

Community Service Order as Alternative Punishment in Syariah Court: An Analysis

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ABSTRACT

Syariah courts in Malaysia have the jurisdiction to impose punishments up to 3 years imprisonment, 6 strokes and RM5000 fine or combination of any two or three of the punishments (Criminal Jurisdictions) Act (Amendment 1984). Referring to Syariah Criminal Offences Act, Syariah Court Judge has the discretion to impose punishment for first offender, youthful offender, woman offender and those who has previous conviction. The judge can consider light punishments as an alternative to the punishment provided for that particular offence. Hence, a judge can use his discretion to order for good behaviour or send the offender to rehabilitation centre/approved home. This paper seeks to examine the possibility of the Syariah Court to give an order of community service as an alternative punishment. This research is basically qualitative and analysis based on the discussions of the implementation of a community service order as practised by civil courts.

Keywords: Alternative punishment criminal offender, order for community service, Syariah court

INTRODUCTION

Under the criminal justice system those who are guilty of committing any offence will be punished. There are ranges of punishment or sentence: death penalty, judicial caning, imprisonments, fine, 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 take specified activities to repay either society or his victims for his

ARTICLE INFO

Article history:

Received: 5 January 2017

Accepted: 26 September 2017

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criminal activities (Abdul Rahim, Zainudin, Azira, Samuri, & Abdul Rahim, 2013).

Punishment is seen as retribution or revenge, deterrence or public education, incapacitation and rehabilitation. Therefore, punishment should be viewed as not only to punish the offender but also to reform the criminal into a better person.

Community service order is considered as an alternative punishment in most criminal justice system. It is the right time for the Syariah Court to consider introducing community service order as an alternative punishment in Malaysia.

DEFINITION OF COMMUNITY SERVICE ORDER

Community service order can be defined as a form of punishment requiring the offender to do certain duties without any reward in return (Walgrave & Geudens, 1996). This order also has been defined as a punishment meted out to offenders without involving imprisonment and is usually known as non-custodial or an alternative to imprisonment (Mc Laughlin & Munchie, 2006). It can be said that community service is only one form of alternative to prison sentences. According to the United Nation Standard Minimum Rules of non-custodial Measures (The Tokyo Rules) a number of non-custodial options can be imposed 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 (Abdul Rahim et al., 2013). Community service order is also 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 (Criminal Procedure Code, section 293). Studies show community service orders benefit the offender and society since the offender is never separated from society (Maher & Dufour, 1987). The offender and society are both involved in performing activities which may encourage the offender to take responsibility and feel more aware of the needs of society (Silberman, 1986). The offender's personality also improve substantially through acquisition of new skills.

COMMUNITY SERVICE ORDER IN MALAYSIA: CIVIL COURT

In Malaysia, community service order is still in its infancy stage. It was introduced in 2007 and only applied to young offenders aged between 18 and 21 years old as provided in section 293 (1)(e) of Criminal Procedure Code (Act 593). This section was amended so that an order of community service for a period not exceeding 240 hours, could be made to youthful offenders for the purpose of their rehabilitation. The enforcement of this order is under the care of the Minister responsible for Women, Family and Community (Sidhu, 2008).

It should be observed that community service order can only be imposed on a child offender between the ages of 18 to 21. A person below 18 will not be entitled to this type of punishment since there is no specific provision in the Child Act 2001 which gives the power to the Court to make community service order for child offenders. However, the court may use section 83 and section 91 of the Child Act to order community service as alternative punishment for child offender (Child Act section 83(2) (b) and section 91(1)(a)(b)(c)).

It has been observed that under Offenders Compulsory Attendance Act 1954 (Act 461) provides for compulsory work to be performed by the offender who had been convicted to be ordered to do compulsory in lieu or being so sentenced or committed: and for purposes connected therewith (Preamble of the Act). By virtue of this Act, compulsory attendance order is one of the additional punishments to imprisonment imposed by the court without affecting the life of offender in the society. This order comes under the Management and Administration of Prison Department.

COMMUNITY SERVICE ORDER: ISLAMIC LAW PERSPECTIVE

In Islamic criminal law, community service order can be considered as a type of *ta'zir* punishments. *Ta'zir* (plural :*ta'azir* or *ta'zirat*) is a crime punishable with penalties that are discretionary, i.e. it is left to the discretion of the judge to determine the suitable punishment to be imposed on the

offender. The crimes of *ta'zir* are unlimited. It consists of transgressions where no specific and fixed punishment is prescribed, i.e. apart from *hudud* and *qisas* and *diyah* ('Awdah, 2003). The *Shariah* gives the ruler or the court considerable discretion in the infliction of *ta'zir* punishments, which range in gravity from a warning to death, taking into account the seriousness of the offence, the circumstances of the criminal, his record, and other mitigating or aggravating factors. However, the authority of the judge is limited by Islamic law (Siddiqi, 1985:165).

The punishment of *ta'zir* imposed can be one of the following categories:

- (1) Basic / original punishment (*al-'uqubah al-asliyyah*) - for crimes which have no fixed punishment, for example, in the case of bribery (*rashwah*), or *riba*, though both acts are considered as *ma'siyah* in the *Qur'an* and *Hadith*, there are no fixed punishments stated. Thus, *ta'zir* punishments are considered as the basic / original punishments for these types of crime.
- (2) Substitutional / alternative punishment (*al-'uqubah al-badaliyyah*) - for the crimes of *hadd* or *qisas* which are remitted for certain reasons, for example, *hudud* crimes which lack one or more conditions of *hadd* such as stealing good whose value is less than *nisab* (i.e. a minimum value fixed by the *shariah*).

- (3) Additional punishment (*al-‘uqubah al-idhafiyah*) - means that *ta‘zir* punishment is imposed on the offender in addition to the basic punishment in the case of those crimes which deserve *hadd* or *qisas* punishment which are clearly mentioned in the Qur’an and *Hadith* of the Holy Prophet, for example, exile for one year is considered as a *ta‘zir* punishment which is additional to the basic one (i.e. flogging with one hundred lashes) in the case of fornication (as held by Abu Hanifah), or adding forty lashes to the basic forty lashes for the crime of drinking intoxicants (as held by al-Shafi’i).

It can be inferred from the above; community service order can be imposed on an offender as an alternative punishment or even as additional punishment depending on the offence committed.

THE OBJECTIVES OF TA‘ZIR PUNISHMENT

Ta‘zir punishments have the objective of preventing the commission of further offences, both by the offender and by other members of society. The word *ta‘zir* literally means to prevent or to restrain. *Ta‘zir* punishments are also intended to rectify the offender and to reform him (al-Mawardi, 1973). In the following paragraph the objective of *ta‘zir* punishments is explained.

Preventive and Deterrent (*al-Zajr*)

Al-Zayla’i, in his discussion on *Matn al-Kanz* states that the objective of *ta‘zir* punishments is to serve as a deterrent (*zajr*) (Al-Zayla’i, 1313H). *Zajr* means to prevent the offender from the recommission of further offences and deter other members of society from initiating the offences, realizing that the punishment which has been inflicted on the offender is not only confined to him alone but may also be imposed on any other potential offender for a similar crime. In this regard Ibn al-Humam states in his discussion on *Fath al-Qadir* as follows:

Punishment can serve as a preventive measure (mawni‘) before the occurrence of a crime, and serve as a deterrent (zawjir) after the occurrence of a crime. It means that the knowledge of the enforcement of the punishment could prevent any other potential criminal from carrying out his intention, or whenever a criminal is punished, it deters him from the recommission of further offence.
(Ibn Al-Humam, 1995)

Since religious disobediences (*ma‘asi*) punishable by *ta‘zir* can be either the commission of the prohibited acts or the omission of the obligatory acts, the meaning of *zajr* is, in the former, to prevent a person from committing such prohibited acts and, in the latter, to prevent him from omitting such obligatory acts. The offender will be punished until he obeys the required religious duty. It is interesting to note that

punishment in the latter case should be stricter and stronger since the objective of *ta'zir* punishment in such cases is to compel the offender to observe the obligatory acts. Thus, the punishment can be repeated so long as he omits the obligatory acts (Ibn Taymiyyah, 1992).

The deterrent aspect in Islamic Penal system is seen as the predominant justification for punishments. The jurists maintain that deterrent punishments promote the safety of society and the honour and interests of all. Deterrence is not pursued based on the speed with which the accused is tried and punished, and on the public manner of the infliction of the punishment (Lippman, McConville, & Yerushalmi, 1988).

Reformative (*al-Islah wa al-Tahdhib*)

Another objective of *ta'zir* punishment is to reform and to rehabilitate the offender. Mawardi (1973), in this regard, states that *ta'zir* is intended to discipline, reform, and prevent a person from the commission of the crime. It means that disciplinary and reformative punishment can lead the offender to stop from the commission of a crime, motivated by his religious awareness and self-consciousness, which results from his abhorrence of the crime and not from the fear of the punishment, to seek God's pleasure since the crime is considered a *ma'siyah*. This religious awareness is, indeed, the best way to confront the crime at its root when a person believes that every one of his actions is recorded by God and cannot go unresponded in the Hereafter.

The concept of reformation of the offender is obtained from the principle of repentance or *tawbah* recognised in the Qur'an. The most noticeable example of this objective can be seen in the absence of any limitation on the period of punishment, and could last till the criminal's repentance or until his death in the case of a dangerous criminal. Recourse has been had to imprisonment from a very early date. It is said that during the caliphate of 'Umar ibn al-Khattab, a house was purchased in Medina to house prisoners. This practice was later followed by governors (Ibn Faraj, 1982). Imprisonment came to be used mainly for discipline and correction, both of which objectives, it was thought, would be achieved by self-reflection.

Retributive (*al-Jaza'*)

Since crime is a detested and undesired act which harms the sense of justice and rouses the wrath of society against the offender, punishment is the reaction of society towards the offender. Therefore, *ta'zir* punishment is the general retaliation of society in the interest of maintaining peace and social order. In the case of a *ta'zir* offence which infringes the right of individuals, the punishment provides satisfaction for the aggrieved parties by eliminating the ill feelings which they may bear towards offenders. Punishment prevents offenders from experiencing the consequences of the wrath their activities creates in society, thus allowing their rehabilitation (Al-Bahuti, 1982).

Expiation (*al-Kaffarah*)

The objectives of punishment in Islamic law do not only cover the benefits gained in this world but also that of the next world (Mehat, 1991). This objective of punishment is a unique feature of Islamic criminal law that cannot be found in any other criminal law systems. The punishment that is inflicted on an offender in this world is to clear his account with Allah. This is based on a *hadith* of the Prophet which says:

“Whoever commits a crime deserving of hadd and receives its punishment, this will be its expiation (of sin)”. (Tirmizi, 1975)

From the *hadith*, it can be understood that an offender who has been punished in this world will not be punished again for the same offence in the hereafter. However, it must be borne in mind that the right to pardon sins of a man belongs solely to Allah. Allah knows the truth.

TYPES OF TA'ZIR PUNISHMENT

There is no specific punishment to be passed on an offender. Any punishment which can serve the purpose of punishment may be used. *Ta'zir* punishment can be inflicted upon the offender's soul, body, property, and dignity. These penalties are based on the school of law used, morality and local custom. Types of *ta'zir* punishment can be of these following categories:

(1) Corporal punishments (*al-'uqubahal-badaniyyah*). These include capital punishment, i.e.

the death penalty, flogging, and crucifixion.

- (2) The withdrawal of one's freedom (*al-'uqubahal-muqayyadah li al-hurriyyah*). This includes banishment, boycotting and imprisonment.
- (3) Financial punishments (*al-'uqubahal-maliyyah*). These include fines, seizure of property, and the modification or demolition of property.
- (4) Verbal punishments (*al-'uqubahal-nafsiyyah*). These include admonition, reprimand, and threat.
- (5) Other punishments. These include any punishment which can serve the purpose of *ta'zir* such as dismissal from office, and public disclosure.

From the above, it can be seen that there are various types of punishments which can be imposed as *ta'zir* punishments in Islamic criminal law as discussed by the jurists. It is agreed that jurists do dispute the legality of some of these punishments, particularly financial punishment and imprisonment. However, as they are all *ta'zir* punishments, they are left to the discretion of the ruler or the authority concerned to legislate *ta'zir* laws depending upon the suitability of their application according to place and time. Thus, Community Service Order can be considered a legal punishment to be imposed on an offender if the public interest necessitates it and it serves the objectives and conforms with Shariah principles.

CRIMINAL JURISDICTION OF THE SYARIAH COURT

It is undeniable that the criminal jurisdiction of Civil Courts especially that of the High Courts, is very wide and unlimited.¹ The High Courts can impose any punishment allowed by the law including the death penalty on any offender regardless of race or religion.

Concerning the Syariah Courts, the Federal Constitution of Malaysia provides that, other than in the Federal Territories, the constitution, organization and procedure of the Syariah Courts are State matters and its exclusive legislative and executive authority.²

Since Syariah Courts were established

¹ See: section 22 of the Courts of Judicature Act, 1960, which provides that the High Court shall have jurisdiction to try all offences committed (i) within its local jurisdiction;(ii) on the high seas on board any ship or on any aircraft registered in Malaysia;(iii) by any citizen or any permanent resident on the high seas on board any ship or on any aircraft;(iv) by any person on the high seas where the offence is piracy by the law of nations; and offences under Chapter VI of the Penal Code [Act 574], and under any of the written laws specified in the Schedule to the Extra-Territorial Offences Act 1976 [Act 163], or offences under any other written law the commission of which is certified by the Attorney General to affect the security of Malaysia committed as the case may be (i) on the high seas on board any ship or on any aircraft registered in Malaysia;(ii) by any citizen or any permanent resident on the high seas on board any ship or on any aircraft; or(iii) by any citizen or any permanent resident in any place without and beyond the limits of Malaysia.

² The Federal Constitution of Malaysia, Schedule 9, List II, item 1.

under the State laws (i.e. the State enactments), they provide for both civil and criminal jurisdiction of the Syariah Courts. State enactments are bound to specify criminal and civil jurisdiction as provided by the Federal Constitution in 9th Schedule, List II, State list.

For criminal jurisdiction, the enactments list a number of offences that can be tried in the Syariah Courts. Generally, the offences can be divided into six categories, namely, matrimonial offences, offences relating to sex, offences relating to the consumption of intoxicants, offences concerning the spiritual aspect of Muslim communal life, offences relating to the sanctity of religion, and miscellaneous offences (of a religious nature) apart from those categories mentioned.³

In criminal matters, the sentencing jurisdiction of Syariah Courts is limited by the Federal Constitution.⁴ Parliament also enacted the Syariah Courts (Criminal Jurisdiction) Act 1965 (amendment) 1984,⁵ which limits the jurisdiction of the Syariah Courts to offences punishable with imprisonment for a term not exceeding

³ Ahmad Ibrahim, *Islamic Law In Malaya* (Singapore: MSRI, 1965), 316, Ahmad Ibrahim and Ahilemah Joned, *Malaysian Legal System* (Kuala Lumpur: Dewan Bahasa dan Pustaka, 1986), 62.

⁴ See: the Federal Constitution, Schedule 9, List II, item 1.

⁵ Act No.23 of 1965. Before its amendment in 1984, the Shariah courts had jurisdiction over offences punishable with imprisonment for no more than six months, or with a fine not exceeding one thousand ringgit, or any combination thereof.

three years, or with a fine not exceeding five thousand Malaysian ringgit, or with whipping not exceeding six strokes, or any combination thereof.⁶ Other types of punishment such as sending the offender to any rehabilitation centre or welfare home can be found in the Syariah Criminal Procedure Enactment/Act. It should be noted that the jurisdiction of the Syariah Courts is applied only to Muslims.

POSSIBILITY FOR THE SYARIAH COURT TO ORDER FOR COMMUNITY SERVICE

Community service as an alternative punishment is a medium to strengthen relationship between the offender and community. There is no clear provision in either Syariah Criminal Offences (Federal Territories) Act 1997 (Act 559) or Syariah Criminal Procedure (Federal Territories) Act (Act 560) regarding community service order. If Criminal Procedure Code provides for a community service order to a youthful offender the same could be done under section 128 of Syariah Criminal Procedure (Federal Territories) Act 1997, where Syariah Court judge can impose a community service order in addition to a bond for a good behaviour. This can be done by adding to the provision which gives the power to the court to order the Syariah offender to do community for a number of hours:

- (1) in addition, to an order for imprisonment, the court can request

a youthful offender to perform community service of maximum 240 hours in aggregate. The type, nature, and time for such services being determined by the court;

- (2) phrase “community service” means any work, service or direction for the betterment of the community in general, and including, any works which involve payment to prison or municipality; and
- (3) community service order under this para is the responsibility of the minister responsible for women, family and community.

The same discretion should be given to a first offender as provided in section 129 of the Syariah Criminal Offences (Federal Territories) Act 1997 by providing the same power to the Syariah Court to make an order for community service within a stipulated period of time.

Community service order given by the Syariah can be carried out in any welfare home, or through activities in the community such as trash-collecting, painting building, housekeeping, serving meals and maintenance works.

In a case where the Syariah offender was given community service order as alternative/substitute to the punishment given by the trial court. However, the order for community service was not actually given by the court, it was ordered by the Sultan. In the case of *Kartika Sari* (2009), the accused was convicted for the offence of drinking liquor by the Syariah High Court of Pahang and sentenced to whipping and a

⁶ Shariah courts (Criminal Jurisdiction) Act 1965 (Amendment) 1984.

fine of RM5000. She did not appeal against the punishment and was ready to be whipped when the Sultan of Pahang commuted the caning sentence to 3 weeks community service at Tengku Fatimah Children Home, Alor Akar, and Pahang. The Religious Department of Pahang who was responsible for the execution of the order had given her a room at the Home where she then spent 3 weeks, and upon completion a report was sent by the Principal to JAIP.

CONCLUSION

From the above discussion, it can be concluded that the criminal jurisdiction of Syariah Courts of Malaysia is limited. The punishment provided for in the Syariah Criminal Offences Enactment of the States seems to be less effective to serve its objectives, i.e. as deterrence and reformation.

It is high time for the authorities concerned to review the power of the Syariah Courts of Malaysia and their criminal jurisdiction. The types and quantum of punishments should also be reviewed. Other type of punishment such as community service should be included as a mode of sentencing a Syariah offender and a clear provision should be included in the relevant laws. The execution of the community service order should also be made clear to the all persons involved in the execution of the order by providing a Standard Operating Procedure on how community service should be implemented.

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