
Conceptualizing the Principles of Sentencing in Criminal Offences in Malaysia: Bridging Theory and Reality

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Abstract:

Sentencing is the final stage in a criminal justice process. The principles of sentencing are aimed towards deterrence, rehabilitation, prevention and retribution. By right, the purpose of the punishment is to deter offenders from reoffending, discourage others from following their example, to prevent offenders from committing additional crimes by locking them up and to reform them in order to control crimes. Yet the study finds that Malaysia's index crime has been inconsistently trending upward and downward. This shows the disparity between the theory of principles of sentencing and the actual result. In this paper, the objective of the research is to examine the theory of the principles of sentencing, and to bridge theory and reality. This paper adopts a qualitative legal research method and secondary data. The paper concludes that the significance of this research is to shed some light for future study to be carried out as an initiative to reduce the crime rate for a safer Malaysia.

Key words: sentencing, punishment, custodial, non-custodial, crime rate.

¹ The information and views set out in this article are those of the author in his private capacity and do not in any way represent the views of the Malaysian Judiciary.

INTRODUCTION

The sentencing deals with the imposition of sentence. It involves punishment. In Malaysia, section 173(b) Criminal Procedure Code and section 173(m)(ii) provides that the court shall pass sentence according to law where the accused pleads guilty and found guilty respectively. When someone has committed a crime and found guilty, he should be punished because a crime has been committed and he deserves to be punished for it in order to deter the offenders from committing offences in the future and also others from committing crime. Overall, the purposes of punishments are deterrence, rehabilitation, prevention and retribution. In theory, those are the aims and purposes of sentencing. Nonetheless, whether or not in practice that is the case is something that we will discuss in this paper.

PRINCIPLES OF SENTENCING

Before we discuss about principles of sentencing, we must describe the meaning of punishment as a sentencing involves punishment. According to H.L.A. Hart, there are five necessary elements of punishment: (1) It must involve pain or other consequences normally considered unpleasant; (2) It must be for an offense against legal rules; (3) It must be of an actual or supposed offender for his or her offense; (4) It must be intentionally administered by human beings other than the offender; (5) It must be imposed and administered by an authority constituted by a legal system against which the offense is committed (Cassia Spohn, 2009). In other words, a person who has been convicted of a crime will be punished by the Court in which the punishment is considered to be unpleasant.

The aims of punishment are well illustrated by Justice Wan Yahya in *Hari Ram Seghal v Public Prosecutor* [1981]

1 MLJ 165. This is what the eminent judge said: *“Our courts have a long time since progressed from the ‘eye for an eye’ and ‘tooth for a tooth’ type of justice. The avowed aims of punishments are retribution, justice, deterrence, reformation and protection, but it is never intended to act as a vehicle of vengeance. This court does not sit here to hand out to victims of aggression their ‘pound of flesh’ but generally to protect society by enforcing justice.”* In summary, the principles of sentencing are aims towards deterrence, rehabilitation, prevention and retribution, but it is never aimed to act as a vehicle of vengeance. Thus, the sentence imposed shall not, subject to torture, cruel and inhuman as provided under Article 5 of The Universal Declaration of Human Rights 1948.

As mentioned earlier, there are four aims of sentencing. A deterrent sentence aims to deter the accused from committing offences in the future and also others from committing crime. The rehabilitation approach to sentencing proclaims that the principal rationale of sentencing is to achieve the rehabilitation of the offender. This aim of sentencing regards offenders as those who are in need of help and support and utilizes sentences other than imprisonment where the circumstances permit. The prevention aim of sentencing seeks to deal with offenders in such a way as to prevent them or make them incapable of offending for substantial periods of time. Lastly, the retribution aim of sentencing seeks to retaliate against the wrongdoer for what he has committed. An offence committed is viewed as an offence against society and the community, and in return society and the community through courts impose punishments or sentences. (V. Sithambaram, 2005).

In addition, public interest has to be taken into account in meting out the sentence to be passed. Public interest would indeed be best served if an offender could be rehabilitated to return to the society as a better person. These principles are well enshrined in Malaysia as intended by the legislators when

formulating the various provisions of the diverse penal legislations. The application of these principles is well assimilated by the courts. An example would be by Justice Wan Yahya in *PP v New Tuck Shen* [1982] 1 MLJ 27, when the court held that the public interest would depend on the facts and circumstances of the case. (Nor Afizah Hanum Mokhtar, 2006).

MODE OF SENTENCING

In Malaysia, the death penalty is the heaviest sentence available. Under Malaysian law, the death penalty is mandatory for some offences and discretionary for others. It is a mandatory punishment for murder (section 302 Penal Code), drug trafficking (section 39B Dangerous Drug Act 1952), offences against the person of the Yang di-Pertuan Agong, Ruler or Yang di-Pertua Negeri (section 121A Penal Code), committing terrorist acts (section 130C Penal Code), discharging a firearm in the commission of a scheduled offence (section 3 Firearms (Increased Penalties) Act 1971) and being an accomplice in case of discharge of firearm (section 3A Firearms (Increased Penalties) Act 1971). On the other hand, it is a discretionary punishment for abduction, wrongful restraint or wrongful confinement for ransom (section 3 Kidnapping Act 1961) and waging war against Yang di-Pertuan Agong (the King) (section 121 Penal Code).

In all other cases except when the sentence to be passed is of death, the Court may resort to either custodial measure or non-custodial measures. The custodial measure is an act of confining a man in a prison. It is noted that serving time in custody is the sentence provided for most offences created under various statutes. For instance, under the Malaysian Penal Code, Dangerous Drug Act 1952, Malaysian Anti-Corruption Commission Act 2009, Corrosive and Explosive Substances and Offensive Weapons Act 1958, Wildlife

Conservation Act 2010, etc. The wording used by the statutes in most cases is "...liable to.... imprisonment". The judge has a discretion with regard to the length of a prison sentence provided he keeps within the maximum prescribed for the offence. The maximum is usually fixed by the statute. (Sir Rupert Cross and Andrew Ashworth, 1981). Besides, the sentence must also be assessed and passed in accordance with established judicial principles, and one of the main factors to be considered is whether the convicted person is a first offender. This proposition is succinctly expounded in the case of ***Public Prosecutor v Jafa bin Daud*** [1981] 1 MLJ 315, Justice Mohamed Azmi had this to say: "A *"sentence according to law"* means that the sentence must not only be within the ambit of the punishable section, but it must also be assessed and passed in accordance with established judicial principles. In assessing sentence, one of the main factors to be considered is whether the convicted person is a first offender. It is for this purpose that before passing sentence, a Magistrate is required to call for evidence or information regarding the background, antecedent and character of the accused."

The Court also can pass non-custodial sentence that do not involve imprisonment. Usually, where the option of a non-custodial sentence is available, a custodial sentence should be reserved for a case in which the objectives of sentencing cannot be met through a non-custodial sentence. There is a wide range of non-custodial sentences which a court may give to adult offenders, including:

(a) Fines

A fine is a sum of money that has to be paid after the offender is sentenced to pay a fine. If the offender fails to pay the fine or in default of payment, the offender could suffer imprisonment. The provisions as to sentences of fine is provided in section 283 of the Criminal Procedure Code. When fixing the amount of the fine, the court needs to assess the gravity of the offence and the

profit derived from an offence. Certainly, the Court also needs to make sure that the amount of the fine imposed must never exceed the offender's ability to pay, and a heavy fine must not be imposed upon a wealthy person in a case in which a man of lesser means would have been sent to prison. This is in tandem with the Kantian principle that "legal justice ceases to be justice if it can be bought for a price". (Sir Rupert Cross and Andrew Ashworth, 1981)

(b) Community Service

Community service orders could be made to youthful offender for the purpose of rehabilitation. It is provided in section 293 (1)(e)(i) of the Criminal Procedure Code. This section is in line with one of the aims of sentencing namely rehabilitation. Under the code, "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 order was added in the Criminal Procedure Code as an alternative punishment for offenders aged 18 to 21 i.e. youthful offenders. (Baljit Singh Sidhu, 2007). A community service order requires the youthful offender to perform community service, not exceeding 240 hours in aggregate, of such nature and at such time and place and subject to conditions as may be specified by the Court.

(c) Police Supervision

The Courts have power to direct an offender be subject to the supervision of the police when the offender has previously been convicted for an offence punishable with imprisonment for a term of two years or upward is convicted of any other offence also punishable with imprisonment for the same period of time. However, if an offender is convicted of an offence under section 376, 377C, 377CA or 377E of the Penal Code, the Courts have the power to direct the offender be subject to the supervision of

the police, whether or not he has previous convictions. This is specified in section 295 of the Criminal Procedure Code. Besides, every offender subject to the supervision of the police is obliged to notify the place of his residence and every change of his residence to the officer in charge of the Police District, and, if a male, of reporting himself once a month to the Chief Police Officer himself or to such other person as that officer directs. (section 296 Criminal Procedure Code). It is noted that any offender who, subject to the supervision of the police fails to comply with the requisitions of section 296, he shall be liable to imprisonment for one year. (section 297 Criminal Procedure Code).

(d) Binding Over

Binding over is when a first offender binds to good behavior. It is provided under section 294 of the Criminal Procedure Code. This section vests the Court before which a person is convicted with power to suspend sentence for such period as the Court may direct, and, if the offender behaves himself during such period, he would escape punishment for his offence. If he fails to observe the conditions of his bond, he would be liable to be apprehended and dealt with for his original offence. This proposition was explained by Federal Court in the case of *Jayanthan v PP* [1973] 1 LNS 56. However, certain conditions need to be fulfilled before we can apply section 294. Firstly, the offender must have been convicted for an offence punishable with imprisonment. Secondly, it must appear to the court, regard being had to the character, antecedents, age, health or mental condition of the offender or to the trivial nature of the offence or to any extenuating circumstances under which the offence was committed, that it is expedient that the offender be released on probation of good conduct.

(e) Conditional Discharge

A conditional discharge means that the Court has discharged the offender conditionally on his entering into a bond, with or without sureties, to be of good behavior, and to appear for, the conviction to be recorded and for sentence when called upon at any time during such period, not exceeding three years, as may be specified in the order. Usually, the offender will be liable to be sentenced for the original offence, if found guilty of committing another offence during the period of time specified in the order. It is provided under section 173A (2)(b) of the Criminal Procedure Code. However, certain conditions need to be fulfilled before we can apply section 173A (2)(b). Firstly, the Court must find that the charge is proven. Secondly, the Court opined that it is beneficial to release the offender on probation, having regard to the character, antecedents, age, health or mental condition of the offender or to the trivial nature of the offence or to any extenuating circumstances under which the offence was committed.

(f) Unconditionally Discharge

Under section 173A (2)(a) of the Criminal Procedure Code, the Court may make an order dismissing the charge or complaint after an admonition or a caution is made to the offender by the Court. This is known as unconditional discharge of which the offender is released unconditionally, without any sentence being imposed. Nonetheless, the Court must find that the charge is proven, and opines that it is inexpedient to inflict any punishment, having regard to the character, antecedents, age, health or mental condition of the offender or to the trivial nature of the offence or to any extenuating circumstances under which the offence was committed.

SENTENCING OUTCOME

Theoretically, it seems that the sentencing has played an important role toward curbing crime. However, in reality that does not represent the true position. According to Susan Easton and Christine Piper, the penal sanction has limited usefulness, since, in the light of continuing socio-legal and criminological research, the importance of sentencing is decreasing. According to their research, few crimes are actually reported, and even fewer are successfully prosecuted to the point of sentence. As a result, punishment which ensures the offender does not reoffend is rare. (Susan Easton and Christine Piper, 2012).

The comments of Susan Easton and Christine Piper are not without basis. If we refer to the data from a Malaysian Crime Index for the years 2007-2009 as cited by Tan Pek Leng in her article, “Safety Issues in Penang from A Gender Perspective” (Tan Pek Ling, 2011), the Index Crimes in Malaysia from 2007 to 2009 are shown below:

Table 1: INDEX CRIMES IN MALAYSIA, 2007-2009

TYPE OF CRIME	2007			2008			2009		
	No of Cases	% of Total Cases	No of Cases Per 100,000 population	No of Cases	% of Total Cases	No of Cases Per 100,000 population	No of Cases	% of Total Cases	No of Cases Per 100,000 population
Murder	590	0.15	2.16	664	0.31	2.37	698	0.29	2.11
Rape	3,176	0.83	11.63	3,494	1.65	12.66	3,816	1.82	13.48
Gang robbery with firearm	75	0.02	0.27	182	0.09	0.66	128	0.06	0.45
Gang robbery without firearm	7,093	1.95	25.97	21,804	10.30	79.03	24,523	11.71	86.63
Robbery with firearm	197	0.05	0.72	76	0.04	0.28	55	0.03	0.19
Robbery without firearm	17,235	4.49	63.30	4,929	2.34	17.97	4,929	2.35	17.44
Voluntarily causing hurt	5,793	3.24	24.87	6,648	3.14	24.10	6,662	3.19	23.61
Total Violent Crimes	35,198	16.78	129.72	87,817	17.81	137.87	80,718	19.45	143.91
Theft	45,046	21.30	163.45	41,215	19.47	149.38	39,874	19.04	140.86
Theft of lorries/vans	5,047	2.41	18.48	6,263	2.96	22.70	5,720	2.73	20.21
Theft of cars	12,428	5.93	45.5	15,198	7.18	55.08	13,888	6.63	49.06
Theft of motorcycles	67,596	32.26	247.52	67,369	31.83	244.14	61,054	29.15	215.69
Snatch theft	11,106	5.30	40.66	8,205	3.88	29.74	6,687	4.63	34.22
Housebreaking by day	9,160	4.37	33.54	9,118	4.31	33.05	11,395	5.44	40.26
Housebreaking by night	24,430	11.66	89.45	26,470	12.51	95.94	27,060	12.92	95.60
Total Property Crimes	174,423	83.22	638.61	173,828	82.13	635.03	168,679	85.65	595.80
Total Index Crimes	209,582	100.00	767.33	211,645	100.00	767.10	209,417	100.00	739.81

Sources: Royal Malaysian Police, Annual Report, 2008 & 2009

Based on the above statistic, the total index crime based on the number of cases in 2007 was 174,423 cases. This figure increased to 211,645 by 2008. Nevertheless, the figure decreased to 209,417 cases in 2009. In the meantime, the number of cases involving car theft in 2007 was 12,428 cases. This amount had increased to 15,198 cases by 2008, but then

decreased to 13,888 cases by 2009. Though both total index crime and crime involving car theft decreased in 2009, the amount is still considered as relatively high.

The government acted in 2010 through the implementation of the NKRA (The National Key Results Areas) attempting to reduce crime, under the Government Transformation Programme. All levels of Malaysian society have fully engaged in this move towards curbing crime, just as relevant government departments and agencies have also been working and striving to well achieve this ambition goal, through various crime reduction initiatives since 2010. The government has implemented the Safe City Programme encompassed by the Crime Prevention Through Environmental Design or CPTED principles, in which closed circuit television (CCTV) cameras were installed. At the same time, other crime prevention measures such as rail barricades, safety mirror and better lighting were also undertaken.

The Royal Malaysia Police had also launched the Omnipresence Programme to fight crime by raising police present in residential and business areas, especially in crime 'hot spots'. Besides this, the Royal Malaysia Police also introduced the Community Policing Programme to increase community participation in crime prevention. These programme have significantly reduced Index Crime by 45 percent from 2010-2015. Incidents of car theft, also further decreased by 10 percent in 2015, following a major 20 percent reduction in 2014. Overall, the incidence of Index Crimes has dropped by 45 percent since the beginning of the GTP in 2010. (National Transformation Programme Annual Report, 2015)

However, Malaysia's crime index recorded a 4.6 per cent increase between January and April 2016 due to increase in property crimes. Federal police Crime Prevention and Community Safety Department director Datuk Acryl Sani Abdullah Sani said a total of 38,877 crimes involving properties were recorded in the first quarter of the year. It means that

about 58 per cent of crimes committed were property crimes. Since the start of 2016, 12,216 motorcycle thefts, 6,662 house break ins and 3,656 cases involving cars, were recorded. (New Straits Times, 2016).

DISCUSSION

As discussed before, the purpose of the sentencing is to deter offenders from reoffending or preventing offenders from committing additional crimes by locking them up or reforming them in order to control crimes. Accordingly, sentencing is supposed to reduce the crime rate. However, the overall crime is still relatively high for the year 2007 to 2009 according to the statistics illustrated in Table 1. Indeed, the decrease of total index crime by 45 percent from 2010 to 2015 was the initiative of government through the implementation of the reducing crime (The National Key Results Areas) under Government Transformation Programme such as the Safe City Programme, Omnipresence and Programme Community Policing Programme. However, this initiative did not involve any reform in sentencing. In 2016, Malaysia's crime index recorded a 4.6 per cent increase between January and April 2016 due to increase in property crimes. So, the question is, is sentencing properly performing its task?

A major purpose of the criminal justice system is to identify, in a legally acceptable manner, the people who should be subjected to control and treatment in the correctional process. If the corrections do not properly perform their task, the entire criminal system suffers. An inefficient or an unfair correctional process can nullify the efforts of courts, prosecutors, and police alike. (Robert O. Dawson, 1969). Thus, a proper study needs to be carried out to evaluate and determine how efficient our mode of sentencing is when it comes to reducing the crime rate, and perhaps if needed, reforms should be proposed to the current system of sentencing. This paper is

made to shed some light regarding the present sentencing system and its true position, hoping to kick start future study to be carried out to reduce the crime rate for a safer Malaysia. Possibly, we should focus on the non-custodial measures as a way to help reduce the crime rate, for doubt has grown regarding the effectiveness of imprisonment in meeting the aims of justice.

While imprisonment is necessary in many cases involving violent offenders, it does not constitute a panacea with regard either to crime prevention or to the social reintegration of offenders. Moreover, in many countries the prison system faces major challenges because of overcrowded and outdated facilities, with the result that prisoners often find themselves in deplorable conditions of detention that can have adverse effects on their physical and mental health and impede their educational and vocational training, thereby also affecting their chances of future adjustment to an ordinary life in the community. The impact of long-term imprisonment on a person's family and work life is also considerable. (Office of the High Commissioner for Human Rights in cooperation with the International Bar Association, 2003). Therefore, we need to find alternatives to imprisonment for offenders and develop non-custodial measures to help offenders while keeping them in the community.

The success of non-custodial measures can be seen in the Netherlands, when the numbers of crime rate have dropped because the judges are sentencing people in different ways. Not more lightly, but differently, with community service, ankle bracelets and rehabilitation clinics, according to Anneloes van Boxtel, who is the administers of the interior Ministry's real estate. In the Netherlands, crime fell by 26% between 2007 and 2015, according to the official Central Statistics Bureau. In a decade, the number of people imprisoned annually in the Netherlands fell from 50,650 in 2005 to 37,790 in 2015. (Arab News, 2017). Besides non-custodial measures like community

service, ankle bracelets and rehabilitation clinics, perhaps we can also look into national service as a mode of non-custodial measures. It has been practiced in the United States when Jimi Hendrix a musician in 1970 was arrested by the local police for riding in a stolen car. Facing up to ten years in jail, a public defender representing Hendrix struck a plea bargain with the local district attorney. As a result, Jimi had received a two-year suspended prison sentence on the condition that he enlist in the Army. (Fred L. Borch, 2016). However, the suggestions on non-custodial measures as mentioned above need detailed study prior implementation.

CONCLUSION

Based on the above study, it finds that there is a disparity between the theory of principles of sentencing and the actual result as according to the index crimes rate in Malaysia. Therefore, a proper and thorough study needs to be carried out to evaluate and determine how efficient our mode of sentencing is in reducing the crime rate, and reforms ought to be proposed to the current system of sentencing, in order to bridge the gap between theory and reality. The focus should be on non-custodial measures as they could be one of the ways to help reduce the crime rate, as shown by the successes of non-custodial measures in the Netherlands. With this study, the writer hopes that it can shed some light on the problem, and to initiate further research in reforming the present sentencing system in order to reduce the crime rate for a safer Malaysia.

REFERENCES

1. Baljit Singh Sidhu, "Amendments To The Criminal Procedure Code: Radical Or Piecemeal Legislation?," *Malayan Law Journal* 7 (2007): liii-lvi.

2. Cassia Spohn, *How Do Judges Decide?: The Search for Fairness and Justice in Punishment*. Los Angeles: Sage, 2009.
3. Fred L. Borch, “ ‘Electric Ladyland’ in the Army: The Story of Private First Class Jimi Hendrix in the 101st Airborne Division,” *The Army Lawyer* 1 (2016): 1-2.
4. Hani Shamira Shahrudin. “Malaysia’s crime index sees 4.6 per cent increase.” *New Straits Times*, May 7, 2016. Accessed June 12, 2017. <http://www.nst.com.my/news/2016/05/144196/malaysia-crime-index-sees-46-cent-increase>.
5. “National Transformation Programme: Annual Report 2015,” Performance Management and Delivery Unit (PEMANDU), accessed May 28, 2017, http://www.pemandu.gov.my/assets/publications/annual-reports/ENG_PEMANDU_NTP_AR2015_260416.pdf.
6. Nor Afizah Hanum Mokhtar, “Should Death Sentence Be Abolished,” *Malayan Law Journal* 3 (2006): cxliii-cl.
7. Office of the High Commissioner for Human Rights in cooperation with the International Bar Association, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*. New York and Geneva: United Nations, 2003.
8. Robert O. Dawson, *Sentencing: The Decision as to Type, Length, and Conditions of Sentence*. Boston: Little Brown and Company, 1969.
9. Sir Rupert Cross and Andrew Ashworth, *The English Sentencing System*. London: Butterworths, 1981.
10. Sophie Mignon. “Life behind bars gets new twist in empty Dutch prisons.” *Arab News*, July 10, 2017. Accessed July 12, 2017. <http://www.arabnews.com/node/1127221/offbeat>.
11. Susan Easton and Christine Piper, *Sentencing and Punishment: The Quest for Justice*. Oxford: Oxford University Press, 2012.

12. Tan Pek Leng, "Safety Issues in Penang from A Gender Perspective" (paper presented at the Advance Gender Budgeting Workshop, Penang, Malaysia, June 6-7, 2011).
13. "The Current Form of Sentencing is Outdated- Time for Reform," The Malaysian Bar, accessed April 19, 2017, http://www.malaysianbar.org.my/criminal_law/the_current_form_of_sentencing_is_outdated_time_for_reform_by_v._sithambaram.html.