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The Meaning of Recidivism in Terms of Criminalistics Practice

Znaczenie recydywizmu w kontekście praktyki kryminalistycznej

Abstract

In the article, authors discuss selected specifications of conducting the investigation of a crime committed by a repeat offender. They also focus on the relevance of criminological knowledge for repeat crime investigation practice and, vice versa, on the importance of knowledge derived from the investigation of such cases for criminology as well as for crime prevention as such.

Keywords: recidivism, criminalistics, criminal knowledge, criminal experience, investigation, offender

Abstrakt

W artykule omówiono wybrane aspekty charakterystyczne dla prowadzenia śledztw w przypadku przestępstw popełnianych przez recydywistów. Autorzy skupiają się na znaczeniu wiedzy kryminologicznej w praktyce śledczej w sprawach z elementem recydywy i odwrotnie – na kluczowej roli wiedzy zdobytej w trakcie takich postępowań dla rozwoju kryminologii oraz w zakresie zapobiegania przestępstwom.

Słowa kluczowe: recydywa, kryminalistyka, wiedza kryminalna, doświadczenie kryminalne, śledztwo, przestępca

Introduction

Recidivism can be characterised in simple terms as a re-offence committed by a person who has already been convicted of or punished for another crime.

The phenomenon undoubtedly has a serious impact on the field of criminal law. At the same time, the issue has societal overlaps, as it is perfectly understandable that it is in the interest of every society that criminal activities be as rare an occurrence as possible and that their perpetrators be punished effectively. The latter means that the penalty should contain both an element of punishment for the crime committed (retributive theory of punishment) and an element of rehabilitation, whereby the offender is to be re-educated during the execution of the sentence so that after serving it they lead a stable life and avoid returning to a criminal path, i.e. so that they do not engage in crime again and thus do not become a so-called "criminal."

The study of recidivism, its causes and possible ways to prevent it is chiefly the domain of criminology. The knowledge gained in this field of non-legal science is then reflected on the level of criminal law and may have an impact on legislative activity. Some common examples are the introduction of new types of punishment, the modification of the manner in which certain punishments are executed, as well as special punishment of recidivism, whether in the form of a general aggravating circumstance or a special, qualified offence.

In this article, however, we will abandon this classical conception of recidivism as a criminological problem and focus on this phenomenon through the lens of criminalistics. The investigation of crimes committed by repeat offenders has many unique features. In practice, operative search means are used more frequently, and criminalistics experts focus more on the environment (or subculture) in which the offender functions during the investigation of a given case. Individual procedural acts also display specific features; among these, it is worth mentioning the interrogation step. The way in which a first-time offender is interrogated differs in many ways from the manner of questioning a repeat offender, and this is reflected in the tactics used during the interrogation.

Recidivism and different perspectives on it

At this point, it is necessary to define the concept of recidivism so that it is clear how this term is understood and what the point of refence is for each of the following interpretations.

To begin with, it bears pointing out that the concept of recidivism does not have a uniform definition, or rather, that the definition depends on the point of view from which the concept is viewed. Criminal law, criminology or penology all have their own definitions of recidivism. While the substance of these conceptualisations is identical at the core, they differ, in particular, in the breadth of their scope. In our opinion, it is also possible to consider the definition of recidivism from the point of view of criminology, since this discipline also deals with this concept.

Criminal law view

Recidivism plays a significant role in criminal law. Not only is it a phenomenon that is endowed with a higher degree of social harm as provided for in Article 12(2) of the Criminal Code,[1] but it is also often a feature of certain, particularly qualified, offences.

Despite the above, the concept of recidivism is not defined in the law *expressis verbis*. We can therefore stick to the doctrinal definition given by Kratochvíl: "Retroactivity (recidivism) is understood as cases in which an offender commits a crime although they have been previously convicted of the crime."[2] Thus, in criminal law terms, the key aspect is that the offender has already been convicted of the offence or that the sentence imposed has been at least partially served.

In the context of the above definition, it is necessary to distinguish between true and false recidivism. True (real) recidivism occurs when an offender has been convicted in a final judgement (and has served or at least begun to serve the sentence) and subsequently commits another offence. In contrast, false recidivism refers to a situation when, despite previous conviction, the offender commits another offence at a time when the judgement has not yet become final. The above distinction has certain practical consequences, since the Criminal Code provides only for true recidivism, either as a general aggravating circumstance or as a feature of an offence. This does not mean, however, that false recidivism is without significance. On the contrary, even these cases are indicative of the offender's attitude towards the crime they have committed and their approach to rehabilitation; therefore, false recidivism may be considered an aggravating circumstance not mentioned in the law.

The law often operates with the diction "commits the offence again" or "in the last three years," by which the legislator means true recidivism as defined above.

Criminology view

Criminology is the field in which the term "recidivism" is most often encountered. This non-legal science under criminal law operates with the concept both in relation to the correction of offenders and to crime prevention, since knowledge of the reasons why some offenders reoffend is very important in this context.

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[1] Act No. 40/2009 Coll., *Zákon trestní zákoník*, as amended, February 9, 2009. Hereinafter referred to as the "Criminal Code."

[2] Vladimír Kratochvíl a kolektiv, *Trestní právo hmotné. Obecná část* (C. H. Beck, 2012), 405.

Criminologists themselves are aware that the concept of recidivism may be subject to different interpretations.[3] According to Gřivna, "the criminological concept of recidivism is based on the one from criminal law, but it is somewhat broader."[4] As the scholar argues, the criminological notion of recidivism refers to the re-commitment of a crime regardless of whether the offender has been convicted or at least prosecuted for a previous crime.

It is therefore clear that the criminological concept is the broadest among all the existing formulations of recidivism. The principle of the presumption of innocence arising from Article 2(2) of the Code of Criminal Procedure states that "until a final conviction has been handed down by a court, the person against whom criminal proceedings are brought cannot be regarded as guilty."[5] It should be noted, however, that this principle has its application primarily in criminal proceedings, where its observance has great importance and constitutes one of the elements of the right to a fair trial. Outside of this context, however, it is very often not observed, a typical example being the activities of the media, which often prejudge a particular person as the perpetrator, even though the conviction has not yet been handed down or has not yet become final.[6]

Marešová offers another definition of recidivism, which, in our opinion, better captures the meaning of this concept for criminology, and especially for criminological research and many other investigations. She states that we perceive recidivism "in the criminological sense (also sometimes referred to as criminological-behavioral), i.e. as a repetition of antisocial behavior (not only criminal) and as a continuation of a criminal career."[7] As she further states, "the criminological concept of recidivism thus includes a re-offense (misdemeanor, infraction, felony, serious antisocial act), regardless of whether the offender has been convicted or punished for the previous offense (misdemeanor, infraction, felony, serious antisocial act), or whether the offender has been prosecuted at all."[8]

Marešová's definition aptly captures the essence of why the phenomenon of recidivism is so important for criminology – it is perceived as a form

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[3] For more on this, cf. e.g. Tomáš Gřivna et al., *Kriminologie* (Wolters Kluwer ČR, 2019), 109.

[4] Gřivna et al., *Kriminologie*, 109.

[5] Act No. 141/1961 Coll., *Zákon o trestním řízení soudním (trestní řád)*, as amended, December 12, 1961. Hereinafter referred to as the "Criminal Procedure Code" or "CPC."

[6] Marek Fryšták and Eva Brucknerová, "Princip presumpce 'viny' v médiích a při činnosti orgánů činných v trestním řízení." In Jiří Jelínek a kolektiv, *Ochrana základních práv a svobod v trestním řízení* (Leges, 2020), 82–93.

[7] Alena Marešová, "Problémy recidivy v kriminologické literatuře a kriminologickém výzkumu," in Alena Marešová et al., *Kriminální recidiva a recidivisté (charakteristika, projevy, možnosti trestního soudnictví)* (Institut pro kriminologii a sociální prevenci, 2011), 10.

[8] Marešová, "Problémy recidivy," 10.

of socially undesirable, anti-social behaviour, where an individual repeatedly violates certain (public) norms. In this understanding, it is irrelevant whether the act is a crime or a misdemeanour, and whether or not the perpetrator has been convicted or at least prosecuted.

Criminology is primarily concerned with the question of why an offender commits crime and why they do so repeatedly, examining what factors influence them (e.g. family, schoolmates, the area in which they grew up, etc.). On the basis of these findings, it then focuses on various forms of prevention, both individual and general. The so-called tertiary prevention[9] applies to repeat offenders and refers to situations where preventive action is taken against those who have previously committed a crime or engaged in other socially harmful behaviour.

Penology view

The penological perspective on the issue of recidivism has already been roughly outlined. Nevertheless, it is appropriate to set it out in more detail in order to make visible the differences between this concept and the interpretations used in criminal law and criminology.

Penology can be defined as a science "that deals with the actual administration of punishment and protective measures and can include the field of alternative sentencing."[10] Simply put, then, it is the doctrine of discipline and punishment. The purpose of punishment is to protect society from crime, which is essentially the same purpose as that of criminal law. If an offender reoffends despite having been punished previously, it is clear that the purpose of punishment, and the purpose of criminal law as such, has not been fulfilled. Therefore, considerable gravity must be assigned to such conduct, and its causes must be eliminated. Penology focuses, among other things, precisely on ensuring that punishments are effective and appropriately individualised, thereby reducing the risk of the offender's recidivism.

Through the prism of penology, or more specifically penitentiary science,[11] the view on the phenomenon of recidivism is that anyone who re-offends on a crime committed in the past, or is serving a second or another prison sentence, is considered a recidivist.[12]

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[9] On this concept, cf. e.g. Gustáv Dianiška, *Kriminologie* (Vydavatelství a nakladatelství Aleš Čeněk, s. r. o., 2011), 132.

[10] Gřivna et al., *Kriminologie*, 179.

[11] Penitentiary science can be understood as the study of the administration of imprisonment.

[12] Gřivna et al., *Kriminologie*, 109.