

CHEATING OFFENCES AND PUNISHMENT: A MALAYSIAN PERSPECTIVE

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Abstract: Crime reduction is one of the focuses of the Ministry of Home Affairs under its Key Performance Indicator. Findings from previous studies revealed that sentencing mechanism, the rate of prosecution and the failure to pay attention to prevalence of crime as aggravating factors in sentencing can all contribute to the exponential increase in crime perpetration. The paper aspires to unearth data about cheating offences as one of commercial crimes in Malaysia in relation to the number of cases, the amount of loss, arrest rate and personnel, and analyze the extent to which the sentencing as provided under the existing law have the deterrent effect to scare criminals from committing the crime.

Keywords: criminal law; cheating offences; punishment; enforcement; commercial crime.

I. INTRODUCTION

This paper analyzes cheating offences as part of commercial crimes as a whole. There are vast varieties of modus operandi in which cheating activities can be perpetrated. Frequently reported cases include fraudulent money lending, job search deception, phishing, black money, cheap sales, modified cheques, foreign workers deception, investment deception, share transfer deception, sale and purchase of lands that never exist, and many others.

The rate of crime in Malaysia is relatively low, i.e. 772 cases per 100, 000 population compared to Hong Kong (1, 166), Australia (4, 470) and Japan (1, 569)

cases (Bernama, 2008). In the past 10 years the rate of crime per 100, 000 population in Malaysia ranges between 602 (in 2005) and 772 (in 2007). The PDRM plays an active role in the prevention and enforcement of crimes in Malaysia.

Literatures have shown that contents of law can have profound influence on the business atmosphere (Gilbert, 2007). Companies can capitalize on the reduced rate of crime as well as on the deterrent laws to attract foreign investments to the business, on the assumption that such law can deter crimes and provide a crime free environment for business. The importance of law in creating conducive environment for business warrants some analysis of its provisions if the authorities were to create a competitive legal environment which are appealing to foreign investors. One of the areas deserving attention is cheating offences because of its potential to diminish or increase foreign investors' confidence.

The increase of cheating offences and severity of monetary loss necessitate a revisit to the legal provisions pertaining to cheating offences. The gravity of the situation certainly calls for attention by the authority to formulate some sustainable policies, including revising the existing punishment and increasing the number of enforcement agencies.

Criminals more often than not act rationally, calculating the prospective gains of the crime and considering the probable risks in the event they are caught and convicted. Considering the huge amount of money lost annually due to the commission of this

crime, it is a matter of public interest that the prevalence of crime be taken into account by courts in awarding the appropriate judgement in such offences.

II. MATERIALS, METHODS AND LITERATURE REVIEW

The study is a combination of a pure legal research and an empirical investigation of police enforcement for the past 5 years. With regards to the legal research, the study employs the qualitative analysis by identifying and examining decided cases and relevant provisions of legislation. The study also analyses primary data obtained from PDRM (Royal Malaysian Police Force) in relation to the number of officers and arrest rate of cheating offenders by using the Pearson Correlation.

Starting with Becker (1968), many studies found that there exists a correlation between the commission of crime and the deterrent effect of punishment (e.g., Ehrlich (1973) and Levitt (1996)). The study explains that the expected punishment affects the criminals' decision and tendency to commit the crime. The punishment may comprise of probability of arrest and prosecution, conviction, and prison sentence. Punishment can also be in the form of damage of reputation, lost licences and difficulty to obtain employment with past criminal record.

In Malaysia, the Parliament amended the provisions of punishments for commercial offences on 17 September 1993. Cheating offences under section 420 of the Penal Code now carry a mandatory minimum term of imprisonment (1 year) together with mandatory whipping, and the courts have the discretion to further impose a fine. This is a laudable effort considering the low rate of prosecution and the lenient punishment to offenders (Francis Ng Aik Guan, 2000).

The question why criminals are engaged in crimes can be answered with reference to the utility theory (Becker, 1968). Under this theory, the basic assumptions are that potential criminals act rationally, basing their decision to commit a crime on an analysis of the costs and benefit of the act. The theory explains that individuals are expected to respond to changes in the probability of apprehension and harshness of punishment. Police presence, convictions and the severity of punishment can influence the level of commission of cheating offences. Prospective criminals who are about to commit crimes are presumed to evaluate both the risk of being caught and the accompanying punishment. The strength of police and judicial system increase the probability of apprehension, thus reducing the incentive to commit the crime. The utility theory of Becker is even more relevant in the context of

commercial crimes. Commercial or white collar crime is a distinct category of crimes considering the social and financial status of the offenders. The crime is defined as one "committed by a person of respectability and high social status in the course of his occupation" (Sutherland, 1940). What distinguish white collar crime from other crimes is that the sociological difference of the criminals are not taken into account in the other crimes, whilst white collar crime is committed by those with power and high social status, or in other words respectable citizens, e.g. business managers and executives. With this background, offenders can calculate the risk and the illicit gain by studying the existing punishment. For example if mere fine is imposed, criminals can plan to set off the fine from the gain.

The utility theory may also co exist with the general strain theory. The fundamental assumption under this theory is that there is uniform pressure on everybody in the society to gain more wealth (Kornhauser, 1978). The theory is not tied to economic status of the individuals but rather is a psychological reaction to any perceived negative aspects' of social environment (Agnew, 1992). Criminals are often driven by the fear of falling, or the stress of losing their wealth (Weisburd et al, 1991).

The pressure to commit crime under the strain theory may be affected by the decline of moral standard in society. Thus greed, corruption and the lack of ethics may further promote the propensity to commit crime. Indeed Charles Colson, the Watergate criminal who found new life as an evangelical prison ministry leader, declared that the problem confronting the society was "greed unchecked by any moral restraint." This observation finds support in Nick Nykodym' Robert Taylor and Julia Vilela (2005) who concluded that the criminal is very much guided by mercantile motive for personal gain. The research which was conducted to probe criminal behavior amongst insider cyber crime found that the sole motive of the cyber thief is to steal valuable information from an organization and utilise it afterwards for money, and his crime is not driven by hate or revenge but rather by greed and hunger for money. The commission of cheating offences driven by greed factor could be reduced by deterrent punishment for the offences.

Cheating offences are handled by the Commercial Crime Investigations Department under the auspices of PDRM. Headed by a Director with the rank of Commissioner and assisted by two Deputy Directors ie: Deputy Director I (Investigation) & II (Administration), the Department is tasked to conduct investigation, arrest and prosecute white collared criminals. Offences investigated include cheating, criminal breach of trust, cyber crime, fraud and

others. Over the years, the police have successfully investigated, arrested and prosecuted the criminals involved in the cases reported to them. However over the past five years the highest rate of arrest attempted by the police is around 30% of the investigated cases (see Table 5).

The arrest rate can have impact on crime commission, where a higher arrest rate would lead to lower crime rates. This may be explained by a supposition that threats of enforcement and punishment will deter potential criminals from committing crimes. Indeed a lot of legal systems assume that threats of punishment deter potential criminals from committing crimes (Buikhuisen 1974). Earlier thoughts on this theory of the general prevention effect of deterrence may be found in the 18th century writings. The theory is further confirmed by more contemporary researches. For example, literatures on crime and punishment (Becker 1968) states that the rational willingness to commit a crime is related to some institutional and judicial variables, such as the probability of detection, the probability of conviction, and the punishment inflicted by the court. The choice of crimes against property is driven by the rational cost-benefit analysis which is carried out by offenders before deciding to do the crime. Monetary calculation is often used for cost-benefit analysis (Farrel and Roman 2002). In the case of crimes against property, benefits would be in the form of the monetary gain from the commission of the crime and this is compared against the cost of a fine or of time spent in jail.

Gary S. Becker (1968) and Isaac Ehrlich (1973) have examined deterrence using mathematical-economic models of Becker and econometric models of Ehrlich. The findings show that the probability of being convicted can pose a greater fear to criminals. However, apprehension of being caught is a more effective deterrent factor. Raising the probability of conviction may have a greater deterrent effect than increasing the severity of punishment (Becker, 1968). Becker's finding concurs with more recent literatures in which it was observed that most review concludes that there is little or no consistent evidence that harsher sentence leads to a lesser crime rates (Doob and Webster, 2003).

The decision to commit the crime is determined by the prospective returns of the activities as well as the probable risk of detection and conviction if they are

to engage in illegal acts (Barry Reilly, 1991). Barry's theory was further reiterated by other researchers on this issue. The relative prices of legitimate and illegitimate activities form the underlying incentive to commit the crime or vice versa. This is what is termed as the economic model of criminal behavior and law enforcement. According to this model the formulation of various policy tools, including punishment, enforcement efforts, and opportunity costs of crime is made on this premise (Jacob Nussima, Avraham D. Tabbachb, 2009). An illustration of this model would be that an increase in the arrest rate of cases and a harsher punishment should reduce criminal activities, given that a higher probability of arrest and a harsher punishment increase the fear to commit the crime, thereby reducing crime levels. Levitt (1995) also affirmed that a strong, negative empirical correlation exists between arrest rates and reported crime rates. Literatures have shown that the probability that the crimes be detected correlate negatively on the inclination to commit crime. There is no complete concurrence amongst scholars on this issue-not all criminal acts can be influenced by apprehension of criminals of the legal sanctions. However studies have been conducted to investigate the extent apprehension and penalization can deter crime (e.g Ehrlich 1973; Levitt 1997). Deterrence essentially aims at discouraging the commission of crime by future criminals.

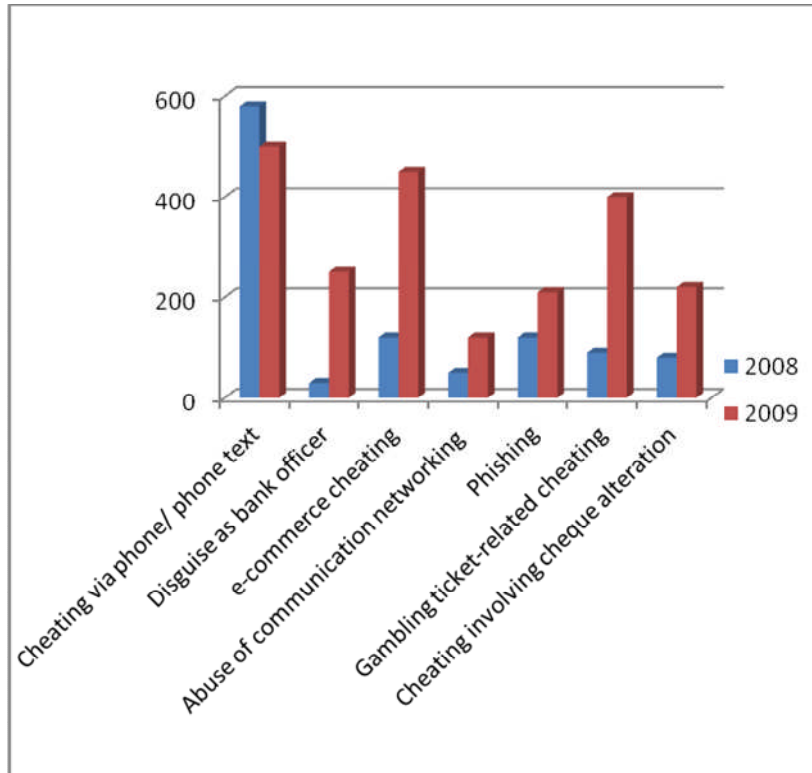
Based on the above it is expected that higher rate of arrest, higher probability of conviction, prison punishment and the length of imprisonment sentencing lead to lower crime rate.

III. RESULTS AND DISCUSSION

Cheating offences can cover numerous transactions with different modus operandi (see Table 1).

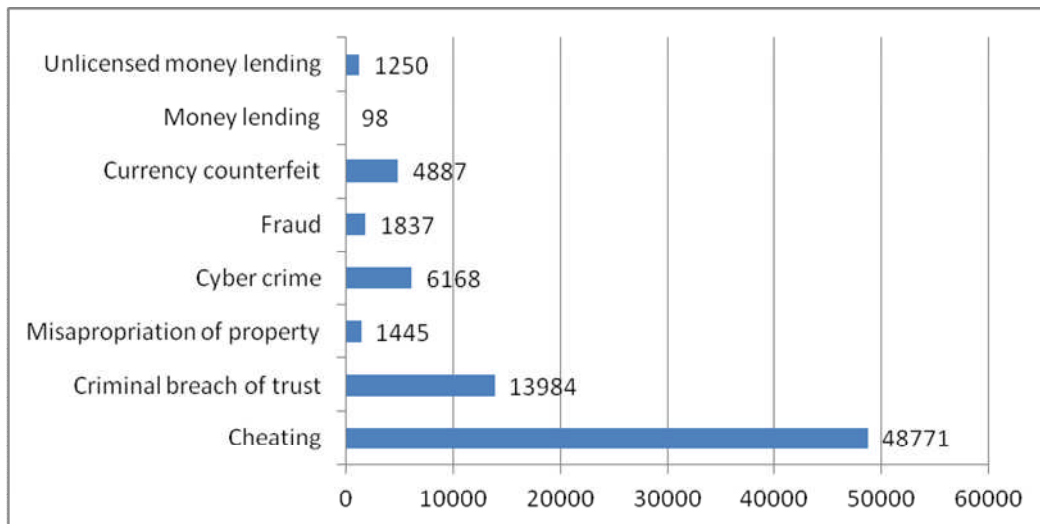
Cheating has been the most prevalent crime in Malaysia. The past 5 years saw a threefold increase from 4,400 cheating cases in 2005 to 13,384 cases in 2009. While some other commercial offences registered an improvement in certain years, this did not happen to cheating offences. More alarmingly the data from 2005 to 2009 indicates that cheating constituted more than half of overall commercial crime cases each year. This has resulted to over RM 900 million loss in 2009, a massive increase from RM 400 million in 2005 (see Table 2 and 3).

Table 1: Different type of cheating offences and the number of cases from 2008 to 2009



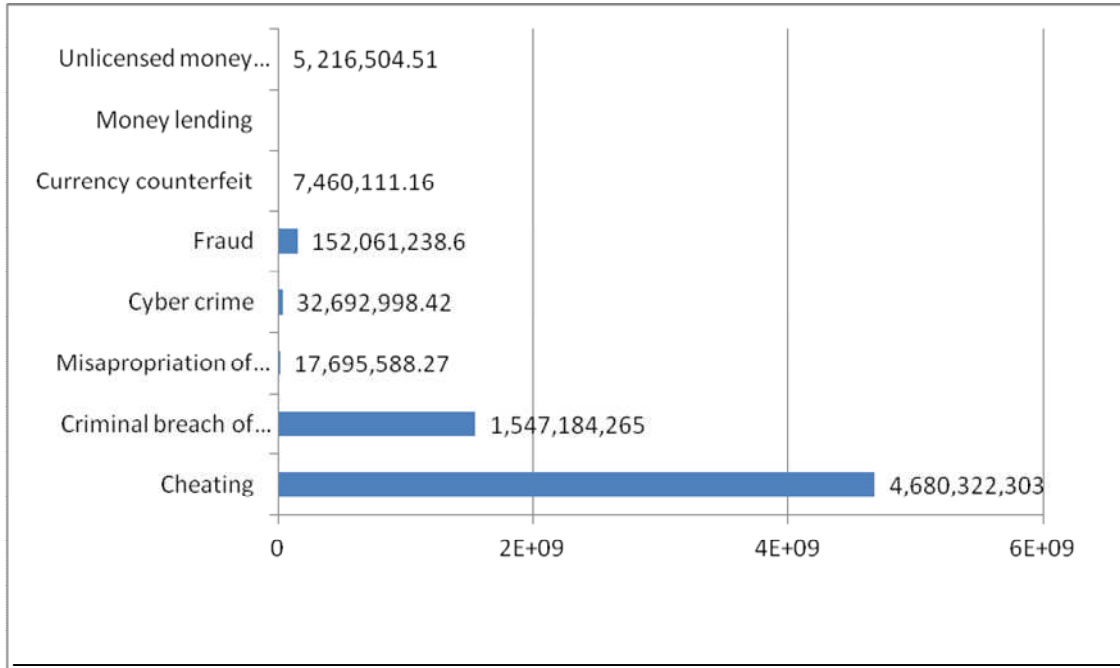
Source: PDRM

Table 2: The number of cheating cases compared to other white collar crimes cases from 2005-2009



Source: PDRM

Table 3: The amount of loss in RM from cheating cases compared to other white collar crime cases from 2005-2009



Source: PDRM

Table 4 a. The number of officers and the rate of arrest and its corelation

Correlations

		The number of officers	The number of offenders
The number of officers	Pearson Correlation	1	-.781
	Sig. (2-tailed)		.119
	N	5	5
The number of offenders	Pearson Correlation	-.781	1
	Sig. (2-tailed)	.119	
	N	5	5

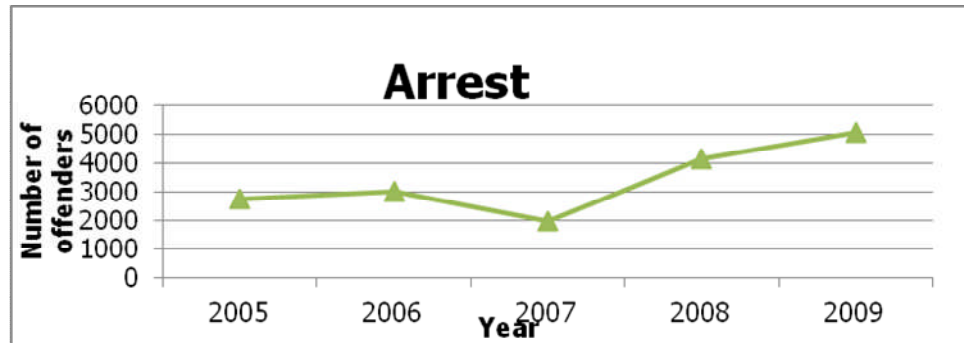
Police resources should have some impact on the enforcement rate, where an increase in the number of police officers should result in the increase in the number of arrests. The data shows conflicting results; a reduction of human resource has led to a reduction of arrest cases in 2007, but a further reduction in recruitment in 2009 did not produce similar results (see Table 4).

The Pearson Correlation (SPSS version 19) has been used to determine the relationship between two variables.

The number of officers and the rate of arrest

The table 4 a has shown that there is no correlation between the number of officers and the rate of arrest, whereby the significant value is $P > 0.05$.

Table 4: The number of arrest cases for commercial crimes and the number of officers handling commercial crimes from 2005 to 2009.



Source: PDRM

It must be admitted that not all reports lodged with the police will proceed with prosecution, and those which do may not necessarily be won by the prosecution. Data from the PDRM shows that only a small fraction of the complaints will be investigated, and a small fraction of the investigated cases will end up with the arrest. With regard to commercial crimes, the research indicates that only a certain fraction of investigation cases end up with arrest. The following table 5 shows that the rate of arrest was within 19 to 31% of cases being investigated by the police.

Punishments for cheating offences are spelt out in the following provisions of the Penal Code.

Section 417: “Whoever cheats shall be punished with imprisonment for a term which may extend to 5 years or with fine or with both”.

Section 418: “Whoever cheats with the knowledge that he is likely thereby to cause wrongful loss to a person whose interest in the transaction to which the cheating relates, he was bound either by law, or by a legal contract, to protect, shall be punished with imprisonment for a term which may extend to 7 years or with fine or with both”.

Section 419: “Whoever cheats by personation shall be punished with imprisonment for a term which may extend to 7 years or with fine or with both”.

Section 420: “Whoever cheats and thereby dishonestly induces the person deceived, whether or not the deception practised was the sole or main inducement, to deliver any property to any person, or to make, alter, or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment for a term which shall not be less than

1 year and not more than 10 years and with whipping, and shall also be liable to fine”.

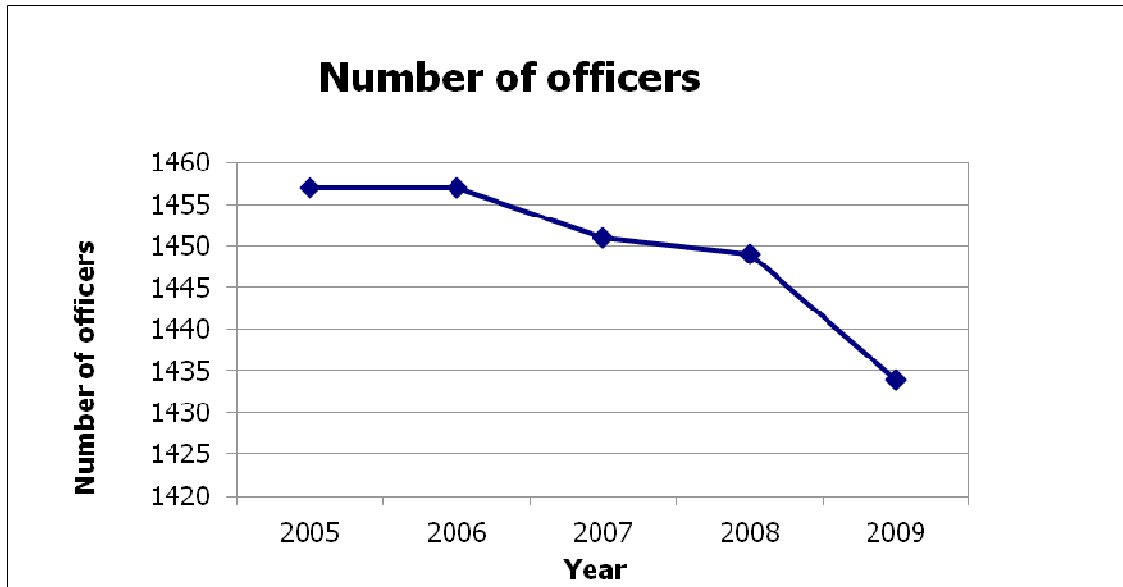
The starting point in sentencing would be the section under which the accused has been charged. Simple cheating is punishable under section 417 of the Code with imprisonment for a term of up to 5 years, or with a fine or both. Imprisonment is not mandatory. Generally, if the amount of money involved is reasonably small and there are no aggravating factors, the courts might be contented to impose only a fine.

It may be noted that sections 417, 418 and 419 provide only for the maximum period for imprisonment and section 420 states both the minimum and maximum range of imprisonment period within which courts can select. Sentencing with minimum term of imprisonment such as that of section 420 is thought to be more effective because the criminals can tell that there is a guaranteed minimum prison punishment.

Aggravated cheating is punishable under section 418 to 420 with imprisonment for a term of up to 10 years, and the offender is also liable to fine. Section 418 lays down a maximum 7 year imprisonment period and this is aimed at the accused who under some legal relationships is bound to protect the victim concerned. Because of the breach of the legal obligation to render the necessary protection, section 418 imposes heavier sentences than the offenders who commit simple cases of cheating without the breach of such obligation.

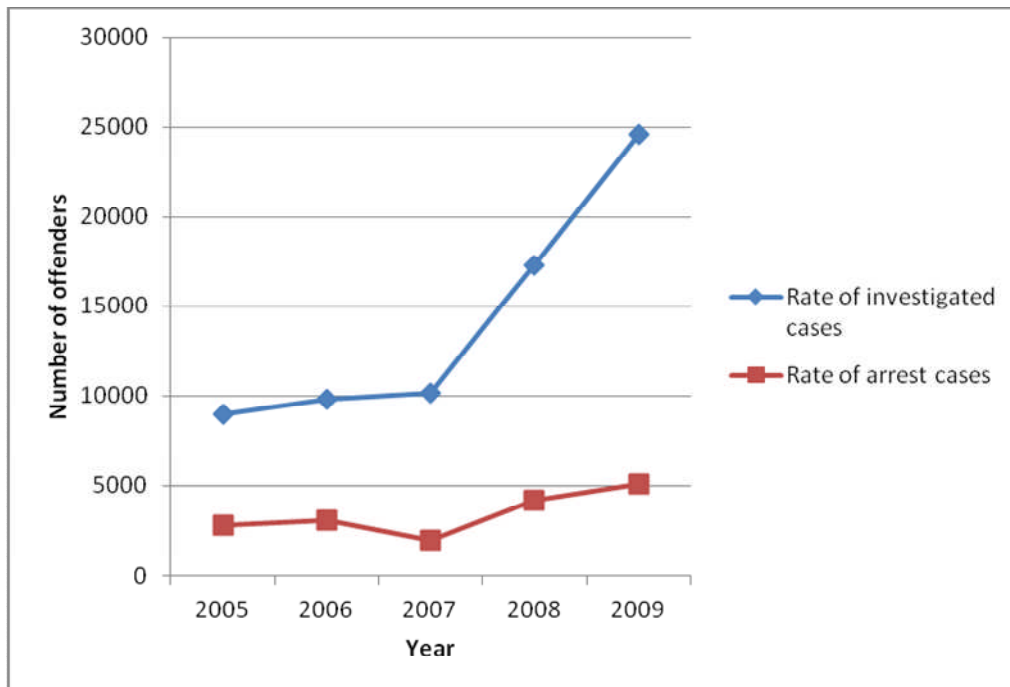
Section 419 also imposes a maximum 7 year imprisonment for the accused who cheated the victims by pretending himself to be some other person, or cheated by substituting one person for another.

Table 5 a: Number of officers from 2005 to 2009



Source: PDRM

Table 5: Rate of investigation and arrest cases for commercial crimes from 2005 to 2009.



Source: PDRM

The longer term of imprisonment in sections 418 and 419 is applauded given the grave nature of the cheating offences-the provisions are invoked when there is a breach of legal or contractual obligation and the impersonation of identity.

As stated above, imprisonment is mandatory under section 420. Hence, the minimum sentence that any accused can be subjected to under section 420 would be 1 year imprisonment coupled with a fine. Section 420 covers cases of cheating involving delivery of property. The essential ingredient of the provision is the delivery of the property, where the victim parted with valuable property on the basis of the false representation made by the accused. Section 420 was amended in 1993 to impose the mandatory minimum 1 year imprisonment and a mandatory whipping, in addition to discretionary fine. The 1993 amendment was a wise move and the heavier sentence is lauded for deterrence purpose. Research has indicated that the severity of ensuing punishment should the case end in convictions correlate negatively on the inclination to commit crime(e.g Ehrlich 1973; Levitt 1997).

All provisions provide for a fine as an alternative or concurrent punishment in addition to the imprisonment. These four provisions generally give discretion to courts in deciding the appropriate length of the imprisonment period.

Given the severe financial loss to the nation, it is argued that imprisonment is an appropriate sentencing for commercial crimes. Harsh punishment is warranted, and with the social position occupied by commercial criminals, it is thought that imprisonment is a more effective deterrent to these offenders than street offenders because humiliation brought about by prison punishment is more felt by the middle and upper-class offenders (Braithwaite, 1984). Clinard (1952) reported testimony from businessman shows that even short termed imprisonment is most feared by corporate executives. With this research finding a question may be raised if it is high time that mandatory imprisonment is also adopted in sections 417 to 419.

A surf of CLJ database indicates that from year 2000 to 2010 there are 22 cases on section 420, 2 cases on 417 and 1 case on 419, however not all these cases deal with the issue of punishment. It may be commented that the prosecution of only 25 cases for a ten year period would not sufficiently deter future criminals.

Certain factors can be considered in aggravating or mitigating sentences. In *PP v. Roslan Imun*¹ Ishak J

recognised that “there are certain factors such as prevalence, difficulty of detection and injury to the public revenue which operate in the direction of severity and others such as leniency to first offenders which operate in the other direction and where, as frequently happens, a number of these factors apply in one case the Court must balance them as best it can”.

Prevalence of crime is widely accepted as a factor that justifies the aggravating of a punishment. In the case of *Lee Chow Meng v. Public Prosecutor*², the learned President took judicial notice of the prevalence of the crime involving firearms in Kuala Lumpur.

The gap between the arrest and investigation rates as shown in Table 5 above could be attributed to many reasons including difficulty in crime detection. Courts in *PP v. Roslan Imun* have recognised difficulty of detection as an aggravating factor.

The quantum involved in cheating offences can serve as a guide for the court in determining the punishment to the convicted offenders. The basic principle is the higher the gain received by the offender the more serious the punishment should be. In *Loh Lian Gun & Anor v. PP*³, the appellant dishonestly cause the finance company to deliver ten payments totalling RM440,000 to one used car company. The money actually went to second appellant’s account. He was charged under section 420 of the Penal Code and sentenced to 4 years imprisonment on each of the first five counts; and 5 years imprisonment each on the rest, all the 10 sentences to run concurrently.

The counsel for the appellant argued that the sentence was excessive given the fact that he was a first offender. It may be thought that court took a correct approach when it dismissed the argument; the quantum should justify the imprisonment sentencing granted in this case.

The modus operandi or the methods the offences are committed are also important factor in determining appropriate sentencing to the offender. The use of sophisticated technology to accomplish the crime should justify a higher punishment to the offenders. Black money in African scam syndicate can be an example of sophisticated methods of crime which should be considered as aggravating factors.

*PP v. Obeng Frederick Kwabena*⁴, a case which involves African scam and black money illustrates this point. In this case the accused was sentenced to 6

¹ [1999] 3 CLJ 494.

² [1976] MLJ 287.

³ [2007] 4 CLJ 467 .

⁴ [2001] 8 CLJ 578.

months imprisonment. The prosecutor appealed against the magistrate's decision on the ground that there has been a mistake given that section 420 prescribes for a minimum punishment of one year imprisonment with whipping. In his judgement the magistrate argued that the accused is a young offender aged 21 years and a foreign citizen, and the plea of guilty made by the accused has saved everybody's time of a length trial in the court, and that considering these factors it would be cruel to impose the one year mandatory imprisonment provided under section 420 to the offender. The High Court granted the appeal and sentenced the offender to 18 months imprisonment with 3 whippings, on the basis of the facts and nature of the case, the applicable principles including the public interest. The imposition of whipping was justified and was indeed welcome on the need to deter the public from committing the crime.

Injury to public revenue has also been recognised as another aggravating factor. It may be thought that the amount of loss for cheating offences should be given due attention by prosecutors. Prosecutions should not feel inhibited to press for a severe punishment given the existing statistics on this issue. Finally preparation for case submission should not be confined to the conventional legal research of past cases or relevant statutes but should also consider wider perspective on this issue, including the enforcement aspects, their challenges, financial loss to the nation and other social research indicating the implications of the crimes to the society.

IV. CONCLUDING REMARKS

The commission of crime may to a large extent be contributed by the apprehension of the implications arising from the perpetration of crime. This refers to the probability of arrest and prosecution, conviction, and severity of punishment. Low rate of arrest and prosecution may constitute the underlying motivation and hence promote the commission of crimes amongst potential criminals. This study demonstrates that of all types of commercial crimes, cheating offences pose the biggest problem to the nation in terms of the number of cases as well as the amount of loss. It further argues that the utility theory of Becker is even more relevant to cheating offenders. Offenders are more likely to calculate the risks of committing crimes given their social backgrounds. The low rate of arrest and prosecution as well as the lack of mandatory imprisonment are favourable factors for utility theory. The low rate of arrest and prosecution may constitute the underlying motivation and hence promote the commission of crimes amongst potential criminals. The availability of sophisticated technologies may have contributed towards the rise of these offences, and measures

taken by the authorities such as through the increase of police officers can be seen as quite a workable strategy for crime reduction. However, the study indicates that the number of police officers has no significant impact on the rate of arrest. Mandatory imprisonment such as those provided under section 420 is very much lauded as that would provide a more deterrent effect on future offenders. Prosecutors should argue prevalence of crime and the increase of monetary loss as one of the aggravating factors in cheating cases. The previous research finding on the negative correlation between severe punishment and the inclination to commit crime deserves attention by the authorities. The consideration of aggravating factors in the judgement awarded will hopefully serve a lesson to future criminals.

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