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An Approach To The Victims Of Crime In Malaysia

In Memory Of
Dr. Mohammad Akram

Ahmad Ibrahim Kulliyah of Laws International Islamic University
akramm@iiu.edu.my

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AN APPROACH TO THE VICTIMS OF CRIME IN MALAYSIA

BY

Dr. Mohammad Akram
Associate Professor
Ahmad Ibrahim Kulliyah of Laws
International Islamic University Malaysia
Kuala Lumpur Malaysia
Email akramm@iiu.edu.my¹

Abstract

The concept of compensation of victim(s) of crime on his/her dependent(s) by the offender, which for many centuries was an established practice in the field of criminal justice is not given due attention in the present criminal justice system. The current criminal justice system lays emphasis on the reformation and rehabilitation of the perpetrator of the crime, however no attention is paid to the victim(s) except to require his/her presence as a witness. In many cases the crime may have incapacitated the victim temporarily or permanently to earn his/her livelihood or in case of death the family's sole earning member might be lost, but the state does not provide assistance to the victim(s) of crime or his/her dependents, they are left to their own resources.

In Malaysia, the provision dealing with compensation to the victim of crime are provided under section 426 of the Criminal Procedure Code and other statutes. The victim(s) or his/her dependents have no legal right to claim compensation from the offender or state and the provisions which are provided to deal with this problem are also not adequate or comprehensive. The courts have not been given wide powers to deal with the plight of victims of crime within the framework of inadequate provision in the Criminal Procedure Code or other statutes.

In this paper an attempt will be made to examine the various ramifications of the problems of compensation to the victims of crime in Malaysia, the paper will also focus on the judicial approach towards the plight of the victims of crime. Efforts will also be made to find a solution with all consequential implications.

Introduction

The concept of compensation of victim of crime or his dependants, which was an established practice in ancient criminal justice system, is almost disregarded in modern criminal justice systems. The prevailing criminal justice is designed to reform and rehabilitate offenders and every care is taken for the well being of offenders while undergoing punishment², but it hardly takes notes of victims of crime.

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² The Prison Department of Malaysia spends RM 35 per prisoner per day.

When the commission of crime is reported to the police, a search is made for the perpetrator of the crime and prosecution sets into motion to get the accused convicted. In the process of trial the accused is considered a privileged person, he is accorded constitutional protection against illegal arrest and detention and is provided all possible help and legal aid.³

Thus, we see that every care is taken of the perpetrator of crime but no attention is paid to the victim of crime, except to require his presence as a witness otherwise the victim's plight is largely ignored. In most cases victims suffer injury, harm or death as a result of crime committed on them and this may have incapacitated the victim temporarily or permanently to earn his livelihood or in case of death the sole earning member is lost but the state provides no help to the victim of crime or his dependants, they are left to their meager resources.

In Malaysia the provisions dealing with compensation to victims of crime are contained in section 426 of the Criminal Procedure Code (herein after called the CPC) and some other statutes. The victim or his dependants have no legal right to claim compensation from the offender or the state and the provisions that are provided are not comprehensive and adequate.

The objective of this paper is to examine various ramifications of the problem of compensation to the victims of crime. This paper makes an appraisal of the origin and use of compensation in some selected countries. It also deals with the issue of the payment of compensation to victims of crime. The paper briefly examines the scheme of compensation provided under Islamic criminal justice system. An endeavor is also made to find solutions to various obstacles that come in the payment of compensation to victims of crime.

Origin and Use of Compensation to Victims of Crime

Compensation for victims of crime is an old institution. It existed in some form or the other in the old Germanic law, Code of Hammurabi, Law of Moses, Hindu law and many other scriptures and civilizations of the past. It also existed in a well entrenched form in the Islamic Criminal Justice system. In recent times numbers of countries have launched schemes to deal with the plight of victims of crime.

In the United Kingdom provision for compensation is made in the Criminal Injuries Compensation 1964. The quantum of compensation corresponds as that of damages in

³ .A number of constitutional safeguards are provided in the Federal Constitution in Malaysia. Article 5(1) of the Constitution provides that no person shall be deprived of his life and personal liberty. Article 5(3) of the Constitution lays down that when a person is arrested he shall be informed as soon as may be grounds of arrest and shall be allowed to consult and be defended by a legal practitioner of his choice. Section 255 of the Criminal Procedure Code deals with the right of legal representation at the trial stage.

civil injuries the money payable for pain and suffering and loss of earning capacity. The cost involved in implementation of scheme was quite high. In the year 1976 approximately six million Pound Sterling was disbursed as compensation for 16000 claims⁴, before a person may be eligible for compensation certain conditions must be satisfied.

Later the idea of compensation was introduced in the Criminal Justice Act 1972. It empowered the court to make an order for compensation in addition to the penalty for the offence where loss injury or damage had been caused. However compensation as a sole penalty for the offence was provided in the Criminal Justice Act 1982.

In the United States of America, California was the first state to enact a victim's compensation law in 1965. Those who are eligible to compensation are only victims of crimes of violence. The victims are required to report the crime within forty eight hours of the commission of the crime to the police and should not have been living with or be relative of the offender.

In the United States 45 states have created compensation schemes for payment of compensation by the states. For example in California during the year 1987, 40 million US Dollars were paid as compensation. The funding of the scheme came from surcharges on fines and forfeited bail money.⁵ In some of the states compensation schemes have been used in cases of domestic violence and it has been extended to victims of drunk driving, even if the victim resides with the offender.

The French law provides a model example of a system whereby the victim's claim for restitution may be entertained in criminal proceedings, despite the civil nature of restitution. There is a general provision in criminal law in addition to civil law that a person who causes any loss, injury or damage to another person should repair it or compensate for it. The law provides for the indemnification of all those who have suffered directly in consequence of criminal offence, that is to say not only to the victim himself but to his rightful claimants (as where the crime caused victims death).⁶

Position of Compensation to Victims of Crime in Malaysia

In Malaysia the main provision relating to compensation to the victims of crime is section 426 of the Criminal Procedure Code. Section 426 of the Criminal Procedure Code provides:

- (i) The Court before which a person is convicted of any crime or offence may in its discretion make either or both of the following orders against him, namely:

⁴ .Summaiah Mundrathi, *Law on Compensation to Victims of Crime and Abuse of Power*, Deep & Deep Publications New Delhi 2002 p.40

⁵ Supra note 3 at p.43

⁶ .S.Schafer, *Restitution to Victims of Crime*.p.21

- (a) An order for payment by him of the costs of the prosecution or such part thereof as the court directs;
 - (b) An order for payment by him of a sum to be fixed by the Court by way of compensation to any person or to the representatives of any person injured in respect of his person, character or property by the crime or offence for which sentence is passed.
- (ii) The Court shall specify the person to whom any sum in respect of costs or compensation as aforesaid is to be paid and the provisions of section 432(except paragraph (d) of subsection (i) thereof) shall be applicable to any order made under this section.
 - (iii) The Court may direct that an order for payment of costs, or an order for payment of compensation, shall have priority, and if no direction be given, an order for payment of costs shall have priority over an order for payment of compensation.
 - (iv) The extent of amount which has been paid to a person, or to the representatives of a person, under an order for compensation, any claim of such person or representatives for damages sustained by reason of the crime or offence shall be deemed to have been satisfied, but the order for payment shall not prejudice any right to a civil remedy for the recovery of any property or for the recovery of damages beyond the amount of compensation paid under the order.
 - (v) Every order made under this section by a Magistrate shall be appeal able to the High Court.

It is clear from the above provision that the court can only make an order under this section when any person is convicted of any offence or crime and has to compensate the victim of crime in respect to the injury suffered to his person, character or property. The quantum of compensation to be paid by the offender to the victim is to be fixed by the court. In fixing the quantum the Court considers various factors such as the nature of the crime, the injury suffered, the capacity to pay and other relevant circumstances.⁷ The Courts in Malaysia have applied this provision in some cases.

In *Yap Eu Leong Sunny v. Public Prosecutor*,⁸ the appellant was convicted for accepting a bribe under section 4(a) of the Prevention of Corruption Act 1961. He was sentenced by the Session Court Judge to one days imprisonment, fine and ordered to pay a penalty of RM 500 to the Government of Malaysia. He appealed against his conviction and sentence.

On appeal it was held that section 426 of the CPC gives power to the court to order compensation to the victim of offences and costs of prosecution. The offender must

⁷ Prabhas C.Sarkar, *The Law of Criminal Procedure* ,Orient Law House, Delhi, 1991,p.963

⁸ [1994]3MLJ434

have been convicted. The payment of compensation may be made to any person, injured in respect of his person, character or property by the crime or the offence for which the sentence is passed.

In this provision the important requirement for an order of compensation is a conviction. The section does not use the word victim. However the phrase any person, injured as appeared paragraph (b) refers to victim of crime for which the offender was convicted or sentenced.⁹

In *Johan Mutalib v. Public Prosecutor*¹⁰, on three charges of offences of using as genuine a forged document, the accused was sentenced to two years imprisonment. In addition he was ordered after completion of his imprisonment to pay a government fine of \$3000 on each charge by monthly installments.

On appeal the Federal Court held that section 426 of the CPC which enables the court to make an order for payment of compensation does not contemplate an order in favour of government.

In paragraph (b) of the section the use of the word conviction and the phrase by the crime or the offence the sentence is passed means that before an order of compensation is made sentence should have been passed by the court. This power of the court to award compensation is in addition to other penalty that the court may impose on offender.

In *Raja Izzuddin Shah v. Public Prosecutor*,¹¹ the appellant had been convicted of the offence of assaulting a public servant. The court while sentencing the appellant in section 294 of the CPC also made an order under section 426 of the CPC to pay as compensation in the sum of \$200m to the complainant.

It is to be noted here that order for payment of compensation can only be made when any sentence is passed.¹²

In *Yakman Bin Mohammad Tahir and Anor v. PP*¹³, the petitioners were convicted by the learned magistrate of an offence under the Small Offences Enactment and made an order for the payment of \$15 compensation under section 426 of the Criminal Procedure Code and in default of the payment, imprisonment. On revision of the case it was held that when the court orders a convicted person to pay compensation under section 426 of the Code to the person injured by the offence and the convicted person defaulted in payment the court cannot order imprisonment in default.

⁹ Hanum Bte Abdul Aziz, *Victims Compensation in Criminal Victimization*, (2002) 2 MCPF Journal

¹⁰ [1978] MLJ213

¹¹ [1979] 1MLJ 270

¹² See the cases *PP v. Ng Tik Chuan* (1948-49), MLJ, Supplement 159 at p. 160 : *PP v. Lee Tak Keong* (1989) 1MLJ,307

¹³ 1940, MLJ 196

One of the interesting developments in the area of compensation came in 1992 when the High Court in Malaysia made an unprecedented compensation order for homicide in the unreported case of *PP v. Law Lu Keng*¹⁴. In this case the respondent was charged for committing the offence of culpable homicide not amounting to murder punishable under section 304 of the Penal Code. At the time of the offence he was 19 years old. He pleaded guilty. After the conviction he was released by the court on a RM 10,000 bond with one surety under section 294 of the Criminal Procedure Code. The Deputy Public Prosecutor appealed against the sentence to the High Court. The High Court confirming the sentence passed by the Lower Court ordered that the respondent pay a sum of RM 10,000 as compensation to the widow of the victim under section 426 of the Criminal Procedure Code.

Compensation under the Islamic Criminal Justice System

The Islamic Criminal Justice system provides a well structured system of compensation to the victims of crime. The punishment prescribed in Islamic Law for causing injury and murder is called '*Qisas*' (retaliation). It is inflicting on the offender an injury exactly equal to the injury he has caused on the victim. The punishment for such an offence could be either '*Qisas*' (retaliation) or the payment of *Diyah* (blood money). The blood money is an alternative punishment to *Qisas* in cases of intentional murder. It is in the form of monetary compensation for homicide and causing injury paid to the victim or his *wali* (guardian)¹⁵. In the Holy Qur'an it is stated,

“O You who Believe, Retaliation is prescribed for you in the matter of the murdered: the free man for the free man and the slave for the slave and the female for the female. But if any remission is made to him by his (injured brother), then grant any reasonable demand and compensate him with handsome gratitude.”

For deliberate killing, the punishment of *Qisas* means the taking of the culprit's life because of the life he has taken. In modern times, this is the death penalty for murder. In cases of willful murder, the heirs of the victim have been given a choice of either *Qisas* or *Diyah*. They may forgive the offender and spare him from *Qisas* and demand payment for *Diyah* (compensation). The purpose of *Diyah* is to soothe the feelings of victims and or their families. Under the present provision of the Malaysian Criminal Procedure Code, the court may impose a fine against the offender upon commutation of the death sentence. It is suggested that even if the government retains the right to commutation of the death sentence, instead of paying the fine to the government the offender should pay compensation to the victim's family and the court may also punish him with imprisonment¹⁶.

¹⁴ Muar High Court Criminal Appeal No., 42-8-1990, cited from Syed Ahmad S. A. Alsagoff, *Al-Diyah as Compensation for Homicide Wounding in Malaysia*, Research Centre, IIUM, 2006, p. 98.

¹⁵ For detailed discussion see Mohamed S. El-Awa, *Punishment in Islamic Law: A Comparative Study*, American Trust Publications, Indianapolis, 1982 p. 69.

¹⁶ Syed Ahmad S. A. Alsagoff, *Al-Diyah as Compensation for Homicide Wounding in Malaysia*, Research Centre, IIUM, 2006, p. 170.

Who should be eligible for Compensation?

Compensation should not be awarded for all types of offences. A scheme for compensation should cover offences against a person i.e. murder, grievous hurt, assault etc. Injuries to properties should be excluded from the purview of the scheme because the case of property can be covered by private insurance. Further if compensation is allowed in cases of property it will give rise to fraudulent claims.

Bodily injuries caused by motor accidents may be excluded from the scheme of compensation for such type of injuries compensation is provided by third party insurance of motor vehicles.

Crimes involving sexual offences maybe be excluded on the scheme of compensation. However an exception may be made in the case of rape , medical treatment , loss of earning, trauma caused by the offence, rape resulting in pregnancy should be taken into consideration while awarding compensation.

Ordinarily compensation should not be allowed in cases where the offender and the victim are members of the same family. This has been followed in countries where scheme of compensation is in existence. The possibility of collusive claims is high in such cases.

Apart from the above, certain classes of persons who assist voluntarily or on the demand of public officials such as the police in the maintenance of law and order, or who assist in apprehending a fleeing offender have a strong claim for compensation from the state. If the person assisting dies, his dependents should be entitled to the same amount of compensation as that provided for a deceased victim of crime.

Who should pay Compensation-the State or the Offender?

The Malaysian Criminal Justice System imposes a liability on the offender to pay compensation when the court makes such an order. There is no liability for the State to compensate the victims of crime. A cogent argument that may be advanced for the State paying compensation to the victim is that it must compensate the victim because it has failed in its responsibility to protect his life and liberty. However it will not be fair to ask the State to compensate fully to the victim or his dependents leaving the offender free from any liability to pay. The offender should be asked to contribute to the payment of compensation to the victim of crime or his dependents. Thus compensation should be partly paid by the State and partly by the offender. Where the State pays compensation it should have a right to recover it from the offender and might have a charge on the offenders' property. The fines imposed in cases of violation of environmental laws, smuggling or other public offences may be remitted to the compensation fund that can be created to provide compensation to the victims.

Another source could be contribution of the offender's earning during his period of incarceration, however no plan of compensation by the offender to the victims of crime can succeed unless the earnings of the inmates in the prison are substantially raised. In order to raise earnings it is necessary to establish industries in prison that may increase the size and productivity of the inmates serving prison sentences. This is not possible unless certain steps are taken. The first step which is required is that the present laws regulating prison labour should be modified and markets for prison products should increase in number and the co-operation of the business community should be obtained¹⁷.

Conclusion

Compensation to victims of crime is an aspect of restorative justice. As it has been discussed above that the plight of the victim of crime and his dependents is largely ignored in the criminal process. It is the responsibility of a welfare state to alleviate the miseries of those victims who have suffered at the hands of the criminals in many cases due to the failure of the state to protect them. The State must take steps to compensate them through effective machinery provided in this regard. The following suggestions are offered to make an effective compensation scheme in Malaysia.

Section 426 of the Criminal Procedure Code that deals with the compensation to victims is very sparingly used by the courts. The section needs to be amended to give more power to the courts to make an order of compensation in every conviction where the circumstances and means of the offender permit. The financial capability of the offender seems to be the main reason for not making a compensation order. The court should make a thorough investigation in such cases where the offender shows his inability to compensate the victim.

The offenders, who are convicted and sentenced to undergo a term of imprisonment and ordered to pay compensation, should be encouraged to pay a certain amount of their earnings to the victims while engaged to work in prisons.

A fund should be created to look after the needs of victims of crime and their dependents on the pattern of other countries such as United Kingdom. The money may come partly from the government resources and partly from various welfare organizations. When the court imposes a fine on the offenders' a part of the money so realized may be transferred to such funds. In some cases, the forfeited bail money may be transferred to the compensation fund.

The Islamic Criminal Justice system provides a wide and well defined system to compensate the victims of crimes. However it would be appropriate to suggest that

¹⁷ In Malaysia the Prison Department has established industries in prisons. They obtain help from the industrial and business community to establish factories in their premises. The inmates who work in these industries are paid wages equal to that which they may receive outside prison walls. They may be required to pay out of their earnings an amount of compensation to the victims or their dependents.

the scheme of compensation (*Diyah*) as laid down in the Islamic Criminal Justice System be implemented with certain modifications that may suit society.