

Community Service as an Alternative Punishment: The Extent of its Application on the Categories of Crime and Offender in Malaysia.

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ABSTRACT

The order of community service is a fairly new concept in the criminal justice system in Malaysia. This order is a non-custodial punishment which acts as an alternative to the custodial punishment. Even though there are several existing legal provisions pertaining to community service in Malaysia, their application is still ambiguous particularly regarding the categories of crime and offenders involved. Hence there are two issues that need to be addressed; firstly, how will the community service order be imposed, and secondly on which categories of crimes and offenders will it be imposed? This article seeks to address these two issues by discussing community service order as an alternative or additional punishment, and the suitability of its application to specific categories of crimes and offenders.

Keywords: Community service – alternative punishment – crimes – offenders

Introduction

The Malaysian criminal justice system provides a range of punishment or sentence, in disposing of a case. Basically there are four main aims of sentencing, namely deterrence, rehabilitation, prevention and retribution. In Malaysia, the death penalty is mandatory for some offences like murder (section 302 of the Penal Code), trafficking in dangerous drugs (Section 39B(1) Dangerous Drugs Act 1952), offences against Yang DiPertuanAgong, Ruler or Yang Di PertuaNegeri (section 121A of the Penal Code), and also discharging a firearm in the commission a scheduled offence (section 3 Firearms (Increased Penalties Act) 1971. The death penalty is also discretionary for some other crimes like abduction, wrongful restraint or wrongful confinement for ransom (section 3 of the Kidnapping Act 1961), consorting with person carrying or having possession of arms or explosives (section 58(1) Internal Security Act 1960, yet to be repealed) and waging or abetting the waging of war against the Yang Di PertuanAgong, Ruler or Yang Di PertuaNegeri.(section 121 of the Penal Code).

Besides the death penalty, there are also judicial caning, imprisonments, imprisonment for life or natural life sentences. Apart from those sentences, the Malaysian judicial system also provides non-custodial sentencing options at its disposal such as fines; where the offender is required to pay a specified sum of money to the authorities, probation; where the offender is required to be supervised and regularly checked for a specific period and reparation or restitution; where the offender is required to undertake specified activities to repay either society or his victims for his criminal activities.

The court in deciding the appropriate sentence must always be guided by certain considerations. The court must act judiciously and in relation to this, Augustine Paul J. in *Zaidon Sharif v Public Prosecutor* (1996) 4 CLJ 441 emphasizes:-

“The phrase ‘pass sentence according to law’ in the subsection adverted to mean that the sentence imposed must not only be within the ambit of the punishable section but it must also be assessed and passed in accordance with established judicial principles”.

Thus, the right to determine the types and quantum of punishment on the accused is absolutely in the discretion of the trial court.

Research Materials and Methodologies:

The study conducted was legalistic in nature, using a qualitative approach. Being so, research methodologies of library research and critical analysis were used in analysing relevant materials, data and information. The main method used in this research was statutory analysis which focused on the meaning of legislative pronouncements. Besides, other relevant materials on community service order are also referred to in order to give a clear picture of the application and enforcement of the order.

Defining Community Service

Basically, community service is one form of supervised non-custodial penalty which involves an offender working without pay for a certain numbers of hours. A community service is a court order which requires the offender to perform certain kind of work and services for a specific period of time for a welfare agency or society, without any monetary gain. (D.S Cluster, 1992) This order has also been defined as a punishment meted out to offenders without involving imprisonment and is usually known as non-custodial or an alternative to imprisonment. (E Mc Laughlin & J Munchie, 2006) As an alternative to imprisonment, community service order has special characteristics whereby an offender must pay back to the society for his wrongdoings. Indeed the order is fair especially in terms of the duration of service or cost incurred as compared to imprisonment. (G.A Caputo, 2004) An essential difference between community service and any other sentence is that it requires the offender to take on the role of “helper”, not “helped”; the work is of a sort normally undertaken by volunteers, so that an offender can be seen and may feel himself to be making reparation to the community (Ray Stortini 1979). What distinguishes community service is the fact that it offers the chance for an offender to be a contributor to society rather than a cost. While community service is a punishment, it also provides an opportunity to pay back for wrong-doing and to learn a skill which can help to rehabilitate an offender. If an offender stands to gain something positive from community service they are more likely to comply.

Henceforth, community service is only one form of alternative to prison sentences. It should be noted that The United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) has listed a number of other non-custodial options including verbal sanctions, such as admonition, reprimand and warning; conditional discharge; status penalties; economic sanctions and monetary penalties, such as fines and day-fines; confiscation or an expropriation order; restitution to the victim or a compensation order; suspended or deferred sentence; probation and judicial supervision; referral to an attendance centre; house arrest; and any other mode of non-institutional treatment.

In the context of Malaysian criminal justice system, the order of community service is still at its infancy stage and does not receive adequate attention from the relevant authorities. The discussion below examines the most relevant laws pertaining to the application of the community service order. Even though most of the laws are not directly or specifically mentions the order and its procedures, they indirectly point out that there is room for the application of community service in Malaysia.

Current Legal Framework of Community Service in Malaysia.

In identifying the extent of the application of community service order, this article refers to the existing relevant provisions of law in Malaysia which provide a range of non-custodial measures as an alternative punishment as part of the criminal justice process. There are several relevant existing statutes that need to be highlighted when discussing the order of community service. These statutes are Criminal Procedure Code, Child Act 2001, Offenders Compulsory Attendance Act 1954 and Drug Dependents (Treatment and Rehabilitation) Act 1983 (Act 283).

Criminal Procedure Code (Act 593)

This act is a criminal procedural act in Malaysia. Community service order is defined in section 293 regarding the application of punishment for young offenders. (Young offender is defined in section 2 of the Criminal Procedure Code as a person of 18 years and above but below the age of 21). The order has been incorporated in the provision through Criminal Procedure Code Act (Amendment) 2006 (Act 1274) to replace para (d) with the following paragraph:

(e) (i) to make an order requiring the offender to perform community service, not exceeding 240 hours in aggregate of such nature and at such time and place and subject to such conditions as may be specified by the court;

(ii) in this paragraph "community service" means any work, service or course of instruction for the betterment of the public at large and includes, any work performed which involves payment to the prison or local authority; and

(iii) the community service under this paragraph shall be under the Minister charged with the responsibility for women, family and community. (The Ministry of Development of Women, Family and Society has been given the responsibility to promulgate and implement the community service programmes.)

It should be observed that community service order can only be imposed on a child offender between the ages of 18 to 21. Therefore a child aged below 18 will not be entitled to this type of punishment. In line with this provision, the Ministry of Women, Family and Society Ministry has established a special unit for the order of community service with three objectives, namely;

- i. punishment ; by giving the child offender a responsibility to be discharged based on their needs.
- ii. rehabilitation; by stimulating a social responsibility and making community service programmes as useful experience to the child offenders
- iii. reparation; by giving rooms or opportunities to child offenders to be reformed and rehabilitated and offering benefits to the society.

Child Act 2001 (Act 611)

This act is only applicable for those below the age of 18 years. The 611 Act defines child as a person under the age of eighteen years and in relation to criminal proceedings, child means a person who has attained the age of criminal responsibility as prescribed in section 82 of the Penal Code.

As to date there is no specific provision on community service order in the Child Act 2001. Nevertheless if sections 83 and 91 on the types of punishment are read together, the application of community service order can be inferred .

Section 91 of the Child Act 2001 reads:

Powers of Court For Children on proof of offence

(1) If a Court for Children is satisfied that an offence has been proved the court shall, in addition to any other powers exercisable by virtue of this act, have power to-

(a) admonish and discharge the child

(b) discharge the child upon his executing a bond to be of good behaviour and to comply with such conditions as may be imposed by the court;

(c) order the child to be placed in the care of a relative or other fit and proper person –

(i) for such period to be specified by the court and

(ii) with such conditions as may be imposed by the court;

(d) order the child to pay a fine, compensation or costs;

(e) make a probation order under section 98;

(f) order the child to be sent to an approved school or a Henry Gurney School

(g) order the child if a male, to be whipped with not more than ten strokes of a light cane –

(i) within the court premises

(ii) in the presence, if he desires to be present, of the parent or guardian of the child.

(h) impose on a child, if he is aged fourteen years and above and the offence is punishable with imprisonment and subject to subsection 96(2) any term of imprisonment which could be awarded by a Session Court.

The relevant paragraphs concerning on community service are Para (a), (b), (c), and (e) where, when one of these types of punishments is imposed on the child offender, the elements of community service concept might be applied. Nevertheless, since this provision of law is silent as to the additional punishment of community service, the extent of its application is very vague and unclear for those offenders below the age of 18 under this act.

Section 83(3) also provides :-

When an offence is committed by a child but a charge in respect of that offence is made against the child after he has attained the age of eighteen years, the charge shall be heard by a court other than a Court For Children and that other Court may exercise the power mentioned in paragraph (2)(a), (b) or (c).

Section 83(2) provides:-

When a child is charged with an offence before a Court For Children and during the pendency of the case he attains the age of eighteen years the Court For Children shall, notwithstanding any provisions of this Act, continue to hear the charge against the child and may –

- (a) exercise the power under section 76
- (b) exercise the power under paragraph 91(1) (a), (b), (c), (d) or (g); or
- (c) if the offence is punishable with imprisonment, impose any term of imprisonment which could be awarded by a Sessions Court.

For cases where a child has attained the age of 18 at the time the charge is made, based on this section, it can be inferred that an order for community service can be made by the court by virtue of sub section 2(b). The court still retains the power to make such order even in cases where the child offender has attained the age of eighteen.

As a conclusion, even though it can be inferred that an order of community service can be made based on the above mentioned provisions in the Child Act 2001, however it is suggested that to give clarity to this area, a specific provision giving the court power to order community service must be incorporated.

Offenders Compulsory Attendance Act 1954 (Act 461)

This legal statute has long been in existence in Malaysia. The preamble of this act states:

An Act to provide for the performance in certain circumstances, of compulsory work by offenders convicted of certain offences and liable to be sentenced to imprisonment or by persons liable to be committed to prison for failure to pay a fine or debt, in lieu of being so sentenced or committed; and for purposes connected therewith.

“Compulsory work” has been defined in this Act as any labour, task, work or course of instruction ordered by the Compulsory Attendance Centre Officer to be undertaken by the offender. (Locations or centres gazetted for offenders to report attendance were as directed by the Home Minister on 4th July 2010 through the gazette [KDN PDP (S): 03/22/3(2)]

With this order, the offender has to attend daily at a centre to be specified in the order and to undertake compulsory work for a period not exceeding 3 months and for such hours, not exceeding 4 hours as may be specified in such order.

Where a person has been convicted of an offence for which he is liable to be sentenced to imprisonment or is liable to be committed to prison for failure to pay a fine or debt, and the court is of the opinion that such person would have been adequately punished by a sentence of imprisonment for a period not exceeding 3 months, and having regard to the character of such person, the nature and seriousness of the offence or the circumstances of such person's failure to pay and all the other circumstances of the case, it is inexpedient to commit him, the court may in lieu of such sentence or committal make a compulsory attendance order. This has been provided in section 5.

The obligations of offenders under a compulsory attendance order have been set out in section 6 of the act. It reads:-

- (1) Subject to the provisions of any rules made under this act and to the terms of the compulsory attendance order, an offender shall during the continuance in force of such order report daily at such time and place as, having regard to the offender's circumstances, the compulsory attendance officer may specify.
- (2) An offender shall each day undertake such compulsory work as may be ordered by the compulsory attendance centre officer which shall be such work as can, in the opinion of that officer, be completed by the offender having regard to his physical capacity during the number of hours specified in the compulsory attendance order.
- (3) If an offender is gainfully occupied in employment, the time at which he is ordered to report daily under sub section (1) shall be such as not to interfere with such employment.

The accused is required to secure bon either with or without guarantor. This is to ensure that the accused will obey the compulsory attendance order. Before an order is imposed, the court must explain in a language understood by the accused the repercussions of not obeying the order and the court cannot make any compulsory attendance order if the accused refuses to obey the order that is going to be imposed.

By virtue of Act 461, compulsory attendance order is one of the additional punishments to imprisonment imposed by the court without affecting the life of the offender in society. The order is under the management and administration of

Malaysian Prison Department. By this order, the court will direct the offender to report himself every day at the compulsory attendance centre. This is in order for the offender to carry out duties or services for the benefit of the society and also to undergo rehabilitative programme not more than four hours per day. The offender will be supervised by an officer at the compulsory attendance centre as specified in the whole country.

Minor offences offenders are given an option to perform community service duties which will not affect their existing jobs.

Examples of duties or services under the compulsory attendance order in Act 461 which are presumed to be similar to community service order are as follows:

1. to work with workers from local government or local councils to clean the town surroundings etc
2. to work at hospitals or public health centres in order to assist the elderly sick patients
3. to work at recreational parks, playgrounds and clean public facilities
4. to work at places of worship, welfare houses and orphanage
5. to attend motivational classes, lectures and career talk
6. to attend short term courses at training centres and other sponsored courses at government training centers
7. other works or services considered appropriate by the compulsory attendance officer in the respective districts.

Drug Dependants (Treatment and Rehabilitation) Act 1983 (Act 283)

This is another non-custodial sentencing options in Malaysia. It is not directly considered as a community service order, but the programmes established by the rehabilitation centres may indirectly involve the community. Under this particular act, the government has established rehabilitation centres for the residence, treatment and rehabilitation of drug dependants. Instead of being processed through the criminal justice system, a magistrate may order a proven drug dependant to undergo treatment and rehabilitation at a specified rehabilitation centre for a period of two years and thereafter to undergo supervision by a Rehabilitation Officer or any police officer at the place specified in the order for a further period of two years. Section 6(1) of the Act states:-

Where a person who has undergone the tests referred to in section 3 or 4, in consequence of such tests, is certified by a government medical officer or a registered medical practitioner to be a drug dependant, the officer shall produce him, or cause him to appear before a Magistrate, and the Magistrate shall upon the recommendation of a Rehabilitation Officer and after giving such person an opportunity to make representations –

- (a) order such person to undergo treatment and rehabilitation at a Rehabilitation Centre specified in the order for a period of two years and thereafter to undergo supervision by an officer at the place specified in the order for a period of two years, or
- (b) order such person to undergo supervision by an officer at the place specified in the order for a period of not less than two and not more than three years.

The act also provides the conditions for an order of supervision that shall be imposed on a person in Section 6(2). The conditions are:-

1. The person must reside in a state or Federal Territory or any area as specified in the order.
2. The person must not leave the area where he resides without the written permission of the Director General
3. At the time specified in the order, the person shall report at the nearest police station or for a member of the armed forces at the place specified by an officer
4. The person shall not consume, use or possess any dangerous drugs
5. The person shall undergo such tests at such time and place as may be ordered by an officer
6. The person shall undergo any programme for the rehabilitation of drug dependants heild by the government.

According to Dr Abdul Rani Kamarudin in his article "Drug Dependants' Treatments and Rehabilitation : From "Cold Turkey to Hot Turkey" (Malaysian Anti Drugs Journal, p.193-226), an experimental drug dependant or a new addict does not require an intensive or long period of rehabilitation in the centre. What is needed is counselling and therapy, besides co-operation from the society, family, employment and user friendly environment in order to keep him free of drugs. This is done through intensive supervision involving a rehabilitation officer, parents and local leaders. In this context, supervision is a community-based programme that is designed for a drug dependant who does not need residential rehabilitation.

Therefore it can be concluded that community service as a non-custodial punishment is not totally alien to the Malaysian criminal justice system. What is needed is only a nudge to the right direction so as to enable this type of order to play its appropriate role.

The extent of the application of community service order in accordance to categories of crimes and offenders.

The order of community service has not been specifically provided as a form of punishment in any criminal provision unlike imprisonment, whipping etc. Hence the application of the order depends totally on the discretion of the presiding judge. However in the context of young offenders, the order is clearly mentioned in section 293 of the Criminal Procedure Code. This shows the Malaysian law recognises that community service order is not unsuitable for young offenders within the ages of 18 to 21. Section 2 of the Criminal Procedure Code defines young offender as a person convicted of an offence punishable by fine or imprisonment who is of or above the age of eighteen and below the age of twenty-one. According to Section 293, community service order is defined as any work, service or course of instruction for the betterment of the public at large and includes, any work performed which involves payment to the prison or local authority.

Other jurisdictions such as the United Kingdom and Australia, have long accepted the concept of community service in dealing with juvenile offenders. Community service is a common strategy used by juvenile courts and probation departments as part of their strategies for dealing with juvenile offenders. (Douglas & Mary Hunninen (2008). It is stated in the article, in the context of juvenile offenders, restorative community service focuses on both the accountability of offenders and on changing their future behaviour and thinking. These objectives are viewed by many victims as the two most important goals for the juvenile justice system. They want offenders to learn from the offence and to never again victimise other people. Besides, victims of crimes have voiced a desire to see offenders become better people, who will contribute in positive ways to the community.

In relation to this, The Malaysian Ministry of Women, Family and Community Development, Datuk Seri Shahrizat Abdul Jalil said the ministry was looking to implement a restorative justice system for juvenile offenders. This is in line with the United Nations, Convention on the Rights of the Child which Malaysia ratified in 1995. The minister added that children who committed minor offences such as stealing chickens, shoes, mobile phones, motorcycles, house breaking or for failing to carry their identification cards with them should not be allowed to languish in juvenile detention centres, instead they should be put under a community service order programme. By doing this, it would facilitate their re integration into society and prevent them from mingling with bad hats at detention centres.

Thus far the discussion in this article has shown that community service order can be imposed on young offenders; but what about other categories of offenders? It is our submission that the order of community service may also be suitable to elderly offenders. Elderly offenders perhaps can be those who are above the age of fifty five or more depending on each jurisdiction. As an analogy, the provision relating to punishment of whipping under section 289 of the Criminal Procedure Code can be referred to. The provision states:-

Sentence of whipping forbidden in certain cases:

No sentence of whipping shall be executed by instalments and none of the following persons shall be punishable with whipping –

- (a) females
- (b) males sentenced to death
- (c) males whom the court considers to be more than fifty years of age.

As the law stands, an adult male offender who is more than fifty years of age is not eligible for whipping. Therefore offenders who have committed grave offences can only be sentenced to imprisonment but escaped whipping eventhough there is a provision for whipping. Thus community service order is perhaps the most appropriate punishment to replace the whipping as an additional punishment to imprisonment.

G R Markham in his article "A Community Service for Elderly Offenders" states that elderly offenders pose special problems for decision makers. When some elderly people commit criminal offences they display distress unconnected with the offence. According to him, there is also evidence that few elderly offenders over-react to the situation they find themselves in and some have even been known to commit suicide after being accused of a quite minor offence.

The above argument relating to elderly male offenders can also be used to adult female offenders who are not eligible for whipping. In Scotland, Belgium and the Netherlands women make up a higher proportion of those on community service than of those in prison. In Belgium, for instance, women make up 8% of those on community service but only 4% of those in prison. This may be because in some cases women are perceived as care takers with family responsibilities (who therefore should not be imprisoned) or because they are perceived by the judiciary as having committed less serious crimes and therefore being less dangerous and not in need of imprisonment. (Gill McIvor et. Al (2010)

For offenders who have only committed minor offences, compulsory attendance order is imposed on them whereby they are required to perform community service as their rehabilitation process. According to Chief Inspector Shamsul Zuraimi Mat Shah, a parole/ compulsory attendance centre officer in Selangor, examples of offences eligible for compulsory attendance order are road traffic offences such as expiry of vehicle road tax under section 21 of the Road Transport Act 1987 and driving without licence under section 26(1) of the same act. Offences under the Minor Offences Act 1955 (Act 336) such as vandalism of public properties under section 15(a)(c), and possession of housebreaking tools under section 28(1) are also suitable for compulsory attendance order. At this stage, the kind of punishment acts as an additional punishment to the offences committed.

It is our humble submission that community service order is not to be made eligible in cases of violent and serious nature. This is due to the philosophy of punishment in those categories of crimes where the main aim is to punish and to deter. This approach is being practised in most jurisdictions. For example the prosecution guideline in the Netherlands provides that community service orders are strongly dissuaded in cases of serious violent or sexual crimes, recidivists who have previously been subjected to a community sentence, offenders who refuse to pay compensation, a mental inability to carry out a community sentence, any inability as a result of an addiction and a refusal to accept the community service order. (Miranda Boone, 2010). Violent or serious crimes require a deterrent punishment such as death penalty or imprisonment.

Concluding Remark

From the above discussion, it seems that the only specific provision for the application of community service order in Malaysia is section 293 of the Criminal Procedure Code. The other legislations only provide for other non-custodial forms of sentences which can be inferred as community service by way of enforcement, but not from the provisional and procedural aspects. It is undeniable that community service will benefit the offender as it gives the offender the opportunity to develop critical thinking and problem solving skills. Besides the offender will gain a better understanding of how to make constructive changes and to form meaningful relationships with others in the society. Nevertheless it is our submission that the order for community service may not be the best solution in cases involving violent and serious crimes.

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