

The Legal Basis for Community Service as an Alternative Punishment in Malaysia

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Abstract: Community service order is now slowly gaining attention from various authorities in the Malaysian legal circle. The question that comes to mind amidst the development in this non-custodial punishment is whether there is existing legal basis for the application of the community service order. It is crucial to identify, the legal foundation that can support community service order in Malaysia to avoid issues of illegality of orders imposed. This study aims to highlight the legal provisions that are in existence in the Malaysian jurisdiction relating to community service order and the extent of its applicability.

Key words: Community service, alternative punishment, crimes, offenders, jurisdiction

INTRODUCTION

Community service order is an order meted out by the court that requires an offender to perform services or duties for a specified period of time without any wages for the welfare agency and society.

There are usually 5 aspects to this order: The court giving the order, the type of the order, the period of service, consideration from the services rendered and the party served (Claster, 1992). This order is also defined, as a non-custodial punishment (Umbreit, 1981) as it will not involve imprisonment or considered as an alternative to imprisonment (McLaughlin and Muncie, 2006).

In ordering community service in criminal cases, the court must ensure that it has a legal provision that he can rely on in making such an order. Therefore, this study will discuss and elaborate the legal provisions that are considered relevant to the application of community service order in Malaysia.

RELEVANT LAWS RELATING TO COMMUNITY SERVICE IN MALAYSIA

Literature review carried out in this area shows that except for 1 legal provision, as yet there is no specific and clear legal provision regarding the implementation of community service order in Malaysia. The one exception mentioned before is Section 293 of the Malaysian Criminal Procedure Code that will be further discussed after.

Be that as it may in this study, the researchers will refer to existing statutes that even though, they do not have clear specific provisions on community service order

but on the other hand have provisions that can be interpreted, as allowing community service order to be made through inference.

The chosen 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)

Criminal procedure code governs the criminal proceedings practiced in Malaysian courts. It is found that Section 293 of the said code clearly gives authority to the court to give community service order, as a form of non-custodial punishment to young offenders. Young offender is defined in Section 2 of the CPC as a person who had been convicted for an offence that can be punished by fine or imprisonment and is 18 years of age or more but below 21 years. This legal development came about in 2006 when the order was incorporated in the Section 293 through Criminal Procedure Code Act (Amendment) 2006 (Act 1274) to replace paragraph (d) with the following paragraph:

- To make an order requiring the offender to perform community service, not exceeding 240 h in aggregate of such nature and at such time and place and subject to such conditions, as may be specified by the court
- 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

- The community service under this paragraph shall be under the minister charged with the responsibility for women, family and community

Therefore under this provision, the court can only impose community service order on offenders of 18 years but below 21.

OFFENDERS COMPULSORY ATTENDANCE ACT 1954 (ACT 461)

This 1954 Act is an act that provides 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 there with.

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. As for the locations and centres gazetted for the offenders to report attendance, they are as directed by the home minister (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 h, 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: 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.

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.

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 alternative 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 >4 h 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 are as follows:

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

From the earlier types of services or orders under the compulsory attendance order, it can be seen that the services are the kind that are usually given in a community service order (Boone, 2010).

CHILD ACT 2001 (ACT 611)

There is actually no specific provision on community service order in the Child Act 2001. It is to be noted that this act only applies to persons who are below 18 years of age. Section 91 provides for the powers of court for children on proof of offence, Sub Section 1 provides.

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:

- Admonish and discharge the child
- 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
- Order the child to be placed in the care of a relative or other fit and proper person
 - For such period to be specified by the court
 - With such conditions as may be imposed by the court
- Order the child to pay a fine, compensation or costs
- Make a probation order under Section 98
- Order the child to be sent to an approved school or a Henry Gurney School
- Order the child if a male, to be whipped with not >10 strokes of a light cane
 - Within the court premises
 - In the presence if he desires to be present of the parent or guardian of the child
- Impose a child if he is age 14 years and above and the offence is punishable with imprisonment and subject to Sub Section 96 (2) any term of imprisonment which could be award by a sessions court

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 1(b) under the phrase to comply with such conditions, as may be imposed by the court. The court will still retain the power to make such order even in cases where the child offender has attained the age of 18. This is as provided by Section 83 on trials of children in conformity with the child act.

Section 83 (3) 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 18 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-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 18 years the court for children shall not with standing any provisions of this act, continue to hear the charge against the child and may (b) exercise the power under paragraph 91 (1) (a, b, c, d or g).

Thus, it can be seen that the relevant provision in this matter is Sub Section 2 (b) to be read together with Section 91 (1) (b) which gives the court the power to discharge the child upon his executing a bond to be of good behaviour and to comply with such conditions may be imposed by the court.

Even though, it can be inferred that an order of community service can be made based on the earlier mentioned provisions, 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 in the act.

DRUG DEPENDANTS (TREATMENT AND REHABILITATION) ACT 1983 (ACT 283)

This is another non-custodial sentencing options in Malaysia. Under this particular act, the government has established rehabilitation centres for the residence, treatment and rehabilitation of drug dependants. This is because in certain circumstances, 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 2 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:

- Order such person to undergo treatment and rehabilitation at a rehabilitation centre specified in the order for a period of 2 years and there after to undergo supervision by an officer at the place specified in the order for a period of 2 years
- Order such person to undergo supervision by an officer at the place specified in the order for a period of not <2 and not >3 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:

- The person must reside in a state or federal territory or any area as specified in the order
- The person must not leave the area where he resides without the written permission of the director general
- 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
- The person shall not consume, use or possess any dangerous drugs
- The person shall undergo such tests at such time and place as may be ordered by an officer
- The person shall undergo any programme for the rehabilitation of drug dependants held by the government

Hence, it can be seen that even though it is not directly considered as a community service order, the programmes established by the rehabilitation centres may indirectly involve the community.

CONCLUSION

It can therefore be concluded that even though, there is in existence some legal basis for community order

in Malaysia but in order to ensure that the relevant laws are devoid of ambiguities, there must be a specific provision in the power of the court to grant such an order. This will surely facilitate the smoothness of the implementation of law relating to community service as a non-custodial punishment in Malaysia (Boone, 2010; McIvor *et al.*, 2010). Perhaps the ideal way to create a foundation that will act, as a basis for community service order is to enact a specific statute on community service that will govern all matters pertaining community service order.

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