

NON-CUSTODIAL SENTENCING OPTIONS IN MALAYSIA

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I. INTRODUCTION

An important development of The United Nations Standard Minimum Rules for the Treatment of Prisoners (1955) was the adoption by the General Assembly¹ on 14 December 1990 of the United Nations Standard Minimum Rules for Non-custodial Measures. Since these Rules were defined by the work of the United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI) based in Tokyo, the General Assembly approved that the Rules should be known as “the Tokyo Rules”. In adopting the Tokyo Rules, the General Assembly expressed its conviction ‘*that alternatives to imprisonment can be an effective means of treating offenders within the community to the best advantage of both the offenders and society*’. The Tokyo Rules reflect the current sentiment that the ultimate goal of the criminal justice system is the reintegration of the offender into society and the restriction of liberty is only justifiable from the view points of public safety, crime prevention, just retribution and deterrence. The General Assembly recommended member states to implement the Tokyo Rules at the national and regional levels².

Malaysia has its own share of the universal problem of a swelling prison population. There has been much discourse on the negative consequences of prison overpopulation especially with the advent of AIDS. Fortunately, the criminal justice process is provided with clear alternatives to imprisonment. In a similar spirit to that of the Tokyo Rules, these alternatives enable offenders to be processed or diverted away from the traditional prison system. Malaysian penal laws contain a broad spectrum of non-custodial punishments that enhance the rehabilitation/reintegration function of criminal justice. This paper gives a comprehensive overview of the existing non-custodial measures used in law enforcement.

II. SENTENCING OPTIONS

The main repository of non-custodial sentencing orders is the Criminal Procedure Code (Act 593 in the Laws of Malaysia series) relating to criminal procedure. Since 10 January 1976, the Criminal Procedure Code is applicable throughout Malaysia having superseded the four separate Codes that existed earlier, namely, one each for the Federated Malay States, the Straits Settlements, Sabah and Sarawak. Various other penal statutes provide for the usual punishment of fine as an alternative to imprisonment but a default to pay the fine, however, would still lead to imprisonment.

The foremost provision in the Criminal Procedure Code (CPC) providing for the non-institutional treatment of offenders is the power to discharge an offender conditionally or unconditionally. A conditional discharge is commonly known as a good behaviour bond. The power to discharge is set out in section 173A, CPC. When a charge is proved against an offender, the Court can make an order under section 173A ‘*... having regard to the character, antecedents, age, health or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed...*’. For minor infractions of the law or compelling mitigating circumstances the Court does no more than give an admonition or a caution to the offender. The Court may alternatively discharge the offender conditionally on a bond of good behaviour; the conditions imposed are geared towards ensuring the offender practices good behaviour during the period of the bond. Such bond shall not exceed three years although the Court can order a shorter period. If the offender remains on good behaviour during the specified period, he will not be called back to the Court. No conviction on the charge is recorded under section 173A and the offender is thereby assured of a ‘clean slate’. Other than the charge and possible trial the offender continues living and working in the community. More importantly there is no lasting stigma as a result of the offending.

A variation of the bond of good behaviour under section 173A is provided under section 294, CPC. The sub-stratum for the consideration of the Court is similar to the one set out in section 173A (in italics above).

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¹ Resolution 45/110.

² *Ibid*, Para. 2.

However, unlike section 173A, the offender has to be convicted first before a bond of good behaviour is considered under section 294. Naturally section 294 is applicable to offences of a more serious category where a record of the offending is necessary. Nevertheless, the offender yet again remains in the community and will be free from any fetters once the bond period expires and he has complied with all the conditions therein. Under section 294A, CPC the Court can require that there is included in the bond one or more of the following conditions:

- (a) *a condition that the person shall remain under the supervision of some other person named in the bond during such period as may be specified in it;*
- (b) *such conditions for securing the supervision as the Court may think it desirable to impose;*
- (c) *such conditions with respect to residence, employment, association, abstention from intoxicating liquors or with respect to any other matter whatsoever as the Court may think it desirable to impose.*

In case of any breach of a bond of good behaviour executed under section 173A or section 294, CPC the Court may issue a warrant for the apprehension of the offender. Once apprehended the offender is brought before the Court which dealt with his original offence. If the Court accepts his explanation or answer to his conduct relating to the alleged breach of the bond, the bond of good behaviour earlier executed continues. Where such a breach is clearly made out, the bond of good behaviour is cancelled and the Court can proceed to sentence the offender as it deems appropriate.

The length of a prison sentence may be reduced by having resort to an order of police supervision under section 295, CPC. Immediately after serving a sentence of imprisonment an offender can be ordered to be subject to the supervision of the police for a period of not more than three years or not more than one year depending on the jurisdiction of the Court issuing the order. Section 296, CPC lists the obligation of persons subject to police supervision as follows:

- (a) *notify the place of his residence to the officer in charge of the police district in which his residence is situated;*
- (b) *whenever he changes his residence within the same police district notify such change of residence to the officer in charge of the police district;*
- (c) *whenever he changes his residence from one police district to another notify such change of residence to the officer in charge of the police district which he is leaving and to the officer in charge of the police district into which he goes to reside;*
- (d) *whenever he changes his residence to a place beyond the limits of Malaysia notify such change of residence and the place to which he is going to reside to the officer in charge of the police district which he is leaving;*
- (e) *if having changed his residence to a place beyond the limits of Malaysia he subsequently returns to Malaysia notify such return and his place of residence in Malaysia to the officer in charge of the police district in which his residence is situated.*

The principle of restitution in sentencing is addressed in the CPC by the provisions relating to the payment of compensation by the offender to the victim of the crime. Such compensation can be ordered by the Court in addition to the bond under section 173A, CPC or generally for all convictions under the power of section 426, CPC. It is interesting to note that under section 426 the court is empowered to fix the sum of the compensation. This provides an avenue for a just and fair compensation to be ordered in an appropriate case. In addition to the payment of compensation, the Court can also order the offender to pay the costs of his prosecution.

Besides compensation, the power to compound offences under the CPC is another example of restorative justice in Malaysia. Section 260, CPC tabulates the offences that are compoundable. A total of 23 offences under the Penal Code (Act 574) are compoundable, the abetment of these offences or attempt to commit them are also compoundable in the like manner. Examples of compoundable offences are causing hurt, wrongful restraint, use of criminal force, house-trespass and criminal defamation. For all compoundable offences, the victim of these offences may compound them provided there is no prosecution pending for such offence. If a prosecution is pending, the consent of the Court is also required for the compound, presumably, because action has been taken by the Court, for example, registering the charge and issuing a summons. When an offence is compounded it does not mean that no offence is committed, it means that the victim is

prepared to forgive the offender and will accept compensation. Sub-section (4) of section 260 makes specific reference to the contractual nature of composition of offences. It authorises any person competent to contract on behalf of the victim to compound the offence. The effect of a composition under section 260 is that of an acquittal of the accused. Again, the 'clean state' result is achieved enabling the uninterrupted social integration of the accused.

Another statute that provides an alternative to a sentence of imprisonment is the Offenders Compulsory Attendance Act 1954 (Act 461). As the name suggests, the Court makes a Compulsory Attendance Order. 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, as may be specified in such order. Section 5 of the Act states that 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 three 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 (as the case may be) 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. The obligations of offenders under a Compulsory Attendance Order as set out in section 6 of the Act are as follows:

6. (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 Centre 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 subsection (1) shall be such as not to interfere with such employment.*

Sub-paragraph (3) is important in that an offender subject to this Order continues to be gainfully employed.

Being in close proximity to the golden triangle, Malaysia has been fighting the scourge of drugs. Although capital punishment is imposed for drug trafficking under the Dangerous Drugs Act 1952 (Act 234), on the other hand, as is consistent with international standards, Malaysia also realises that drug dependants have to be treated for their dependency. Hence, under the Drug Dependants (Treatment and Rehabilitation) Act 1983 (Act 283), the government has established Rehabilitation Centres for the residence, treatment and rehabilitation of drug dependants. A proven drug dependant need not be processed through the criminal justice system but may be immediately processed for his dependency. A Magistrate can order a 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. Alternatively, the drug dependant can be ordered to undergo *only* supervision at the place specified in the order for a period of not less than two and not more than three years. Even section 38A of the Dangerous Drugs Act 1952, empowers the Court to order offenders who are below the age of eighteen and certified to be drug dependants to be sent to these Rehabilitation Centres to be followed by two years of after-care supervision. This provision, however, does not apply where the drug dependant is found guilty of a serious category of offence like drug trafficking and cultivation of drug-extracting plants.

For child offenders, in tandem with worldwide trends, Malaysia is equally concerned with their welfare and rehabilitation. It is a recognized fact that even the modern prison system is deemed harmful to children and special laws have to be enacted for the treatment of child offenders. In Malaysia, child offenders are governed by the provisions of the Child Act 2001 (Act 611). This Act superseded the old Juvenile Courts Act 1947 and has been in force since 1 August 2002. A child is defined as a person aged above 10 years and under 18 years. The courts constituted under this Act are known as the Courts For Children and are vested with jurisdiction to try all offences except offences punishable with death. Where an offence has been proven

the Court for Children has the power to make the following orders:

- (i) admonish and discharge the child;
- (ii) discharge the child under a bond of good behaviour with such conditions as may be imposed by the Court;
- (iii) order the child to be placed in the care of a relative or other fit and proper person with such conditions as may be imposed by the Court;
- (iv) order the child to pay a fine, compensation or costs.

One special feature of the Child Act 2001 is the power of the Court to order the parent or guardian of the child to execute a bond for the child's good behaviour. The conditions attached to this bond make it imperative that the parent or guardian plays an interactive role in the supervision and care of the child. Failure by the parent or guardian to comply with the conditions of the bond constitute an offence punishable with a fine of up to RM5,000. Such provisions have a semblance to the 'parenting order' made under section 8 of the Crime and Disorder Act 1998 of England.

Further provisions of the Child Act 2001 provide for the probation of child offenders. A probation order shall have effect for a period not less than one year and not more than three years from the date of the order. Under section 98 of the Child Act 2001, a probation order is made for the purposes of securing the good conduct and supervision of the probationer or preventing the repetition by him of the same offence or commission of other offences. The Court for Children is empowered to include any one or more of the following requirements in a probation order:

- (i) *that the probationer shall reside at a probation hostel, at the home of his parent or guardian or relative or at some other place;*
- (ii) *that the probationer shall attend an educational institution to be recommended by the probation officer;*
- (iii) *that the probationer shall remain indoors at his place of residence, be it at the probation hostel or at home, during hours to be specified.*

Before making a probation order containing requirements as to residence, the Court shall consider the home surroundings of a child.

Perhaps mention should also be made that the Child Act 2001 contains provisions relating to the protection and rehabilitation of children which are pre-emptive to any offending by a child.

III. POST-SENTENCING OPTIONS

Included in the Tokyo Rules³ are guidelines for post-sentencing dispositions that should be available to the competent domestic authorities. Rule 9.2 refers to some specific post-sentencing dispositions such as:

- (a) *Furlough and halfway houses*
- (b) *Work or education release*
- (c) *Various forms of parole*
- (d) *Remission*
- (e) *Pardon*

In Malaysia offenders sentenced to imprisonment have resort to remission and pardon to avoid further incarceration.

The remission system applicable to prisoners in Malaysia is provided under Part 6 of the Prisons Regulations 2000 (made under the Prison Act 1955). The relevant provisions set out the rationale for the grant of remission i.e. *with a view to encouraging good conduct and industry and to facilitate reformatory treatment*. A convicted prisoner sentenced to a term of imprisonment exceeding one month may be granted a one-third remission of his sentence. The remission system is explained to all prisoners on admission and when, for any reason, remission is forfeited the prisoner is made fully aware of such forfeiture. At stipulated intervals the Officer-in-Charge of the prison is required to prepare a report on the work and conduct of the

³ Rule 9.

prisoner.

Article 42 of the Federal Constitution gives power to the Yang di-Pertuan Agong (the King) to grant pardons in respect of all offences committed in the Federal Territories. The Ruler or Governor of a State has power to grant pardon in respect of all offences committed in his State. To implement the power of pardon, Pardons Boards are constituted for each state and a single Pardons Board exists for the Federal Territories. All cases of offenders sentenced to capital punishment are as of right referred to the Pardons Board.

IV. FUTURE DIRECTIONS

Rule 9.4 of the Tokyo Rules states:

Any form of release from an institution to a non-custodial programme shall be considered at the earliest possible stage.

Malaysia takes a proactive approach in searching for alternatives to incarceration in prison. One such suggestion is for the introduction of community service. In fact, as early as 1979⁴ the Minister of Social Welfare and Services suggested that community service in Malaysia should be implemented in lieu of short-term imprisonment. Clearly then the search for alternatives to custodial penalties has been on for the last two decades. Of late, the Law Reform Unit of the Attorney-General's Chambers conducted research to study the rationale and introduction of the community service scheme. The study is looking into possible rationale such as cost savings, deterrence, reparation to the community and rehabilitation of offenders. The study shows the spirit of the legal system to consider improvements in the treatment of offenders. Indeed, the main concern of any modern sentencing policy should be the circumstances of the offender involved and how best they can be addressed by non-custodial measures such as community service⁵.

Another area being looked at is the possible introduction of the parole system. Again the Law Reform Unit of the Attorney-General's Chambers has prepared the relevant paper which studies the parole system in other jurisdictions with a view to explore the possibility of the implementation of parole in Malaysia. For that matter, the Prisons Department too has prepared a paper⁶ detailing the logistics of the parole system. Among other reasons, this paper stresses the social re-integration of the offender as the main justification for parole. Parole affords an opportunity to continue the correction of the offender in a 'real' environment.

V. CONCLUSION

Incarcerated offenders who leave prison face stigma, ostracism, suspicion and isolation and hence despair, which may very well spur them to return to prison. Statistics in Malaysia show that about 50% of offenders in prison are recidivist offenders. It is to avoid the undesirable effects of imprisonment that the Tokyo Rules encourage the promotion of non-custodial measures with due regard to an equilibrium between the rights of individual offenders, the rights of victims and the concern of society for public safety and crime prevention. The laws referred to in this paper provide a range of non-custodial measures at both ends of imprisonment. Provided all necessary conditions are met an offender has access to these measures as part of the criminal justice process. The treatment of offenders in this manner ensures that they continue being part of the community. Law enforcement and social service agencies can provide the requisite framework to assist the offender to lead a law-abiding and self-supporting life. Of course, the biggest challenge is to promote among offenders a sense of responsibility towards society and to restore their dignity in order for them to function productively. To that end the search for suitable alternatives to incarceration continues.

In the final analysis, prison and custodial institutions should remain only for offenders of grave crimes, recidivists and hard-core criminals.

⁴ See *New Straits Times*, 9 November 1979 and 28 August 1979.

⁵ Community service: A Rationale. (1981) 2 MLJ CXXXV.

⁶ Proposal for the Parole System in Malaysia.

⁷ *Ibid*, note 6.