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Balancing Human Rights and Restorative Justice: A Study Case for Compulsory Attendance Order Sentence in Malaysia

Muhamad Helmi Md Said[1*]

[1] *University of Kebangsaan Malaysia, Malaysia*
[*]*Corresponding author. Email: mhelmisaid@ukm.edu.my*

ABSTRACT
Compulsory Attendance Order (CAO) is an alternative punishment provided under the Offenders Compulsory Attendance Act 1954 [Act 461]. It serves as a punishment in lieu of custodial sentence such as imprisonment, and usually imposed by the court on person who has been convicted of certain offences. Based on the case laws in Malaysia, although imposing CAO as a punishment is quite a rarity, however there were few notable instances where the CAO punishment was imposed on the offenders. This article intends to explain the concept of CAO punishment in Malaysia, and to elucidate the readers on the relevant laws regulating this area of law. Comparative studies on the legal provisions in United Kingdom and Hong Kong will be made, particularly on the aspect of purpose and age requirement in imposing CAO punishment. This article further provides several suggestions to ensure that the effectiveness of CAO punishment is maintained and further improved.

Keywords: *Compulsory attendance order, legal provisions, case laws, comparison, suggestions.*

1. INTRODUCTION

Compulsory Attendance Order (CAO) is a type of sentence that is stipulated under Malaysian Law which is known as the Offenders Compulsory Attendance Act 1954 (hereinafter stated as Act 461). CAO is an alternative to imprisonment sentence imposed by the court to offenders who committed certain offences to serve sentence outside the prison by performing compulsory work without disrupting his or her daily life [1]. Convicts under the CAO are obliged to come to attendance centre every day as ordered to conduct compulsory work sentence within three months at most and for a duration of not exceeding four hours for every single day[1].

CAO is imposed on first-time offenders who committed minor offences such as petty shoplifting, riding motorcycle without license et cetera[1]. Offenders who are sentenced to CAO will be supervised by Compulsory Attendance, Parole and Community Services Centre's Officer of Malaysian Prison Department [1]. During the CAO period, convicts are required to perform community services like cleaning the mosque for Muslims while the non-Muslim convicts have to clean their houses of worship and many more. They shall also attend courses as specified, religious sermons or social awareness talks, so that they will repent and refrain themselves from committing the same mistake again [1]. In other words, CAO provide chance for convicts to reintegrate into community and promote family and societal values. Nevertheless, if the offenders breach the conditional order while serving such sentence, they could be convicted for the offence of breaching CAO, that is punishable with imprisonment[1].

2. MATERIAL AND METHODS

This research uses normative methods with a legal approach, conceptual comparison, library research, and case studies. Sources of legal material are laws, legal research, expert opinions, and other legal materials that support this research.

3. RESULT AND DISCUSSIONS

I. PROVISIONS UNDER OFFENDERS COMPULSORY ATTENDANCE ACT 1954

Offenders Compulsory Attendance Act 1954 was enacted in 1954 through Ordinance No. 37 1954 and came into force on January 1st, 1984 in Peninsular Malaysia [2]. This Act contains 9 sections and its objectives are 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 in Preambule of Act 461. Act 461 Section 2 of the Act defines "compulsory work" as any labour, task, work or course of instruction ordered by the

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Compulsory Attendance Centre Officer to be undertaken by the offender. Moreover, Section 4 states that the Director General shall appoint a Superintendent of Prisons or an Officer in Charge of a prison either by name or office to oversee each Centre and such Superintendent or Officer shall be known as the Compulsory Attendance Centre Officer and in charge of such centres.

Furthermore, this Act also provides the circumstances in which CAO could be given. According to Section 5(1), if someone: first, has been convicted of an offence for which he is liable to be sentenced to imprisonment; or second, is liable to be committed to prison for failure to pay a fine or debt. So, the court may consider factors such as character, type and gravity of offences or other circumstances before giving an order of compulsory attendance against this offender. In addition, Section 5 (1) of the Act also provides that if the court thinks it is expedient to punish the offender with imprisonment, the court may replace the sentence or suspend the sentence by making an order Compulsory attendance requires that the offender is present at the mandatory attendance centre specified in the Order on a daily basis. In accordance with section 5 (1), when the offender is ruled to undergo such punishment, this offender must undertake to perform a mandatory work for a term not exceeding three months and for a specific number of hours per day not exceeding four hours as may be stated in order.

The court may, with the intention of ensuring compliance of an order by this offender, require the offender to enter a bond with or without a guarantor. However, it is necessary to note that before issuing an order of the compulsory attendance, the court shall explain to the offender the effect of the order and the consequences of failing to adhere to the order and the court shall not give a sentence of CAO unless the offender stated his consent to comply with the requirements of the order as described in Section 5(4) of Act 461.

In addition, this Act also imposes t responsibility on the offender throughout execution of the compulsory attendance order. Section 6 states the offender shall, upon the effect of such order, report on a daily basis at the time and place as ruled by the officer of a compulsory presence, with regard to circumstances Offenders. An offender shall undertake a mandatory work assignment as may be directed by the officer of the centre of compulsory attendance every day. However, the work shall be, in the opinion of the officer, executed by the offender by considering the physical ability of the offender this is explained in Act 46 Section 6 (2). Nevertheless, pursuant to section 8 (1) (a) to (e) of Act 461, an offender is deemed to have committed an offence under the Compulsory Attendance Act if the offender's action falls under any of the headings below:

(a) fails on any day to report in accordance with subsection 6(1);
(b) fails on any day to undertake or to complete the compulsory work ordered under subsection 6(2);
(c) in any way misconducts himself during the time when he is or should be undertaking compulsory work;
(d) without permission granted by the Compulsory Attendance Centre Officer in such circumstances and subject to such conditions as may be prescribed, absents himself from any place at which he should undertake such compulsory work;
(e) fails in any other way to comply with any of the requirements of the Compulsory Attendance Order or the provisions of any Rules made under this Act.

Hence, the mandatory Attendance Centre officer shall conduct the investigation against the offender and after due inquiry, may: *first*, order that the offender forfeit any remission of the period of such Order which he may have earned, not exceeding such amount as may be prescribed; and second, report the circumstances to the Director General who may order that any further remission be forfeited or that a report in writing be made to the Court, at the same time furnishing the offender with a copy thereof.

On receipt of the report the court means the courts whict issues original CAO according to Section 8 (3) explains the Court will summon the perpetrator to be brought before him, and if satisfied with the truth of the allegation, the court may: first, impose a sentence or make an Order (including a Mandatory Attendance Order) which may be given or made if the violator is convicted of the offense for which the original Mandatory Attendance Order was made, the allowance provided is given for the number of days in which he has completed his daily duties; second, can reprimand the violator without imposing any punishment; or thirdly, make further orders.

Nevertheless, the Act also caters for a situation that the offender holds a profitable job. He may be allowed certain leeway i.e., the CAO serving time shall not clash with working hours of his daily job as described in Section 6(3) act 461. Section 7 of the Act also provides that if the offender is injured due to an accident happened during the execution of compulsory work, he is entitled to receive medical and hospital treatment for free as may be prescribed.

II. ANALYSIS OF PREVIOUS CASES

Generally, the main objective of the application and enforcement of CAO is regarded as an alternative

sentence of imprisonment as provided under section 5 of the Act 461. Section 5 (1) of the Act also outlines the elements and the prerequisites that must be complied with before the Court decides to impose this punishment. Section 5 (1) authorizes the Court to consider and pass the sentence of compulsory attendance order on a person, if he is residing within certain radius from a compulsory attendance centre.

(a) Has been convicted of an offence for which he is liable to be sentenced to imprisonment; or
(b) is liable to be committed to prison for failure to pay a fine or debt, and the Court considers the character of that particular person, the nature and seriousness of the offence or circumstances in which he fails to pay and all other circumstances of the case, is inexpedient to punish him with imprisonment.

There are several prerequisites that must be fulfilled before an accused person may be convicted of such CAO punishment as provided under section 5 (1) of Act 461. There are two main principles in applying CAO towards the accused. First, the court shall be in a situation that it deems fit to consider an alternative that, had it not been for this Act, the court would have reasonably imposed an imprisonment sentence of not more than 3 months for an offence charged. Furthermore, apart from the accused character and the nature of the offence, the court should also consider the effectiveness of the punishment sentence in upholding justice which can be seen or as in the verdict from Malaysian Law Judiciary (MLJU) 513. This part intends to discuss some cases that applied the rules prescribed by Act 461 as a punishment.

Public Prosecutor v Azizie Chew Chung Zhi & Anor* on *MLJU 185

First and foremost, this is an appeal case at the High Court of Sabah and Sarawak at Kota Kinabalu which was lodged by the prosecution against the imposition of CAO under the Offenders Compulsory Attendance Act of 1954 imposed on two accused (respondents). The respondents in this case were accused of an offence under Section 379A of the Penal Code, for trying to steal a Perodua Viva with the registration number of SAB 3072B by removing the cable front of the car and such offence is punishable under section 511 under the same Code. The main issue arose was whether there exists a list of certain types of offences under the 1954 Act. Although the Act does not specifically pronounce the nature or class of offences that are subject to its application for imposition of sentence, section 5 is sufficient in assigning the guidelines to answer the question:

> *"...section 5 provides that such an order could be made in cases where, if the option of a Compulsory Attendance Order was not available, in the opinion of the court the person would be adequately punished with a period of imprisonment not exceeding three months. This simply means that if the sentencing magistrate wanted to imprison an accused person, he would have exercised his discretion to impose a period of three months of imprisonment or less..."*

The prosecution stated the following two grounds of appeal: first, CAO is not a suitable punishment in this case; and second, Based on facts of the case, the offence committed was a serious offence and it required "deterrent" and "custodial" punishment.

The court held that section 5 of the 1954 Act is only applicable in situations where the Court believes that imprisonment of not exceeding 3 months is sufficient. However, based on the facts of this case, both were accused of attempted theft under section 379A, read together with section 511 of the Penal Code. It is a serious crime and the minimum punishment for such offence is a year of imprisonment. Therefore, an imprisonment sentence of not more than 3 months was neither desirable and nor relevant to be used in determining the CAO in this case. Therefore, the court allowed this appeal case and had set aside the magistrate's CAO sentence.

Public Prosecutor v Tey Kim Kok in Malaysian Legal Networks Series (LNS) 172

The appeal was filed by prosecution against the court decision which imposed CAO for three months of four hours working hours in a day under section 5 (1) of Act 1954 towards the respondent who was accused under section 4(1)(b) of the Entertainment Enactment 1993 (Pahang) and if convicted of offence, he can be fined with a minimum amount of ten thousand but not exceeding fifty thousand ringgit or imprisonment for a term not exceeding five years or both. The accused in this case pleaded not guilty and claimed trial. Nevertheless, the prosecution had succeeded in proving the prima facie case against the accused. The accused however pleaded guilty and accused's counsel applied for CAO on the ground that the accused was only the custodian of the premises and not the premise owner. This was the accused's first offence, and such matter did not involve an act of physical crime against the public. The accused had low income yet was the breadwinner of his mother and sister at the village. On the other hand, the prosecution submitted that CAO ought not to be considered a sentence because the accused only admitted to his guilt during the defence stage.

The court in this case opined that CAO was the best punishment for the respondent. In fact, section 4 (1)(b) of the Entertainment Enactment (Pahang) 1993 also does not specifically prescribe any minimum period of imprisonment sentence for this offence.

Mohd Khir bin Toyo v Pendakwa Raya on MLJU 513

The appellant in this case was charged under section 165 of the Penal Code. The main question in this appeal case was the punishment issue. In granting the alternative sentence order, it is important for the court to consider whether there is a particular situation or condition that

justify imposition of such order by virtue of section 5 (1) (a) (b) (i) and (ii). In this case, the court was of the view that:

> *"... There were no extenuating circumstances for the offence. The trial court was right to pass a custodial sentence..."*

The court during the appeal stage had upheld the imprisonment sentence decided at the trial stage and ruled that the sentence was a relevant and fair justification. The court at the appeal stage stated:

> *"... As a public servant and chief executive of the State, the Appellant took a valuable thing for a consideration which he knew was inadequate from a person whom he knew was concerned with him as a public servant in his official functions. The Appellant took advantage of his official position. One purpose of section 165 of the Penal Code is to prevent that sort of corruption. Corruption in all manner and form cannot be condoned. A fine would not send that message. Neither would community service. In any event, community service is an option only in the case of youthful offenders (section 293 of the CPC) and the provisions of the Offenders Compulsory Attendance Act 1954 (Act 461) with regard to community service do not apply to the Appellant [see section 5(1) of Act 461]. The instant offence, which is destructive of public confidence in the government, was not trivial in nature. Imprisonment was the right and proper punishment. A year's imprisonment, which was not appealed against by the learned DPP, was hardly excessive. We unanimously dismiss the appeal against the sentence. We therefore affirm the sentence of one year imprisonment meted out by the trial Judge..."*

Accordingly, this case clearly shows that it is prudent for the court to consider the nature of the offences before issuing the CAO. Apart from the purpose of upholding justice, the objective of the sentence should also be regarded as prohibitive in nature alongside teaching lessons towards the public.

Public Prosecutor v Mohd Rezza Muslim Mohd Asri on CLJ 1013

This is a criminal appeal case in the High Court of Malaya in Kangar. The respondent in this case had pleaded guilty to a charge under section 43(1) of the Road Transport Act 1987 (RTA) for driving vehicle carelessly and causing road accident, a conviction that may subject him to a fine of not less than RM 4,000.00 and not exceeding RM 10,000.00 and imprisonment term of not exceeding 12 months. However, after sentencing the accused under section 43(1) RTA, the Magistrate opted to punish the respondent under section 5(1) of the Offenders Compulsory Attendance Act 1954 for a period of two months.

The prosecution appealed against the sentence and submitted a notice of appeal to the High Court of Malaya in Kangar. After listening to submissions at the appeal stage, the High Court also opined that there was a defect or omission when the Magistrate decided this case and his Lordship made an order that section 5(1) of Act 1954 was not applicable. The High Court Judge in his ruling stated that in ordering the CAO, the Magistrate must first comply with the provisions of section 5(1)(a)(b)(i) and (ii) of Act 1954 by writing his consideration in the statement of note. The court ordered for a re-trial of this case before another Magistrate. However, the prosecution in this case withdrew the appeal on the ground that the respondent had completed CAO and the prosecution wished to avoid the respondent from being subjected to double jeopardy effects i.e., liable to another punishment arising from the same offence.

Based on this case discussion, it can be said that it is vital for the court to record the rationale of its decision in granting CAO. The failure to fulfil the elements in section 5 (1) of Act 461 would indirectly affect the concept of justice and raise the issues regarding effectiveness of CAO as one of the alternative sentences to imprisonment.

III. COMPARISON BETWEEN COMPULSORY ATTENDANCE ORDER (CAO) IN MALAYSIA, UNITED KINGDOM AND HONG KONG IN TERMS OF COMMUNITY SERVICE SENTENCE

According to Martin Wasik, community sentence is a sentence applicable for offences classified as a modest point offence [3], the fault of which requires no offender to be imprisoned. In Malaysia, this sentence is governed by the Offenders Compulsory Attendance Order (OCAO) 1954 [Act 461] as an alternative sentence to imprisonment towards the offenders who are sentenced to imprisonment with the maximum period of three months. This order is usually imposed on those convicted of minor offences to teach lessons, so that they would not repeat the similar offence in the future.

Act 461 does not specify who may be sentenced to the CAO. In regard to this matter, the order under Act 461 is usually read together with section 293 of the Criminal Procedure Code (CPC) and section 82 of the Penal Code, that contain specific provisions on imposing community service sentence for young offenders as descrubing in section 293 (1) Criminal Procedure Code (593). However, in certain circumstances, the court also imposes CAO on any offender regardless of their age aspect, and examines the type of offence committed instead.

Furthermore, the provision of section 5 of Act 461 has been enforced not only on young offenders but senior offenders who committed petty offences. Hence, it can be inferred that there is flexibility in terms of legal implementation. In this respect, the United Kingdom and Hong Kong legal systems will be compared with that of

Malaysia in terms of the scope of the application of community service sentence, including age limit of the offender as well as the objective of sentence execution towards the offenders.

IV. COMPARISON OF IMPLEMENTATION OBJECTIVES

In Malaysia, the implementation of the community service sentence was formally incorporated into the legal system after Malaysia acceded to the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules), which was adopted by the United Nations General Assembly on 14 December 1990 [4]. The objectives of Tokyo Rules 1990 are to propose more effective alternative punishment by focusing on the benefits for both parties (offenders and community). The objectives of Tokyo Rules are considered as reflecting the current sentiment of national criminal justice system at that time, which takes into account the importance of integration of the offenders in society when they have undertaken their respective sentence [5]. This is because of considering the social stigma attached on newly released ex-convicts and degraded treatment by the society[6] . Therefore, the purpose of implementing the community service sentence at that particular time was to provide an alternative sentence that can give benefits for all parties, the offender and community in particular [3]. According to Muhd Al Adib Samuri, the community service is specifically implemented on children with purpose to develop attitude, behaviour and competency that can educate the children towards becoming caring and responsible individuals as they reach adulthood[7].

In England and Wales, the community sentence was first introduced through Wootton Report by the sub-committee of the Criminal Advisory Council in 1970, with the aim to reduce number of prisoners and prison population due to the their daily increasing numbers [8]. This is because the authorities opined that the incarceration sentence at that time was burdening as the government had to bear the expenditure of maintenance and prison operations including meal costs of the inmates. In addition, imprisonment is regarded as irrelevant and unjust if imposed on offenders who commit trivial offences [9]. In this regard, the community service sentence in the United Kingdom is implemented to reduce prison population as it increases the financial burden on the government.

Hong Kong, being one of the British colonies, began to adopt community service sentence into their legal system through the Department of Social Welfare in 1987 [10]. However, the implementation had started on trial basis until its effectiveness was apparent in 1992 [8]. This sentence was recommended by the Hong Kong Law Reform Commission after many other countries took this approach as an alternative punishment in their respective legal system [10]. However, this punishment is implemented with dual purposes of not only reducing prison population but also facilitating the judicial institutions to discharge their responsibilities. In this case, Hong Kong considered community service as an additional sentence that could diversify the choices for judicial body to mete out sentences against offenders [10]. Hence, the purpose of the sentence execution is to facilitate the duties of the judicial body at that time. In relation to above, it can be inferred that each country implements this sentence to suit current needs of the government at that time.

V. COMPARISON OF THE OFFENDERS' MINIMUM AGE LIMIT SENTENCED TO COMMUNITY SENTENCE UNDER COMPULSORY ATTENDANCE ORDER (CAO)

The community sentence in Malaysia is governed by section 293 (1) (e) of a Criminal Procedure Code (CPC or the Code) which specifically refer to young offenders [5] aged 18 to 21 years as provided under section 2 of the same Code. Generally, there is no specific law in Malaysia that ties imposition of this order to youthful offenders. It is said so because the provision under section 91 of the Child Act 2001 (Act 611) that empowers the court to impose community service sentence on young offenders is silent about this. Nonetheless, this order has been regarded as more appropriate punishment to protect the best interest of children as opposed to fine or imprisonment [5]. Therefore, magistrates at the Court for Children are given the authority to use any legal provision in Act 611 to issue the order on child offender. For example, section 96 (2) of Act 611 prevents children aged between 14 and 18 years from undertaking imprisonment sentence and lists several alternative sentences such as probation, or fine, or being sent to a place of detention or an approved school, or a Henry Gurney School. This provision of law can otherwise be construed as or meant to include the Community Service Order [5]. Accordingly, the community service in Malaysia is applicable to an offender with minimum age limit of 14 years old and above.

In the United Kingdom, this order is governed by the Criminal Court Jurisdiction Act 2000 by using the term 'Community Punishment Order' (CPO) after amendments was made to the said Act. In addition to the Criminal Court Jurisdiction Act 2000, the United Kingdom also refers the provisions under section 147, Part 12, Chapter 2 of the Criminal Justice Act 1972, which provides for application of the CPO to offenders aged 17 years old and above. However, based on the guidance of the Scottish National Young Offenders Justice Practice Guide, of Chapter 10 at page 40, offenders between the age of 16 and 17 years old will be placed under the supervision of the 'Community Payback Order'. It illustrates that a child offender who is undergoing a community service sentence must be placed under the supervision of the authority throughout

the sentence period. In respect of this matter, based on the stated provisions, laws in United Kingdom shows inconsistency in terms of the minimum age of child offenders to undergo community sentence in each territory. This is because each region is controlled by their respective regulations like Scotland that has enforced community sentence towards the offender aged 16 years old. However, it can be concluded that the United Kingdom has general provisions relating to minimum age of the offender is 17 years old and above.

Furthermore, in Hong Kong, the judiciary refers section 4 (1) of Cap 378 Ordinance which provides for the application of community service sentence that applies towards offenders aged 14 years and above.[20] In this regard, the Court has the option to pass the sentence to the offender aged 14 years old by sentencing the offender to imprisonment or ordering him to undergo a community service sentence. However, the distinction in Hong Kong legal system is the court must obtain the offender's consent to execute such order [8]. As a matter of principle, Hong Kong laws allow persons aged 14 years to be sentenced to a maximum of 240 hours of community service because Hong Kong's Employment Ordinance prohibits the employment of children younger than 13 years old in any area of occupation [11] alongside the Employment of Children Regulations under the Employment Ordinance of Hong Kong which excludes children below age of 15 from working in all industrial sectors. Meanwhile, children aged 13 and 14 years old can work as part-timers besides schooling on a full-day basis. Therefore, it is clear that Hong Kong has stipulated minimum age limit for imposition of community service sentence on the youthful offenders to those aged 14 years old and above as outlined in the legislations.

4. CONCLUSION

In conclusion, the Offenders' Compulsory Attendance Act 1954 [Act 461] is an alternative to the imprisonment sentence imposed by the Court on an offender who commits a particular offence. This offender will serve his sentence outside the prison wall by performing compulsory work without affecting its daily life. In granting CAO, a presiding judge must comply with the provisions of Act 461 from time to time. The grounds of decision must be specified when giving CAO and failure to fulfil the elements in section 5 (1) of Act 461 indirectly affects the concept of justice and raises the issue in respect of the effectiveness of CAO as one of alternative sentences to imprisonment. The purpose of execution of the CAO is differ from one country to another. By comparison to the legal position in United Kingdom, community sentence is implemented to reduce the population of prisoners simply as the growth of population increases the financial burden of the government. In Hong Kong, the purpose of CAO implementation is merely to facilitate duty of the judiciary at that time. If it is compared to Malaysia, the purpose of the CAO implementation is to provide an alternative punishment that benefits all parties, in particular the offenders and the community. This article also provides a few improvement proposals with hope that this CAO sentence can be further enhanced in terms of its implementation. The suggestions are as follows: (a) Incorporation CAO into the Criminal Procedure Code; (b) Cooperation with other government agencies; (c) Application of CAO for road traffic offences; (d) Enhancement of skills and trainings for CAO curricular; and (e) Creation of occupational system standards.

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