

ALTERNATIVE PUNISHMENT TO IMPRISONMENT IN THE MALAYSIAN SHARIAH COURT: PROSPECTS FOR REFORMS

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Abstract— Imprisonment is a type of punishments that can be imposed on a Shariah offender in Malaysia. Nevertheless, in practice, Shariah Courts rarely send the convict to prison. They would usually prefer the infliction of fines instead. The question arises as to whether imprisonment should be replaced with alternative punishment which is considered to be more effective to rehabilitate the offender and to reduce the rate of recidivists. Thus this paper will examine the existing legal framework to look at the possibility of the Shariah Courts to consider other punishments as alternative to imprisonment. This paper will also suggest improvements to the system so that the aspects relating to sentencing can be revised.

Index Terms—Alternative Punishment, Criminal Justice, Imprisonment, Shariah Court.

I. INTRODUCTION

The Shariah Courts (Criminal Jurisdiction) Act 1965 (Amendment) 1984 provides that the Shariah Courts of Malaysia have jurisdiction over offences punishable with imprisonment not exceeding three years, or with a fine not exceeding five thousand ringgit, or with whipping not exceeding six strokes, or any combination thereof. The power of the Shariah Courts to try and impose a punishment is also limited to persons professing Islam and concerning family and personal laws only.

In most cases, the Shariah Courts impose fine as the sole punishment for Shariah offender. The Shariah judges seem quite hesitate to resort to imprisonment. It should be noted that only a small number of Shariah offenders who were sent to prison. The detailed figures of the statistics on Shariah offenders who had been sentenced with imprisonment based on types of offences committed through the years 2011 until 2014 are shown in the table below [1].

Types of offences	2011	2012	2013	2014
Close Proximity	284	259	463	441
Deviate Teaching	0	1	12	14
Unregistered Marriage	8	3	0	0
Gambling	20	24	36	42
Other Shariah offences	60	85	61	62
Total	372	372	562	559

Hence, this paper deliberates the above problems by examining statutory provisions, case law and other legal literatures pertaining to the topic. In doing this, leads to the objective of the paper which is to provide suggestions as to how these questions could be answered.

This paper is divided into three parts. The first part concerns with the explanation of the criminal justice system in Malaysia. The emphasis is given to the criminal jurisdiction of Shariah Courts. This will then

lead to the second part which relates directly with the crux of the problem, i.e., imprisonment as a mode of punishing Shariah offenders. From here, the third part of the paper concludes by submitting that in order to ensure that the punishment serves its purpose, alternative punishments must be incorporated in the system.

II. THE CRIMINAL JUSTICE SYSTEM IN MALAYSIA

A. Civil Courts

In Malaysia, two separate bodies with different jurisdiction and power govern the administration of criminal justice. The Federal Constitution of Malaysia provides for a dual court system, i.e. Civil Courts and Shariah Courts. The former is administered by the federal government while the latter is administered by the State government. Civil Courts comprise two types of courts, i.e. Superior Courts which are established under the Federal Constitution [2] and Subordinate Courts which are established under the Subordinate Court Act 1948 [3]. The hierarchy of the Civil Courts is as follows:

Superior Courts:

- i. Federal Court
- ii. Court of Appeal
- iii. High Court

Subordinate Courts:

- i. Session Court
- ii. Magistrate Court

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

B. Shariah Courts

The Federal Constitution of Malaysia provides that, other than in the Federal Territories, the constitution, organization and procedure of the Shariah Courts are State matters over which the State has the exclusive legislative and executive authority [4]. Each Shariah Court is presided by a Muslim judge, i.e. a judge learned in Islamic law, and has jurisdiction only over Muslims and mainly in personal matters and applies only "Shariah law". Generally, there are two types of Shariah Courts, namely, Shariah High Courts and Shariah Subordinate Courts. There is also Shariah Appeal Court which functions to hear appeals from the Shariah High Courts. Appeal from the Shariah Subordinate Court may be heard by the Shariah High Court which also exercises supervisory and revisionary jurisdiction over all Shariah Subordinate Courts. What distinguishes the Shariah High Courts from Shariah Subordinate Courts is their jurisdiction and locality. These Shariah Courts are separate from the ordinary (i.e. Civil) Courts and do not come under the supervision of the Lord President. [5]

C. Criminal Jurisdiction of Shariah Courts of Malaysia

Shariah Courts were established under the State laws (i.e. the State enactments). The State enactments also provide for both the civil and criminal jurisdiction of the Shariah 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 Shariah 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 [6].

Parliament also enacted the Shariah Courts (Criminal Jurisdiction) Act 1965 (amendment) 1984, limiting the jurisdiction of the Shariah Courts to offences punishable with imprisonment for a term not exceeding three years, or with a fine not exceeding five thousand Malaysian ringgit, or with whipping not exceeding six strokes, or any combination thereof, limiting the jurisdiction of the Shariah Courts to offences punishable with imprisonment for a term not exceeding three years, or with a fine not exceeding five thousand Malaysian ringgit, or with whipping not exceeding six strokes, or any combination thereof. The jurisdiction of the Shariah Courts is applied only to persons professing the religion of Islam.

III. IMPRISONMENT

Imprisonment as a mode of sentencing for Shariah offender is provided for all offences as stated in Shariah Criminal Offences Enactment of the States. It is normally imposed as an additional punishment or as an alternative to fine in default of payment. The maximum term of imprisonment awardable in respect of any Shariah offence is three years. Where the offence is punishable with imprisonment, the policy is to give sufficient discretion to the court in awarding a suitable term of imprisonment. In exercising this discretion the court takes into account several factors such as the gravity of the offence, the age, character, repetition of an offence, repentance and the effect of punishment on dependents, occupation etc.

Nevertheless, in practice, Shariah Courts would rather impose fine on a Shariah offender instead of imprisonment. Sometimes, the Courts initially consider the punishment of imprisonment but set it aside later particularly during the plea of mitigation or appeal session [7]. This might be due to certain considerations that impede the Shariah judges from imposing such sentence, among others:

D. Shariah Offences are Less Serious

It should be noted that unlike civil offender, Shariah offender commits a less serious offence which is against the precept of religion of Islam and it is usually a victimless crime, e.g., failure to perform Friday prayers, disrespect for Ramadan, gambling, nonpayment of zakat etc. Certain acts such as drinking liquor, sexual intercourse out of wedlock and indecency are prohibited and punishable under Shariah law though under the Common law such acts are not considered offences.

E. No Separate Prison for Shariah Offender

As mentioned earlier, Shariah Judges do not inflict imprisonment on Shariah in most cases. They do not have other option but to impose fine which is considered to be less effective to serve as deterrent. The decision is made perhaps, after due consideration the fact that at present there is no separate prison for Shariah offenders. Thus it is not appropriate to impose imprisonment on Shariah offender as it may not serve its objective to rehabilitate the inmates. If they are to be imprisoned, they will be put together with other civil offenders who usually have committed more serious offences such as robbery, theft and drug trafficking. It can be even worse when the Shariah offender is surrounded by habitual prisoners that might affect him with bad influence.

F. Criminal Record

The consequence of imprisonment is also serious. Personal record of prisoners is tarnished causing them difficulties in getting jobs and applying for loan. He may lose his job or pension if he is imprisoned and this could also affect his dependents.

G. Bias / Double Standard

Imprisonment which is imposed as an alternative to fine in default of payment seems to cause double standard in the application of criminal justice system. The court may direct that in default of payment of the fine the offender shall suffer imprisonment for a certain term, which imprisonment shall be in excess of any other imprisonment to which he may be sentenced. The imprisonment which is imposed in default of payment of a fine shall terminate whenever that fine is either paid or levied by process of law. [8]

The imposition of imprisonment in default of payment of fines seems to negate the principle of justice since it might open a wider gap between the poor and the rich. Those who could afford to pay the fine might escape the punishment. However, the poor who could not afford to pay the fine will have to face the punishment of imprisonment.

H. Negative Impact on Family Members

The immediate family members are affected particularly when it involves the bread winner of the family. Imprisonment does not only affect the offender but also his family member particularly the parents, spouse and children. When the offender is imprisoned for a long period it might also loosen the family relationship which consequently leads to marital problem and so on.

IV. ALTERNATIVE PUNISHMENTS TO IMPRISONMENT

From the above, it can be seen that there are several reasons that make the Shariah Courts to think twice before determining the appropriate punishment to be imposed on Shariah offender. Therefore, this paper seeks to forward some suggestions pertaining to alternative punishments to be considered by the authority concerned, i.e., as follow:

I. Shariah Detention Centre

Shariah detention centre should be established to detain Shariah offenders and to serve the purpose of rehabilitating the inmates. It is different from imprisonment in the sense that personal record of the detainee remains clean and the consequence is not serious. It is interesting to note that to date; there are only two Approved Centres for Shariah offenders that have been established in Malaysia, i.e. first, *Baitul Iman* to cater offences relating to religious belief and second, *Baitul Ehsan* to reform female offenders (normally those convicted with immoral activities). Both are operating in the state of Selangor only [9]. The offenders from other States must be sent to Selangor, away from their homes and families. It is suggested that each State establish more approved homes or centres to rehabilitate Shariah offenders as

alternative to imprisonment.

J. Bond for a Good Behaviour

Currently there is a provision pertaining to the procedure in sentencing the youthful offenders in the Shariah Court, section 128 of the Shariah Criminal Procedure (Federal Territories) Act 1997 (Act 560) provides that:

- (1) When any youthful offender is convicted before any Court of any offence punishable by fine or imprisonment, such Court shall instead of awarding any term of imprisonment in default of payment of the fine or passing a sentence of imprisonment-
 - (a) order such offender to be discharged after due admonition if the Court shall think fit; or
 - (b) order such offender to be delivered to his parent or to his guardian or nearest adult relative or to such other person, as the Court shall designate, on such parent, guardian, relative or other person executing a bond with a surety, as the Court may require, that he will be responsible for the good behaviour of the offender for any period not exceeding twelve months or without requiring any person to enter into any bond, make an order in respect of such offender ordering him to be of good behaviour for any period not exceeding two years.

The application of the above provision could be extended to other Shariah offenders if the Courts deem that such alternative punishment might serve its objective.

K. Community Service Order

There is no clear provision in either Shariah Criminal Offences (Federal Territories) Act 1997 (Act 559) or Shariah Criminal Procedure (Federal Territories) Act (Act 560) which provide for community service order as one of the orders that can be given by the Shariah Court to the syariah offenders. However, looking to section 128 of the Syariah Criminal Procedure (Federal Territories) Act 1997 relating to the punishment for youthful offender, there is a room for a Syariah Court judge to impose community service order in addition to the bond for a good behaviour. The same discretion should be given to the first offender as provided in section 129 of the Syariah Criminal Offences (Federal Territories) Act 1997.

L. Order to Attend Particular Classes

Education is considered one of the effective methods to reform Shariah offenders so that they understand their mistakes and reform their behaviour accordingly. The module should cater the type of offences. For instance, those who are found guilty of matrimonial offences

should attend parenting classes whereas other offenders should attend religious classes. Existing classes and venues such as mosques, community halls can be used for this purpose.

CONCLUSION

From the above discussion, it can be concluded that it is high time for the authorities concerned to review the power of the Shariah Courts of Malaysia and their criminal jurisdiction. The types and quantum of punishments should also be reviewed.

Alternative punishments such as bond for a good behavior and community service should be included as a mode of sentencing a Shariah offender and a clear provision should be included in the relevant laws. This is necessary to ensure that the punishment is deterrent and rehabilitative whilst at the same time; it would

safeguard the interests and welfare of Shariah offenders.

REFERENCES

- [1] Prison Department Malaysia.
- [2] The Federal Constitution of Malaysia, article 121(1).
- [3] The Courts of Judicature Act, 1960, section 22.
- [4] The Federal Constitution of Malaysia, Schedule 9, List II, item 1.
- [5] Wu Min Aun, "The Malaysian Legal System" Longman, Kuala Lumpur, pp. 164-165, 1999.
- [6] Ahmad Ibrahim, and Ahilemah Joned, "Malaysian Legal System" Dewan Bahasa dan Pustaka, Kuala Lumpur, p. 62, 1986.
- [7] See: *Zarina Mahamad Budi v Chief Syarie Prosecutor of Penang* [2006] 22 (1) JH 127; *Zainab Abd. Rahman v Syarie Prosecutor of Negeri Sembilan* [2003] 16(1) JH 41; *Norazlisham Ramli v Chief Syarie Prosecutor of Negeri Sembilan* [2002] 15 (2) JH 16.
- [8] Shariah Criminal Procedure (Federal Territories) Act 1997, Section 122.
- [9] Majlis Agama Islam Selangor, see: www.mais.net.my.

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