
Research on the Special Recidivism in the Criminal Law of the People's Republic of China

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Introduction

The Special Recidivism is an important part of Chinese criminal law system. It is an important part in punishing the most dangerous crimes and protecting our precious social values. In 2011, the People's Assembly passed the Eighth Amendment ("The Amendment") to the Criminal Law of the People's Republic of China ("The Criminal Law"), this amendment expanded the scope of the Special Recidivism clause[1]. In the Eighth Amendment, it categorized three types of crimes into the provision of Special Recidivism, namely: Crimes that endanger national security; Terrorism and Organized Gangsterdom. Several critics to the amendment has been made[2].

The Amendment failed to specify the specified crimes. Though it has three categories of crimes within its scope, the question then comes to be what specific crimes shall constitute such offenses? Giving all three of them are relatively abstract concepts with high potential of expansion, where is the outer limit? Since Special Recidivism clause is only applicable at the second conviction of the same kind of crime perpetrated by the same convicted, the determination of the character of the crime is crucial.

The Amendment seemed not to be consistent with other parts of the Criminal Law. The Special Recidivism clause on its construction, works as a supplement to the Regular Recidivism Clause. But it failed to address concerns about "Reconvictions" in Drug related Crimes. In the Criminal Law, there is a special wording for those who are reconvicted for drug related crimes. The specific wording "Reconviction" as opposed to "Regular Recidivism" seems to denote that the legislature want a specific treatment for Drug Related crimes. But in practice, this different treatment along with the Amendment seems to be conflicting with each other when Drug related Crimes are in fact in furtherance or in correlation of the crimes included in the Amendment. It is not clear in such conflicted situation which law should prevail.

Part I. The Applicability of the Special Recidivism

To understand the applicability of the Special Recidivism Clause, it is important to understand the scope of the crimes condemned by it. Terrorism law is a new thing to China and not much steps had been taking by the legislature, thus ambiguities and conflicts arise. For Endangering National Security crimes and Gangsterdom Crimes, these crimes are relatively more mature and easy to go along with.

I. What is a Terrorism Crime?

Criminal Law though referenced to Terrorism Crimes in several Provisions such as Provision 120 and Provision 191[3]. But never the less, the Criminal law did not specify its concept and its identification standard. In 2011, in its 23th conference, the National People's Congress of the People's Republic of China first defined terrorism[4]. But there are two major problems with this definition. First, this order served more as a inter department procedural guide rather than a legislature made law. Under current system, the Courts may sometimes refer to such definitions but still they may nevertheless develop their own theory about what criteria is needed to constitute terrorism. Secondly even if, though highly unlikely, the courts fully relied on such definition, it is still too ambiguous to be put in daily use. Terrorism crimes are changing their form all the time, there could be literally no definite description of such crimes.

This has remained unexplained by the Supreme People's court but the legislature had been active in this field. The Anti-Terrorism Law of People's Republic of China had just been ratified by the Standing Committee of the 12th National People's Assembly[5]. In its provision 3, it describes what terrorism is and described five categories of terrorism actions. This law will become legally binding on January 1st, 2016. Though this law is not a part of the Criminal Law, but as a parallel statute, I expect that courts will heavily if not exclusively rely on the descriptions provided by this law. This new Anti-Terrorism law seemed to have solved the practical difficulty previously existed for applying the Special Recidivism to terrorism crimes, but since it is yet to be actually used in the courts, how well it would work out is still a myth.

As stated earlier about the Endangering Public Security crimes, in the Criminal Law, these crimes involve hijacking airplanes, explosions, robbery of guns and ammos and all such crimes that potentially extremely harmful to unspecified group of people. These crimes sounds familiar right? By reading through Provision 114 to Provision 125, there are all kinds of actions that terrorists would typically implement. Thus, it seemed to me that there is a conflict between Criminal Law and the Anti-Terrorist Law in this regard. People who are convicted for Endangering the Public Security would not be subject to the harsher punishment provided by the Special Recidivism Clause while the same crime if defined as Terrorism would.

The Anti-Terrorist Law is theoretically a specific law when compared to the Criminal Law. That means the Criminal Law then become a relatively general law. In interpreting laws, we want to make sure the provisions would not be strike out in both statues and conflicts to be solved in favor of the specific law. Thus, one way to reconcile the conflict is by interpreting the Anti-Terrorist Law as mens rea requirements and the Endangering Public Security provisions as actus reus requirements when a potential terrorism actions is at bar. But there is another curtail flaw where the Anti-Terrorism Law is not a penal code in nature giving that it is actually a law regulating and authorizing the national power in dealing with such terrorism acts. Article 9 of the Anti-Terrorism Law has some liability clauses but all the subject of these liabilities are people acting under official capabilities. An interesting twist right.

So theoretically, the Anti-Terrorism is just a somewhat related law that can provide reference to the Criminal Law but it was neither intended by the Legislature to act like a penal code nor by its construction can be interpreted as a penal code. But it can always work as the last resort and giving the fact that it is the only codified law which has a definition of terrorism, it will continue to have a say in this area of Criminal Law. Because even if future Criminal Law amendments should add anything more specific about terrorism to it, the legislature would probably follow Anti-Terrorism law's description in order to maintain uniformity.

II. Gangsterdom and Endangering National Security

Provision 294 of the Criminal Law provides that: Gangsterdom means organizing, leading and actively participating actions that uses violent, threat or any other actions to carry out illegal organized actions. This description focuses on the organization character of the Gangsterdom. There are three specific charges provided by the Criminal Law in relating to Gangsterdom, meaning: organizing, leading and participating Gangsterdom; indulging Gangsterdom or harboring Gangsterdom; international Gangsterdom trying to establish in China. But indulging and harboring Gangsterdom may not be a crime where Special Recidivism is applicable given that this crime does not condemn any directly dangerous actions but rather, it condemned Gangsterdom through an indirect way by punishing those who indulged or harbored such actions. This actions though is regulated under the Gangsterdom provision, but it actually does not bear the organized character of Gangsterdom crimes. The intention of punishing Gangsterdom crimes is that by its organized nature, these crimes are capable of repeating to happen. Often times it is just an individual action.

On the other hand, Provisions 102 to 113 provides a definite description of crimes that are Endangering to National Security. These crimes are practically ease to characterize and as long as the

courts follow the original recipe, they would have much trouble applying the Special Recidivism Clause.

Part II. Conflicts within the Criminal Law

Given the fact that the Special Recidivism is a new law, and we have already seen that there are multiple difficulties in the applicability of the law

I. Conflicts with Re-Convicted for Drug Crimes

Drugs related crimes are Regulated in Part II, Article 6, Section 7 from Provision 347 all the way to Provision 357. Among them, Provision 356 provides that: those who had been convicted previously for manufacturing, sale, transportation, smuggling, and illegal possession of drugs, if is reconvicted for any of the crimes with in Section 7, should be punished at the higher limitation.

This provision thus is in a way not consistent with the Regular Recidivism Clause and it assembles the Special Recidivism Clause in this regard. Then, what is the relationship between these three clauses?

By looking at the Criminal Law itself, it is divided into two parts. The Part I of the Criminal consists of general principles. In this section, the Criminal Law set up the basis structure of the entire statutes. Part II provisions provide definitions and punishments of specific crimes Thus, provisions in this part serves as general guidance to provisions in Part II. If ever there is a direct conflict between any two clauses within each part, the law should be interpreted in favor of Part I.

But here, we do not have a direct conflict. Provision 336 only provides a more stringent punishment than Provision 66 as before the Amendment. Despite where Provision 336 is located and only look at the wording of the statute itself, it has the identical function as the Special Recidivism Clause. Though a harsher punishment for Provision 336 is achieved directly by itself and Special Recidivism Clause need to rely on other provisions to achieve the same effect as analyzes in above. But never the less, despite the technical interpretation by looking at where the clause is located, the Re-convicted Drug Crime Clause is just another exception to the Regular Recidivism Clause same as how Special Recidivism Clause works. Then the better approach is just leave it be and no need to further complicate the analysis.

II. Are Minors Subject to Special Recidivism Clause

Traditionally, minors are excluded from the application of Regular Recidivism Clause.

Provision 17 of the Criminal Law states that: people of no less than 16 years old should take criminal responsibility. For those who are between 14 and 16 year old, should be responsible if they are convicted for intentional murder, intentional battery leading to death or severe bodily harm, rape, robbery, sale of drugs, arson, explosion, poison; for those who are between 14 years old and 18 years old, should receive a punishment at the lower limit or blow the lower limit

Provision 65 after the Amendment excluded minors under 18 years old from the application of Regular Recidivism.

But, the interesting thing is that in Provision 66, either before or after the Amendment, does not address the question of whether or not minors are capable of being the subject of Special Recidivism. I do hold the view that minors are not eligible for the application.

Firstly, although all three provisions are within the Part I of the Criminal Law, they are all general principles. But as analyzed above, the Special Recidivism is not a independent clause, its existence is heavily relying on the existence of the Regular Recidivism Clause. Thus, by its plain wording, although it excluded the three categories of crimes from the application of Regular Recidivism Clause. But this exclusion is not trying to establish a new rule, rather it is intended to impose harsher punishment above and beyond the Regular Recidivism Clause. Thus, the Special Recidivism Clause is an add-on rather than cut off. That explained why Provision 66 neglected to mention the age limitation because it is supposed to

be applied within the boundaries of Provision 65. Thus, the limitation is still applicable to the Special Recidivism Clause.

Secondly, a policy argument can be made. Provision 17 is a strong evidence of showing that the legislature intends to take a merciful approach to minors. This is also supported by several other provisions such as Provision 49 where death sentence should not be applicable to the defendant when at the time of the crime, the defendant is younger than 18 years old. And Provision 29 provides that inducing a minor to criminal act should be punished at the higher limit. Thus without evidence of changing the merciful view, it is safe to assume that the legislature would want to maintain such practice. An evidence in favor that Provision 66 is not applicable to minors.

III. Conclusion

The Special Recidivism is relatively a new law and an attempt for the legislature to enhance the overall quality of the Criminal Law. But undeniably, there are issues about the theoretical construction, the applicability and conflicts with pre-existence law.

In my opinion, this Criminal law had only been in existence for less than 40 year since 1979, and the crimes the Special Recidivism Clause is dealing with are relatively new concepts to the legislature, especially the Gangsterdom crimes and the Terrorism crimes. The Special Recidivism Clause is only the beginning and there is still a long way ahead.

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