

香港青少年犯事者之判刑選擇研究

**A Study on Sentencing Options
For Young Offenders in Hong Kong**

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SUMMARY REPORT

1. Introduction

The purpose of this study is to review the sentencing options for young offenders in Hong Kong, taking into consideration sentencing aims (deterrence, rehabilitation, incapacitation, desertion, restoration and reparation, etc.), sentencing principles and policies (dignity, equality, restraint in the use of custody, control of public expenditure, equality before the law, etc.) and other factors such as function of the penal system, public attitudes, economic costs, juvenile justice, judicial processes, social work as well as victimology and empowerment issues. The study has also drawn references from countries such as New Zealand, Australia, United States and United Kingdom in which measures of restorative justice are being practiced. In this youth study, we hope to discuss the possible sentencing and rehabilitative options for young offenders in Hong Kong. Through a qualitative opinion survey, we hope to improve our understanding on rehabilitation of young offenders by looking at the issue from different angles, which hopefully will lead to suitable policy guidelines and services.

2. Methodology

A qualitative survey is employed for this study. Copies of a self-administered questionnaire, together with a discussion paper on the issue and the current situation of Hong Kong, were sent out to a wide spectrum of potential respondents including legal and judicial professionals, community leaders, academics, advisory committee members, agency administrators, educators and youth workers. Questions of the survey were directed to solicit respondents' opinions towards community-based sentencing disposals, family members' involvement as well as principles and practice of restorative justice. The survey was conducted from 27 January to 15 March 1998. A total of 75 copies of questionnaire were sent and 51 were successfully completed and returned. The analysis contains a synthesis of the qualitative data from the respondents and from an extensive review of the literature.

3. Discussion

The contemporary direction in juvenile justice system emphasizes the use of community based approach for the rehabilitation of juvenile offenders who have committed minor offences. In countries such as New Zealand and the United States which go one step further to put forth efforts on developing restorative justice system, different programmes have been tried out for many years. These include programmes such as family group conference, victim-offender reconciliation programme, victim-offender mediation programme, diversion contract, intermediate

confinement, intensive supervision probation, and so forth. The objective of most of these programmes is to facilitate repentance by young offenders and their rehabilitation. The use of restorative justice programmes are particularly appropriate for young people who have committed minor offences.

The juvenile crime rate in Hong Kong has been stabilized in the nineties. Each year, the total number of crimes committed by young people aged between 7 and 20 is about fifteen thousand. Most of these crimes involve minor offences such as theft, shoplifting or offence against personal properties of others. A significant number of these offenders are first-time offenders. The issue of rehabilitation for young offenders, given the fact that many of them are minor offenders or first-time offenders, is an important topic for our existing juvenile justice system. The way to effectively actualize one of the primary rationales of sentencing, that is rehabilitation, is an important concern.

As a result, non-custodial and community-based sentencing are widely encouraged in many countries regardless of their judicial system. International movement towards sentencing reform has been ongoing for the past decades. United Nations Congresses have discussed sentencing on several occasions. At the UN Congress in Cuba in 1990, there were resolutions in favour of developing structures and procedures to ensure that custody is used with restraint.¹ To this end, countries such as New Zealand have developed a system of restorative justice which “is a form of criminal justice based on reparation, that is, actions which attempt to repair the damage caused by the crime, either materially or symbolically.”² Through various programmes in the community, offenders are encouraged to rehabilitate through repentance and reparation.

The issue of adequate sentencing options then arises. To achieve justice, the court should be given adequate options so that judges can fully exercise their discretion in granting the sentence according to the circumstances and needs of individual cases.

3.1 Most of the respondents support the principle of community-based rehabilitation for young offenders. However, references should be made to experiences of other judicial areas on how to put forth effort on rehabilitation by increasing sentencing options.

(a) Most of the respondents support the principle of community based rehabilitation:

The connotation of “community-based” rehabilitation principally refers to those non-custodial sentencing options which aim primarily to retain the young offenders, instead of putting them in jail, in the community where they are able to obtain appropriate training or counselling for their rehabilitation. The direction of using

¹ Ashworth, Andrew. *Sentencing and Criminal Justice*, London: Butterworths, 1995, p.335

² Zehr, Howard. *Changing Lenses: A new Focus for Crime and Justice*, Scottsdale Pa.: Herald Press, 1990.

more community-based non-custodial sentencing options for young offenders are supported by many research findings in different judicial areas. The latest one was an evaluative research on the effectiveness of rehabilitative programmes for young offenders in Hong Kong. The study was commissioned by The Central Fight Crime Committee to the City University of Hong Kong. Major recommendations of the research are strongly in support of the community-based sentencing options for young offenders.

This direction of community based rehabilitation is recognized and supported by many respondents of this study. Most of the respondents are in favour of the concept because they believe it will be beneficial to the rehabilitation of young offenders.

(b) The support of community will be indispensable for rehabilitation of young offenders:

The support of the community where the rehabilitation takes place will be crucial to the success of the programmes. According to the 1996 National Opinion Survey on Crime and Justice (NOSCJ) in the United States, there are three primary dimensions of citizen's attitudes about crime and criminal justice. The first dimension is fear of crime; the second concern is exasperation with and loss of confidence in the official criminal justice system; and the third is that attributions about criminals are changing. In the public mind a criminal has transformed into a more volitional, more willful actor. As a result, the public in the United States is in general very cautious towards community rehabilitation programmes for young offenders.³

Respondents of this study also share similar views. Some respondents expressed the opinion that adequate support from the community should be available. This support may include assistance by the community members, in providing avenues to prevent young offenders mixing with criminal elements, providing job training or study opportunities and counselling in their neighborhoods. All these elements are important to the success of a community-based rehabilitation programme.

(c) The provision of manpower resources should be adequate:

However, one of the shortcomings of the community-based programmes is the need for adequate professional support. Without it, the effectiveness of rehabilitation will be doubtful. One example is the existing practice of probation officers engaged in submitting to courts social enquiry reports of offenders. This heavy work load renders probation officers incapable of providing offenders intensive counselling that are crucial elements for their rehabilitation. An opinion from a respondent indicates that the attitudes of individual judges, as well as probation officers, are far from satisfactory and certainly not supportive.

³ Flanagan, T., & Longmire, D. (Eds.). (1996). Americans view crime and Justice: A national public opinion survey. Thousand Oaks, CA : Sage Publications.

3.2 The current sentencing options in courts for young offenders are very limited when compared with other judicial areas. More sentencing options should be introduced to encourage young offenders to rehabilitate through repentance and reparation.

Despite the fact that Hong Kong has adopted, for years, the community based approach in juvenile justice system, as exemplified by the use of probation order and community service order, the current sentencing options in court for young offenders are still very limited when compared with other judicial areas. In view of the general trend towards more rehabilitation measures in the judiciary, the introduction of more new sentencing options will be an appropriate move. This could occur particularly in non-custodial options of our court system to encourage young offenders to rehabilitate through repentance and reparation.

Examples of community based sentencing options are diversified for different countries. The following are some of the examples:

Intermediate Treatment (IT): The Intermediate Treatment Initiative was announced in January 1983, and by March 1986, its funding had been agreed by Department of Health and Social Security (DHSS) for 110 Alternative to Custody and Care Projects in 62 Local Authority areas in England. Court disposals under which juveniles attended initiative project programmes included: on remand, on bail, supervision order, supervision order (intermediate treatment), supervision (specified activity requirements), care order, deferred sentence, etc. Intensive counselling and group activities are mandatory.⁴

Intensive Supervision Probation (ISP): ISP targets adults and juveniles found guilty of level 5-10 offences that are predominantly non-violent offences following the Kansas Sentencing Guidelines Grid established in 1994. Each offender is required to enter into an intensive supervised plan that includes vocational, educational, psychological and alcohol or drug treatment. The intensity of supervision ranges from jail work release and house arrest to frequent and unannounced contacts. Offenders are supervised based on their risk and need levels. Through intensive supervision and counselling, Douglas County Community Corrections staff monitor the daily activities of offenders and create opportunities for offenders to prepare themselves to remain law abiding citizens and to contribute to the community.⁵

Sergeant Redd's Physical-Training Programme: this is a court-approved plan to turn troublemakers on probation into law-abiding citizens. Redd, a court bailiff and a former army drill sergeant, oversees a military-style regimen three mornings a week that mixes physical discipline, mental toughness, and common-sense counselling, individually and in groups. Participants in this programme enter a

⁴ NACRO Juvenile Crime Section, Directing Juveniles from Custody, 1987, p.3.

⁵ Douglas County Community Corrections, Douglas County Community Corrections.
<http://www.douglas-county.com/dccc.htm>

structured training environment a few hours a day, three days a week, for three months. They must arrive on time, wear uniforms, and learn basic drills. They also receive regular warnings to stay in school, along with practical instruction about finding and keeping jobs. Graduates avoid jail and might also see the court relax their probation requirements. Nongraduates head straight to jail. Redd decides who is fit to graduate --- with no second chances and no appeals. The approach differs from many boot-camp experiments and is highly appreciated by judges involved.⁶

There are also other intermediate confinement programmes such as mandatory military training, electronic monitoring, and so forth which aim at incapacitating offenders within the community. While there are merits appreciated by officials of other places, the applicability and feasibility of introducing them to Hong Kong are greatly in doubt, as it involves complex concerns on geographical environment, human rights, manpower resources, social attitudes, etc.

3.3 There is still controversy on the pros and cons of restorative justice. Its applicability to Hong Kong is not yet certain. Further research on this area is strongly recommended.

(a) The characteristics of restorative justice:

Restorative justice is a form of criminal justice based on reparation, that is, actions which attempt to repair the damage caused by the crime, either materially or symbolically. Restorative justice seeks to redefine crime, interpreting it not so much as breaking the law, or offending the state, but as an injury or wrong doing to another person or persons. It encourages the victim and the offender to be directly involved in resolving any conflict between them through dialogue and negotiation. Thereby, the victim and offender become central participants in the judicial process with the state. The legal professionals in such an approach become facilitators, supporting a system which aims at offender accountability, full participation of both the victim and the offender, and making good, or putting right the wrong that has been committed. There is a range of restorative programmes operating internationally. The major ones include the victim-offender reconciliation programmes (United States and Canada), victim-offender mediation programmes (England and Australia) and family/community group conferencing (New Zealand).

(b) New Zealand as an example of “Restorative Justice”:

The New Zealand youth justice system applies to children and young people under 17 years of age. It has a variety of goals, a number of which accord with a restorative approach. These include: an emphasis on young offenders paying for their wrongdoing in an appropriate way; the involvement of families and offenders in decision-making arising from the offence; the participation of victims in finding solutions; and consensus decision-making. These are laid down by the legislation

⁶ Joe Loconte, “Redd Scar: A drill sergeant’s brilliant assault on juvenile crime,” *Policy Review*: The Journal of American Citizenship, Nov-Dec/1996, Number 80.

“Children, Young Persons and Their Families Act 1989.” The operation of the youth justice system is mainly by way of the family court, the youth court and family group conferences. There are both an informal and a formal systems, with the family group conference having a central role in both systems. When Police believe a child or young person has committed an offence, they have three options. They may:

(i) issue a warning and maybe arrange some alternative action such as an apology or reparation; or

(ii) refer the matter to the Youth Justice Coordinator (YJC) to arrange a Family Group Conference so the family, family group and victim can make a plan to which everyone agrees with and thinks will correct the situations as much as possible; or

(iii) make an arrest and refer the matter to the Family or Youth Court for more serious offences.

(c) The advantages of restorative justice:

The advantage of restorative justice rests on its very nature in its contrast with the retributive justice system. In restorative justice, offenders are being reintegrated into the society through repentance and reparation. Victims are also given opportunities to forgive the wrong done by the offenders. Besides, restorative programmes are diversions so that young offenders do not enter into the criminal justice system all together. An early settlement for these offences saves money and therefore is more cost-effective. In addition it eases the problem of overcrowding prisons.

(d) The potential danger of restorative justice:

On the other hand, there are at least six potential dangers in the restorative programmes (particularly the family groups conference approach). These include (i) inadequate preparation by the primary parties in the joint conference which inhibit them to participate freely in a genuine dialogue; (ii) victim insensitivity and coercion may occur in which programmes may end up not being sensitive to the emotional, informational and participation needs of the victims; (iii) young offenders feeling intimidated by adults, including police officer in uniform and others; (iv) lack of neutrality by the police officers, probation officers, or school officials which give rise to shaming the offenders; (v) inflexibility and assumed cultural neutrality of the process which makes the transferability of experiences ineffective; and (vi) net-widening effect --- restorative programmes tend to identify and label very minor cases that would have largely self-corrected on their own with little intervention by the justice system. All the above shortcomings point to the self-defeating problems of the restorative approach.

(e) There is still controversy on the pros and cons of restorative justice and its applicability to Hong Kong is not yet certain:

The views of respondents on the pros and cons of the restorative justice are divided. Some respondents from this survey endorse restorative justice and suggest

that they support its introduction in Hong Kong. They believe that the nature of restorative justice would nurture the notion of "forgiveness" and "repentance". Young offenders are also given opportunities to reflect over what they have done as a means to change. This self-educational process is vital to their rehabilitation.

Opponents come from respondents of a diverse backgrounds, be it from legal, social welfare, educational, or community. They are concerned that in practice restorative justice may render our criminal justice system ineffective, nourish abuse of power, encourage false restoration or even create greater injustice. The argument is that if the state does not initiate the prosecution it will be easier for the wealthier members of the community to escape from criminal liability if the victim agrees to reparation. The definition of crimes, the criminal procedures as well as the sentencing disposals may thereby be modified if restorative justice system is followed.

3.4 In recognition of the community based approach, mediation programmes can be considered as one of the possible sentencing options for Hong Kong.

As noted above, while in recognition of the community based approach, there are concerns over the negative implications of the restorative justice system. These worries particularly refer to the restorative arrangement "outside the court system" which may imply that the rule of law is not followed or even justice is not seen to be done. However, if these potential shortcomings of restorative justice can be avoided, some of its arrangements are not necessarily completely inapplicable to Hong Kong.

Based on this analysis, reference can be made to arrangements such as "mediation programmes" of other judicial areas that might be a possible choice of sentencing option for Hong Kong. "Mediation programmes" can be completely different from "restorative justice". The latter is not only a sentencing option, but a system of justice which comprises of a particular set of concepts that intend to redefine the notion of "crime", to reform the existing criminal justice system, or even to transfer power and authority from the judiciary to the hands of victims and offenders. If these concepts are not properly and carefully exercised, the negative impact can be tremendous. It is therefore understandable why it worries many of our respondents in this study.

"Mediation programmes", when used as a sentencing option, can be operated under the existing criminal justice system with some positive elements of restorative justice. The arrangement encourages the repentance of offenders and their compensation to the victims. It also allows the victim to choose whether to forgive the wrong done by the offenders. However, the decision of using "mediation programmes" must come from the court and while the power and authority remains in the judiciary. In other words, the use of "mediation programmes" is at the post-sentence stage of the court. It adds one more options for the judge when he/she considers possible sentence. This operation must be in line with the existing criminal justice system. When the scheme is properly designed, taking into consideration

issues such as targets (only juvenile offenders who commit petty crimes are qualified to the programme), authority (only operate as a sentencing option by the court and similar to probation order or community service order), or justice (how to balance the interest of the victims, offenders, and the greater society), many of the potential drawbacks can be avoided.

Of course, the above is only a discussion in principle. For operation in detail, one must also be able to answer the following questions: who will also attend the mediation programmes besides victims and offenders? Should parents, teachers, social workers, police officers or probation officers be present? Who chair the mediation (mediator)? What are the roles of the mediator? Who make the final decision? What should be included in the mediation agreement? What kind of guidelines the court should issue? On what basis “mediation programmes” are granted by the court? How to proceed in the criminal proceedings when mediation fails? Further study on these questions are needed before mediation programmes can be put into reality.

In summary, given the fact that most of the respondents are in recognition of the community based approach, mediation programme can be considered as one of the possible sentencing options for Hong Kong.

3.5 The views are divided on the roles of family members’ involvement for the rehabilitation of young offenders.

Respondents are asked in this study if they agree that family members of the young offender (be it parents, guardians, brothers, sisters...) be given a statutory role in the sentencing process. In other words, the court shall make reference to views of family members before a final decision on a sentence is made. The views of respondents are divided regarding this question.

The proponents on this idea are largely based on the belief that family members’ involvement helps the rehabilitation of the young offenders. A respondent mentions that this method will be beneficial to responsible parents. Another respondent voiced her opinion in such a way that “... family members can pledge to supervise their convicted children.”

For those who disagree that family members can be given a statutory role in the sentencing process, their concerns are mainly on the administration of justice. They believe if the court must make reference to the views of family members by law, the objectivity of the court will greatly be hampered. Given that the family members are likely to side with the offenders, this bias may result in prejudice or even obstruction in the administration of justice. In fact, most of the respondents opined that views of family members are adequately considered in mitigation in punishment during the court hearing. In general, most of the respondents feel more confident that ultimate authority rest in the court rather than given out to family members. Respondents maintain same opinions about the “family empowerment” notions.

Overall speaking, although the views of respondents are divided on the *roles* of family members' involvement when authority of the court is concerned, most of them still maintain that family members' support and involvement are beneficial and important for the *rehabilitation* of the young offenders. Given the trend that more and more community based sentencing options will appear, family members will inevitably play a more important role for the rehabilitation of the young offenders.

4. Recommendations

In view of the above discussion, the Federation will recommend:

- 4.1 Due to the fact that most of the respondents are in support of the community based approach for rehabilitation of young offenders who commit petty crimes, the Federation recommends that the government should consider enlarging community based counselling and training services to facilitate young offenders' rehabilitation and reintegration into the community.
- 4.2 When compared with other judicial areas, the current sentencing options for young offenders in the court are very limited. The Federation recommends the government to conduct a further research on this topic, and consider having more sentencing options to further facilitate the repentance and rehabilitation of the young offenders. Reference can be made to other judicial areas which have relevant experiences.
- 4.3 There is still controversy on the pros and cons of restorative justice and its applicability to Hong Kong is not yet certain. The Federation believes, in recognition of the community based rehabilitation, arrangements that contain restorative elements should also be considered when further research on possible sentencing options is examined.
- 4.4 To further develop community based rehabilitation, mediation programmes which have been successfully used in many judicial areas, can possibly be an option to enlarge sentencing choices in court for Hong Kong. While consisting the advantages and flexibilities of the restorative justice, mediation programmes can maintain their operation under the existing criminal justice system. As long as authority and judgement remains in the courts, most of the possible negative impact from restorative arrangement, such as deceptive restoration, evasion of criminal liability, or even obstruction in administration of justice, can possibly be avoided. The Federation recommends that the government consider using mediation programmes as a sentencing option in courts for young offenders who have committed petty crimes. Through the mediation programmes, offenders are encouraged to rehabilitate through repentance and reparation. At the same time victims are given opportunities to forgive the wrong done by the offenders.