs to be checked by a punishment higher than that provided for the offence.[14] Similarly, very old convictions do not necessarily mean that the convict is a habitual criminal.[15]

ii) S. 75 does not apply to previous convictions for attempts to commit an offence, not specially made offences in Chapter XII and XVII of the Code.[16]

Following the recommendation of the Indian Jails Committee, (1919-20) rules were framed whereby habitual criminals are segregated and confined in special jails or settlements as far as possible. They are not generally employed as convict officers and are liable to hard labour and strict prison discipline.

Experience has shown that by sending the habitual offender to the prison for long periods or by keeping him under strict police surveillance the problem cannot be solved. The jail sentence, the attendant social stigma and ostracism, and the disastrous effects of police supervision and surveillance put a released convict in a state of total demoralisation in which the chances of his relapse into evil ways are more than his adopting a law-abiding path. A progressive, enlightened penal policy with emphasis on reformatory and rehabilitative measures might go a long way in reducing the evil of recidivism. The system of "Open Jails" now being tried in the States of Rajastan, Uttar Pradesh and Kerala is said to be a remarkable step in this direction.

---

[14] A.I.R. 1937 Madras 231; A.I.R. 1947 Madras 386; 1965 Cr. L.J. 1235.
[15] 38 Cr. L.J. 484.
[16] A.I.R. 1942 Madras 521.

Responsibility of Recidivists under the Penal Legislation of the USSR and Union Republics *

Reader I. M. Galperin **

1. Current penal legislation in the USSR imposes a higher degree of responsibility on persons who repeat or recurrently commit a crime.

Under Article 34 of the Foundations of Penal Legislation in the USSR and the Union Republics (1958),[1] an aggravating circumstance to be taken into account by courts when imposing sentence is "commission of a crime by a person who has previously committed a crime of any sort". Classification of this as an aggravating circumstance is grounded on the fact that the criminal persists in his refusal to submit to the requirements of the law.

The penal codes of the Union Republics cite a number of cases where repeated or recurrent commission of crime is viewed as an aggravating circumstance. Thus, for example, under Article 144 of the Penal Code of the RSFSR,[2] theft of the personal property of citizens, when committed by an individual for the first time and in the absence of aggravating circumstances, is punishable by deprivation of liberty for a period up to two years [3] or corrective labour for not more than one year. Theft of personal property committed a second time is punishable by deprivation of liberty for a period up to five years.

Similarly, repetition of the offence is an aggravating circumstance in deliberate murder, brigandage, robbery, riotous behaviour and a few other crimes.

2. Soviet penal legislation does not contain any specific provision of general scope, establishing the responsibility of recidivists. However, in Article 23 of the Foundations of Penal Legislation in the USSR and Union Republics, reference is made to the greater degree

---

* Translated from the original by Berlitz Schools of Languagues of Canada Ltd.

** Senior Scientific Collaborator at the All-Union Institute of Research into the Causes of Crime and Means of Crime Prevention.

[1] Collected laws of the USSR and Decrees of the Presidium of the Supreme Soviet of the USSR 1938-1961, Izvestiya Publishing House, Moscow, 1961, page 728.

[2] Penal Code of the RSFSR, Yuridicheskaya Literatura Publishing House, Moscow, 1966, pages 51-52.

[3] Under Article 24 of the Penal Code of the RSFSR, the minimum period of deprivation of liberty is three months.

of guilt of persons cited in a court decision as particularly dangerous recidivists (concerning the concept of a "particularly dangerous recidivists", see below).

At the same time, the enhanced responsibility of persons already convicted of certain crimes, who repeat the same crimes, is established in several articles in the special section of the penal codes of the Union Republics. Article 130 of the Penal Code of the RSFSR, for instance, enacts heavier penalties for slander on persons previously convicted of this offence.

3. Article 23 of the Foundations of Penal Legislation in the USSR and Union Republics provides that deprivation of liberty as a penalty inflicted on a person convicted of crime by a court "is established for a period not exceeding ten years, and — for particularly grievous crimes committed by particularly dangerous recidivists in the cases provided by the legislation of the USSR — not exceeding fifteen years."

The provision contained in Article 23 of the Foundations of Penal Legislation is not to be understood as meaning that a person recognized by a court as a particularly dangerous recidivist may be sentenced to deprivation of liberty for a longer period than that sanctioned by the article of the penal law which the court finds him guilty of violating. In contrast to the penal codes of certain foreign States, which envisage the possibility of increasing a recidivist's sentence beyond the upper limit of the law, Soviet penal legislation does not recognize the right of courts to impose a harsher sentence on a particularly dangerous recidivist than the law provides. Deprivation of liberty for a period of more than ten, but not more than fifteen, years may be passed on a particularly dangerous recidivist, if he is convicted under a penal law which provides for the penalty of deprivation of liberty for a period in excess of ten years, or where, under Article 36 of the Foundations of Penal Legislation, he is sentenced for several previous convictions. However, even in this case the maximum penalty cannot exceed fifteen years' deprivation of liberty.

The concept of a particularly dangerous recidivist has been formulated, not in All-Union law — the Foundations of Penal Legislation in the USSR — but in the penal codes of the Union Republics.[4]

According to Note 1 in Article 24 of the Penal Code of the RSFSR and the relevant articles of the penal codes of other Union Republics,

[4] It should be noted that views (which are shared by the author of these lines) have been expressed in Soviet legal literature in favour of incorporating a single definition of the particularly dangerous recidivist in All-Union penal legislation.

a criminal may be pronounced a particularly dangerous recidivist if he has previous convictions for serious crimes such as, for instance, particularly dangerous crimes against the State, intentional murder, brigandage, infliction of grievous bodily injury, rape and others, and has repeated any of these crimes. A criminal may also be pronounced a particularly dangerous recidivist if he has two or three previous convictions for other, relatively less serious, offences than the aforesaid, of which an exhaustive list is provided in the law,[5] and repeats any one of these crimes.

Finally, a person may be declared a particularly dangerous recidivist who, while serving a sentence of deprivation of liberty at his place of sentence, commits a deliberate crime.

It must be stressed that declaration of a criminal to be a particularly dangerous recidivist at the time when the aforesaid combinations of sentences for concrete crimes takes place, is a right, and not an obligation, of the court.

In Note 1 to Article 24 of the Penal Code of the RSFSR and the relevant articles of the penal codes of other Union Republics, it is stated that "the court, in considering the question of declaring a person a particularly dangerous recidivist, shall take into account the nature and degree of public danger of the crime committed, the character of the offender and the circumstances of the case".

Declaration of a person to be particularly dangerous recidivist may only be effected by a court at the time of pronouncing sentence.

Drawing the attention of courts to the need for a differentiated approach to the question of pronouncing offenders particularly dangerous recidivists, the Supreme Court of the USSR declared in a Decree of the Plenum, dated July 3, 1963, that "courts must proceed on the premise that in Law only malicious criminals who represent a major danger to society and persistently refuse to accept the path of correction, may be pronounced particularly dangerous recidivists".[6]

Declaration of a person to be a particularly dangerous recidivist entails the following legal consequences:

1. Particularly dangerous recidivists serve their sentences in the form of deprivation of liberty in a special-regime corrective labour colony or prison (Article 23 of the Foundations of Penal Legislation in the USSR and Union Republics, Article 2, clause (g) of the Decree of the Plenum of the Supreme Court of the USSR, dated January

---

[5] This group includes crimes such as theft, robbery, fraud, malicious hooliganism, etc.

[6] Collected Decrees of the Plenum of the Supreme Court of the USSR 1924-1963, Izvestiya Publishing House, Moscow, 1964, page 175.

19, 1961, "Concerning the procedure to be followed by courts in defining the type of corrective labour colony for persons condemned to deprivation of liberty.").[7] The regime under which sentences are served in a special-regime corrective labour colony is more severe than in the corrective labour colonies in which other prisoners undergo deprivation of liberty.

Under Article 23 of the Foundations of Penal Legislation particularly dangerous recidivists who have served not less than half their prison sentences, provided their behaviour is exemplary, may have their imprisonment commuted by order of the court to confinement in the colony. Under Article 6 of the above-mentioned Decree of the Plenum of the Supreme Court of the USSR, dated July 19, 1961, particularly, dangerous recidivists who have completed nos less than half their sentence in special-regime colonies, may, subject to exemplary behaviour and a conscientious attitude to their work, be transferred by decision of the court to strict-regime corrective labour colonies where the conditions are milder in comparison to the special-regime colonies.

2. Particularly dangerous recidivists do not qualify for remission of sentence ahead of time or substitution of a milder sentence. (Article 44 of the Foundations of Penal Legislation in the USSR and Union Republics).

3. Following release from their place of sentence, persons pronounced particularly dangerous recidivists are subject to administrative supervision, which is exercised for the purpose of observing their conduct, forestalling criminal activity on their part and exerting the necessary educative influence on them. This supervision is exercised by organs of the Milita pursuant to, and in conformity with, the "Decree concerning the administrative supervision of persons from places of deprivation of liberty by organs of the Militia" endorsed by decree of the Presidium of the Supreme Soviet of the USSR, dated July 26, 1966.[8]

---

[7] *Idem*, page 214.

[8] Bulletin of the Supreme Soviet No. 30 (1324) of July 27, 1966, Publishing House of the Supreme Soviet of the USSR, Moscow.