

# Criminal Sanctions Against Recidivists in Turkish Penal Law\*

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## Abstract

This study aims to analyze and explain the issue of recidivism which refers to repetition of criminal behaviour by the same offender, within the context of the Turkish Penal Code of 2005 which approaches recidivists differently, as opposed to the former Penal Code. The differences will be dealt within the study.

**Key words:** Recidivism, recidivist, recidivism period, general recidivism, special recidivism, aggravated special recidivism, safety measures, supervised release, special execution regime.

## I. Introduction

Since the formation of the Turkish Republic, Turkey has undergone two penal codes. Although these codes both have dealt with recidivism, the conception and consequences of recidivism have severely varied between these two codes. This study aims to compare these treatments and shed light on the differences between them.

To point out significant differences, it can be said that recidivism used to be an institution that aggravated penalties for the repeat offender. In the current application, however, it is considered as a safety measure. The reason is that recidivism is based on the dangerousness of the crime. This is exactly what our current penal law bases safety

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\* This study was presented at the Bosphorus Seminar-Comparative Law Criminal Law Workshop (Turkish, German and Hungarian Criminal Law), 20-27 June 2014, at University of Istanbul, Faculty of Law and not peer- reviewed.

measures on. Also, in the previous system, different classifications of recidivism were accepted and the result/penalty varied in accordance with the type of recidivism. Within the current system, however, the type of recidivism has little to no role on the penalty decision. (As a matter of fact, currently, recidivism is a safety measure and does not directly affect the penalty. It only leads to a special execution regime.)

## II. Concept of Recidivism

Recidivism is not defined in the Turkish Penal Code (which entered into force in 1st of June 2005). Though, in the justification of the code, recidivism is defined as '*committing a crime after the finalization of the verdict given as a result of the previously committed crime.*'<sup>1</sup> Artuk/Gökçen/Yenidünya define recidivism as '*the situation of the perpetrator of another crime following a criminal conviction*'<sup>2</sup> Koca/Üzülmez define recidivism as '*someone committing a crime after either conviction for a previous crime or the execution of the punishment that occurred due to the previous crime.*'<sup>3</sup> Zafer defines recidivism as '*the situation of committing another crime after committing a crime and facing final conviction*'<sup>4</sup>. Günay asserts a slightly different definition by stating: '*recidivism is the situation in which one or more crime are committed again, during the time period stated by the code, after execution or quashing of the penalty*'<sup>5</sup>

Legists have asserted various theories<sup>6</sup> to explain the essence of recidivism; some explaining it as a penal law institution, some not.

<sup>1</sup> This statement confirmed that finalization of the verdict was enough to constitute recidivism and put a stop to the previous debates regarding this issue.

<sup>2</sup> Mehmet Emin Artuk, Ahmet Gökçen & Ahmet Caner Yenidünya, *Ceza Hukuku Genel Hükümler*, 3rd Edn., Turhan Kitabevi, Ankara, 2007, p. 1030.

<sup>3</sup> Mahmut Koca & İlhan Üzülmez, *Türk Ceza Hukuku Genel Hükümler*, 6th Edn., Seçkin Yayıncılık, Ankara, 2013, p. 598.

<sup>4</sup> Hamide Zafer, *Ceza Hukuku Genel Hükümler (TCK m. 1-75)*, Beta Yayınları, 2nd Edn., İstanbul, 2011, p. 548.

<sup>5</sup> Erhan Günay, *Cezada Tekerrür Uygulaması (Pratik)*, Adil Yayınevi, Ankara, 1996, p. 29.

<sup>6</sup> For more information, see Koca&Üzülmez, p. 600; Artuk, Gökçen & Yenidünya, p. 1039; Hasan Dursun, "Türk Ceza Hukukunda Tekerrür", *Yargıtay Dergisi*, October 2009, p.84.

Consequently, even though its existence cannot be ignored, whether recidivism can be accepted as a penal law institution or not is still a controversial matter in the doctrine.<sup>7</sup>

*'The article regulating recidivism is in the general provisions section of the Penal Code so it is applicable for every single code that includes a penal norm, with all of its conditions and consequences.(Article 5) ' 8* As for a legal nature, it is pointed out that *'Recidivism is an institution of substantial penal law rather than execution law.'*<sup>9</sup> However, recidivism is an institution that has effects on the procedure of execution. In Turkish penal law, recidivism is considered to be a situation showing that the perpetrator is in a more dangerous status than other criminals. It increases the fault, because it proves that the previous penalty given to the perpetrator had no deterring effect on him/her. It indicates persistency and *'determination'*<sup>10</sup> in committing crimes. Thus, it is regulated as a reason that requires the implication of security measures; not as a reason to aggravate the penalty.<sup>11</sup> In the case of recidivism, a special execution regime is accepted and a supervised release regime is imposed that can continue even after the execution of the penalty.

Now the study will elaborate on the subject by discussing how recidivism was applied in the past and how things are now.

Since the establishment of Turkish Republic, Turkish penal law had been regulated by two penal codes. The former code, Code Nr. 765, dates back to 1926. It has stayed in force for 79 years until it was abolished in 1st of June 2005, leaving its place to the new code, Code Nr. 5237. There were obvious and several differences between these two codes. Recidivism was one of the issues that had its share of changes. To inform the reader about this process, the next sections

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<sup>7</sup> For arguments that are opposed to the existence of recidivism, see Ayhan Önder, *Ceza Hukuku Dersleri*, Filiz Kitabevi, İstanbul, 1992, p. 570 (Though, it should be stated that, this book bases its arguments on the Code Nr. 765. Bear in mind the differences.).

<sup>8</sup> Koca & Üzülmöz, p. 599.

<sup>9</sup> Hakan Hakeri, *Ceza Hukuku: Genel Hükümler*, 15th Edn., Adalet Yayınevi, 2013, p. 608.

<sup>10</sup> Justification of Article 58 of Code Nr. 5237.

<sup>11</sup> Koca & Üzülmöz, p. 598.

elaborate on the way recidivism was/is handled according to both the former and the new code. Code Nr. 765 and Code Nr. 5237 will be mentioned, respectively.

### **III. Recidivism in the Former Turkish Penal Code (Code Nr. 765)**

In the Code Nr. 765, recidivism is regulated in the articles between 81 and 88. In this (previous) system, different classifications of recidivism based on various criteria (such as national/international, compulsory/optional, periodic/indefinite, etc..<sup>12</sup>) were accepted. However, one of these classifications (general-special- aggravated special) has been of great importance because according to this classification, each type had different repercussions. This is why these types (and their consequences) will be elaborated on.

While special recidivism refers to a case where the previous crime and the crime that constitutes recidivism are of the same kind, in general recidivism the former and the latter crime are not of the same kind. The third kind, aggravated special recidivism is in fact an exceptional version of special recidivism that requires the fulfilment of other criteria<sup>13</sup> which were mentioned in Article 85 of the Code.

#### **A. Consequences of Recidivism**

The main consequence of recidivism is aggravation of the penalty. In Articles 81, 82, 83 and 85, system of this aggravation is regulated. Since there are three types of recidivism and the consequences of these types differ, they will be explained separately.

#### **1. Consequences of General Recidivism (Article 81/1)**

In cases of general recidivism, penalty of the second offense is aggravated up to one-sixth of the original penalty. (Article 81/1) Judge

<sup>12</sup> For more information, see İlhan Üzülmez, *Türk Hukukunda Tekerrür*, Ankara, Turhan Kitabevi Yayınları, 2003, p. 76.

<sup>13</sup> For more information on the other criteria, see Üzülmez, *Türk Hukukunda Tekerrür*, p.76ff.

has to aggravate the penalty.<sup>14</sup> The upper limit is regulated but the lower limit is vague and it is left to the judge's discretionary power. Though, said aggravation cannot be longer than the most severe punishment given for the previous crime (Article 81/3). Judge can extend the penalty as long as the previous penalty at most. (This is a provision that does not set a lower limit; implicitly stating the trust the lawmaker has to the judge on making the right decision in accordance with the circumstances of the case; while insisting on a different treatment towards the recidivists because of their insistence on committing crimes.)<sup>15</sup> If there is only one previous imprisonment, the limit is this penalty's length. Though, if there are multiple previous imprisonments, in order to determine the upper limit, the most severe crime must be taken into account. For example, if the previous penalties include imprisonment and a punitive fine, then the imprisonment will count. If the previous punishment has been converted into another penalty, the converted penalty will be taken into account. (Penal Code Article 88). In addition, if the punitive fine due to recidivism is not paid in time and is converted into imprisonment, then, according to Article 84, the prison sentence cannot exceed five years.

## 2. Consequences of Special Recidivism (Article 81/2)

Turkish Penal Code has viewed special recidivism as more severe than general recidivism. Thus, it is subjected to a more severe treatment.

In case of special recidivism, the penalty of the second offense is aggravated. The extension can range from one-sixth to one-third of the original period. (Penal Code Article 81/2) (It should be noted that the upper limit of general recidivism is the lower limit of special recidivism.)<sup>16</sup> The limit set in Article 81/3 is applicable here as well. (The extension cannot be longer than the longest penalty of the previous offenses.) It does not matter if some of the previous offenses resulted in general recidivism; while extending the penalty, all of the

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<sup>14</sup> İlhan Üzülmmez, "Suçta Tekerrür", *AÜEHFD*, vol.4, no. 1-2, 2000, p. 314.

<sup>15</sup> Üzülmmez, "Suçta Tekerrür", p. 314.

<sup>16</sup> Günay, p.50.

previous crimes are considered. In addition, Article 114/2 states that the penal time bar stops in case of special recidivism. Severity of the crimes does not matter; rather, their being of the same kind is considered enough. However, the new crime must have been committed during the time bar period of the previous crime; otherwise it can by no means constitute recidivism.<sup>17</sup>

### **3. Consequences of Aggravated Special Recidivism (Article 85)**

In cases of aggravated special recidivism; penalty is aggravated. However, as a departure from the special recidivism system, the period of this aggravation depends on the length of the original penalty. If the penalty is less than 30 months, the penalty is increased up to half of the original period. If the penalty is longer than 30 months, judge can extend the penalty up to one third of the original period. (Article 85 of the Penal Code) However, the final penalty cannot exceed 30 years in imprisonment and penal servitude. If the penalty in question is a punitive fine, there is no upper limit. If the penalty is life imprisonment or heavy imprisonment for life, these principles cannot be applied. If the penalty is both imprisonment and punitive fine, both penalties are handled according to relevant provisions (imprisonment: Article 85, punitive fine: Article 81/2)

### **IV. Recidivism in the New Turkish Penal Code (Code Nr. 5237)**

The new penal code (Code Nr. 5237), which has entered into force in June 1st 2005, has made significant changes in the concept of recidivism and its sanctions. The biggest difference made by the new Code arguably is that recidivism was turned into an institution that requires safety measures and bases on dangerousness; while the former code expressively stated that recidivism was based on fault and increased the penalty.

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<sup>17</sup> Murat Çakır, "Türk Ceza Hukukunda Dava Zamanaşımı", *İÜHFEM*, vol. 71, no.1, 2013, p. 225.

The new code focuses on recidivist's insistence on committing a crime and his/her not being deterred. This is actually striking bearing in mind that the new code focuses only on the current crime(s) and states that the offender is punished "according to the action", not based on his/her past criminal tendencies. In contrast, the former Code leaned heavily on "punishment according to the perpetrator" and checked on the perpetrator's past, criminal tendencies, etc. This study sees this change as a good and effective one, because it is not fair to punish someone for something other than his/her current offense.

### **Conditions of Recidivism**<sup>18</sup>

Conditions of recidivism are regulated in articles 58/1 (first and second conditions) and 58/2 (the third condition) of the Code. These can be listed as:

#### **A. Being sentenced to imprisonment and/or punitive fine due to a previously committed offense**

It does not matter if the penalty in question is a punitive fine or imprisonment or if the penalty is not executed. Article 58/1 suggests that '*commission of an offense after finalization of the decision for conviction*' is enough and that '*execution of the sentence is not sought for*'. Neither safety measures, nor offenses that have passed the time bar constitute recidivism<sup>19</sup>. (So, if a penalty is converted to an alternative sanction, that penalty does not constitute recidivism.). Another issue that has to be pointed out relates to amnesty and pardon. The biggest difference between them is that while amnesty erases the conviction, pardon does not. As a result, amnesty does not constitute recidivism, while pardon does.<sup>20</sup>

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<sup>18</sup> For the conditions envisaged in the abrogated Code, see. Sulhi Dönmezer & Sahir Erman, *Nazarî ve Tatbikî Ceza Hukuku Genel Kısım*, Cilt: 3, 12th Edn., İstanbul, October 1997, p. 152ff.

<sup>19</sup> Çakır, p. 225.

<sup>20</sup> For more information on amnesty and pardon and other special situations such as withdrawal of complaint, see Özcan Özbey, "Suçta Tekerrür ve Mükerrirlere Özgü Güvenlik Tedbirleri", *Türkiye Barolar Birliği Dergisi*, no. 88, 2010, p. 69ff.

## B. Commission of a new crime:

To apply recidivism to a perpetrator, he/she must have committed another offense, following a final conviction from the aforementioned offense (i.e. if the first offense is still in the trial process, recidivism cannot be applied).

This rule, though, has a few exceptions which have been listed under the Articles 58/4 and 58/5 of the Penal Code. First, if the initial crime was intentional, the second crime has to be intentional, too. Same thing applies to negligent offences. Because in negligent offences, there is no will of breaching the law; but in intentional offenses, there is. Second, recidivism cannot occur between exclusive military offenses and other offenses. *'Exclusive military offences are the crimes that can be committed only by soldiers and are not by any means defined in the general penal code. These crimes are committed by breaching military service or mission.'*<sup>21</sup> Third, verdicts given by a foreign court cannot constitute recidivism except for the crimes stated in the abovementioned article<sup>22</sup>. *'Turkish penal law has accepted the national recidivism system.'* Though in some agreements that Turkey was a party of, foreign verdicts constituting recidivism may have been accepted. This should be looked into.<sup>23</sup> Finally, situations in which the perpetrator had not yet attained the full age of eighteen at the time he/she committed the first crime; (as a result of Article 58/5), the aforementioned crime does not constitute recidivism; even if the second crime was committed after turning eighteen. This is an important regulation in terms of educating and rehabilitating minors that have committed crimes.

## C. Commission of a crime within a certain period (recidivism period) following the execution of the previous penalty

Article 58/2 of the Code envisage two different recidivism periods depending on the duration of the imprisonment due to the conviction

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<sup>21</sup> Zafer, p. 553.

<sup>22</sup> which are felonious homicide, felonious injury, plunder, swindling, and production and trading of narcotic and harmful drugs & counterfeiting of valuable stamps.

<sup>23</sup> Zafer, p. 553.



of the previous crime. For imprisonments that last for more than five years, the recidivism period is five years. For imprisonments not exceeding five years, recidivism can be applied only in the three years that follow. These durations initiate from the start of the execution. If the penalty is not executed, initiation of the recidivism period is prevented; but recidivism provisions are applied nonetheless. In addition, to initiate the period, the penalty must have been fully executed. Hence, in case of delay of imprisonment, recidivism period starts only when the release period ends without any complication.<sup>24</sup>

It should be noted that there were also two recidivism periods in the former Code (Nr. 765). The limit was five years. For imprisonments that exceeded five years, the recidivism period was 10 years while penalties that lasted for five years or less had a recidivism period of 5 years. A significant reduction can be seen in the duration of the recidivism periods in the new Code.

### **Consequences of Recidivism in the New Turkish Penal Code (Code Nr. 5237)**

#### **A. In cases in which punitive fine and prison sentence are imposed as alternative sanctions, punitive fine cannot be enacted (i.e. more severe sanction is put into action).<sup>25</sup>**

Turkish Penal Code 58/3 reads as: "*In case of recidivism, the offender is punished with imprisonment if an alternative between imprisonment and administrative fine is provided in the relevant article of the law for the current offense*". This indicates that the discretionary power given to the judge is omitted.

#### **B. The punishment is subjected to a special execution regime.**

As regulated in the Art. 58/6 of the Turkish Penal Code, punishment is executed '*according to the regime exclusive to the recidivists*'. This is only

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<sup>24</sup> For further information, see Koca & Üzülmöz, p. 607.

<sup>25</sup> (Penal Department Nr. 3 of the Supreme Court, 26.3.2014, 2013-26722/2014-12569, retrieved from Kazancı İçtihat Bilgi Bankası, [www.kazanci.com](http://www.kazanci.com), (last accessed: 01.12.2014).)

for the second offense -the one recidivism is based on. This is because Article 108 of the Execution Code (The Law on the Execution of Penalties and Security Measures, which will be referenced as 'Execution Code' from now on) (Code Nr. 5275) only regulates consequences about the execution periods of the second offense of the recidivists.

If a punitive fine is converted into prison sentence because it is not being paid (108/3 of the Execution Code), a special execution regime is not applied. This is mainly because the penalty here, even though it is converted into jail time, is punitive fine in essence. Also, the imprisonment in question is preventive detention which aims the payment of the punitive fine.

Article 2 of the Penal Procedure Code backs up this statement by saying that preventive detention does not constitute recidivism. ("*...Disciplinary incarceration: ...which cannot be transformed into alternative measures; and cannot be subject to settlement procedures; and shall not be a ground for application of repetition provisions; the perpetrator of which may not be released under certain conditions; which cannot be postponed; and cannot be taken into the records of convicted individuals.*")

### **C. Supervised release measure is applied.<sup>26</sup>**

Supervised release measure is also regulated in the Art. 58/6 of the Turkish Penal Code ("*...the convict is released following the execution of the sentence but kept under control and observation as precaution*"). This measure being applied is a sanction itself because it limits the perpetrator's freedom even though he/she has served his/her time. The special execution regime imposed under the aforementioned article is regulated in Article 108 of the Execution Code.

The regulation about this extension is stated in Article 108/1. According to this article, in order to benefit from conditional release, a) 39 years of a sentence of heavy life imprisonment, b) 33 years of a sentence of life imprisonment, c) Three-fourths of another sentence of imprisonment has to have been spent in the execution institution in

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<sup>26</sup> (Penal Department Nr. 2 of the Supreme Court, 28.3.2011, 2009-38707/2011-6171, retrieved from Kazancı İçtihat Bilgi Bankası, www.kazanci.com, (last accessed: 01. 12. 2014).)

good behavior under a prison. Subsection 2 envisages that *'the time to be added to the period for conditional release on account of recidivism shall not be more than the heaviest punishment taken as a basis for recidivism.'*

If there are more than one offenses that result in recidivism, then, the imprisonment that requires the longest penalty counts. There is no regulation which applies to situations in which the previous penalty is a punitive fine. Though the widely accepted idea in the doctrine states that the number of days that result in punitive fine is calculated and that result should be the basis. This number is calculated in accordance with Article 63 of the Penal Code: 100 Turkish Liras = One day

According to Art. 58/7 of the Penal Code, the imposition of supervised release must be additionally stated in the verdict of conviction. (*'The decision for conviction should contain a statement notifying adoption of special execution regime and imposition of precaution seeking control and observation of the recidivist after release.'*) Judge is not given any discretionary power regarding this issue. It is also emphasized in the Code that this measure can be applied only the way it is regulated in norms. (*'The sentence and precaution seeking control and observation of the recidivist after release is executed according to the procedure set out in the law.'*)(Article58/8).

It is stated in Article 108/4 of the Execution Code that *'the judge shall specify for the recidivist a control period to start after the execution of the penalty is completed and not to be less than one year.'*

Article 108/6 gives the judge the right to extend the control period of the recidivist. The extension of the control period cannot exceed five years. This Article brings the question of who the competent court is. Duty of extension is not given to the court that rendered the verdict but to the one that assessed the recidivist's behaviour during the execution period and decided on the conditional release. This means, the first court only decides on the application of the measure, the duty of extending the period is of the latter's.<sup>27</sup>

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<sup>27</sup> (Penal Department Nr. 7 of the Supreme Court, 21.5.2012, 2012-5120/2012-16651, retrieved from Kazancı İçtihat Bilgi Bankası, www.kazanci.com, (last accessed: 01. 12. 2014).)

Article 108/5 allows the implementation of conditional release provisions to the control period although the implementation has to be specified on account of recidivism.

The supervision period about the recidivism does not start from the time of the conditional release; rather, it starts after the supervision regarding the conditional release comes to an end. Therefore, the supervision period will overlap with some of the post-release time. It is briefly mentioned in Article 58/9 of the Penal Code: (*'The court may decide adoption of special execution regime and precaution seeking control and observation of the recidivist after execution of the sentence also for the inveterate offenders, and the persons who commit offense in a professional manner or the offenders belonging to an organized group.'*)

Subsections seven, nine and ten of the Execution Code deal with the precautions that will be taken and things that will be done during the conditional release period. Subsection seven envisages: *'During the control period, the convict may be employed with pay in a public institution to perform the art or trade he has learned in the execution institution, or under the supervision of another person who performs the same art or trade privately.'* Article 108/9 reads: *'The judge may appoint an expert to guide the convict during the control period. This expert shall advise the convict to keep away from circles where he could acquire bad habits and to lead a good life with awareness of responsibility, shall meet and consult with the officials of the institution where they are working, and shall draw up and submit to the judge quarterly reports on the convict's behaviour, his social adaptation and the progress in his awareness of responsibility.'* Article 108/10 is as follows: *'Considering the personality of the conditionally released convict and his success in social adaptation, the judge may decide that the control period be spent without implementing the measure of controlled freedom or specifying any obligation or may lift the measure of controlled freedom or the specified obligations during the control period.'*

These articles enable recidivists to re-enter the social circle and help preservation of social stability and prevention of increased criminal behaviour.

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(Penal Department Nr. 7 of the Supreme Court, 7.2.2013, 2011-5554/2013-2652, retrieved from Kazancı İçtihat Bilgi Bankası, www.kazanci.com, (last accessed: 01. 12. 2014).)

Article 107/12 states the situations in which the decision of conditional release is revoked: *'...if the conditionally released convict during the control period deliberately commits an offence punishable by imprisonment or insists on not complying with his obligations despite a warning by the judge.'*

Article 107/13 regulates the ramifications of revoking of the said decision: *' it shall be decided that he serve in the penal execution institution: a) The remainder of his sentence in full as from the date of committing the subsequent offence; or b) In the case of failure to comply with his obligations, a period of time to be determined at the discretion of the court, between the date of finalisation of the decision to revoke the decision of conditional release and the date of deserved release. Once the decision of conditional release has been revoked, no other decision of conditional release may be made regarding the execution of the same sentence.'*

Some recidivists may insist on breaching his/her obligations after the end of the conditional release period. It is clear that subsections 12 and 13 are not applicable in these situations. It has been stated before that recidivists are perceived as more dangerous than other criminals. Hence, controlling them even after conditional release periods is appropriate. Also, the main concern should be making conditional release periods more effective rather than focusing on sanctions in case of commission of another crime.<sup>28</sup>

What if all of these measures and aims of rehabilitation and crime reduction fail? What if the recidivist is not deterred and consequently commits another crime? Then, the commission of the crime would make him/her a *second-time recidivist*. Second time recidivism is regulated in Article 108/3 of the Execution Code. Pursuant to this article, second-time recidivism eliminates the possibility of conditional release for the recidivist.

Last but not least, one of the most significant regulations regarding recidivism relates to the Article 7/3 of the Penal Code which states that: *'Provisions regarding the execution regime are immediately applied sans delay of imprisonment, conditional release and*

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<sup>28</sup> Özgenç, p. 766.

*recidivism.*' In this article, recidivism is counted as one of the three exceptions of immediate application of execution regimes.

## V. Conclusion

To conclude, this study points out that recidivism has proven to be helpful in classifying criminals and (thanks to the supervision) rehabilitating them. It has been and still is an integral part of the criminal justice system. It is not debatable that there is a huge difference in consciousness of illegality between a one-time offender and a recidivist. Thus, they should be subjected to different treatments. Provisions of recidivism and their application provide just that.

As for the system and legislation of recidivism, the changes brought by the new Code are considered as a positive improvement now since penalty is not aggravated for recidivists and supervised release is the main focus. Supervised release serves as an effective tool for rehabilitation of the recidivists and preventing commission of more crimes in the long run, which in turn fulfill one of the main aims of the crime policy.

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