Volume: 7 Issues: 46 [July, 2022] Special Issues pp. 250 - 262
Journal of Islamic, Social, Economics and Development (JISED)
eISSN: 0128-1755
Journal website: www.jised.com
DOI: 10.55573/JISED.07461526

A LEGAL REVIEW BETWEEN IMPACTS OF CHILD SEXUAL ABUSE AND CRIMINAL COMPENSATION ORDER IN MALAYSIA

Izmi Izdiharuddin B Che Jamaludin Mahmud [1]
Nadzriah Ahmad [2]
Rafizah Abu Hassan [3]

[1] Faculty of Law, Universiti Teknologi MARA, Raub, Pahang, Malaysia
Email: izdiharuddin@uitm.edu.my
[2] Faculty of Law, Universiti Teknologi MARA, Shah Alam, Selangor, Malaysia
Email: nadzriah046@uitm.edu.my
[3] Faculty of Law, Universiti Teknologi MARA, Shah Alam, Selangor, Malaysia
Email: fiza@uitm.edu.my

Article history
Received date : 1-3-2022
Revised date : 2-3-2022
Accepted date : 25-6-2022
Published date : 1-8-2022

To cite this document:
Che Jamaludin Mahmud, I. I., Ahmad, N., & Abu Hassan, R. (2022). A Legal Review Between Impacts of Child Sexual Abuse and Criminal Compensation Order in Malaysia. *Journal of Islamic, Social, Economics and Development (JISED)*, 7(46), 250 - 262.

Abstract: *In Malaysia, child sexual abuse issues ("CSA") is prevalent even during the Covid-19 pandemic. In addition, there are numerous social and health issues against child sexual abuse victims ("CSA victims") as it is associated with short and long-term impacts on daily life. Therefore, the compensation may practically assist CSA victims in redressing their sufferings. The primary legislation towards restoring victims' loss or injuries in the Malaysian criminal justice system derives from section 426 (1A) of the Criminal Procedure Code. This provision allows criminal courts to order the offenders to pay a criminal compensation order ("CCO") to victims subject to the application by the public prosecution. Nevertheless, there are shortcomings in the application of Section 426 (1A) due to various reasons, such as the offender does not have the financial ability to pay the compensation, lack of implementation of victims' rights in the criminal justice system, oversight of legal principle of CCO by government-appointed stakeholders and the system rigidity in the assessment of CCO. Thus, this paper focuses on the relationship between the impacts and availability of compensation for child sexual abuses cases in Malaysia. This research adopts the doctrinal legal research method and will determine whether there is a compensatory justice legal system for CSA victims in Malaysia.*

Keywords: *child sexual abuse, child victims & criminal compensation order.*

Volume: 7 Issues: 46 [July, 2022] Special Issues pp. 250 - 262
Journal of Islamic, Social, Economics and Development (JISED)
eISSN: 0128-1755
Journal website: www.jised.com
DOI: 10.55573/JISED.07461526

Introduction

Before the Sexual Offences Against Children Act, 2017 ("SOACA") came into operation on 10 July 2017, Malaysia was one of few countries which do not have a national plan to deal with CSA issues. This is based on the fact that the government is quite reluctant to disclose information about the prevalence of CSA to the public (Ananthalakshmi et al., 2017). The lack of responses from a public official is distressing, considering that there are numerous medical researches on CSA issues in Malaysia that can be found as early as the 1970s (Yarina et al., 2020). The CSA issues are only becoming media headlines after discovering Richard Huckle, who molested impoverished children in Malaysia (Kuan et al., 2016). He pleads guilty before United Kingdom's Court on the extra-territorial jurisdiction crime under the Sexual Offences Act 2003 for abusing Malaysian children (Jay et al., 2020). Richard Huckle's case exposes the weakness of the Malaysian criminal justice system in dealing with CSA cases. A few reasons can be found in the literature, such as a lack of centralised effort among Malaysian authorities towards awareness and handling the CSA cases; since Malaysia does not have specific legislation to deal with CSA abusers and the child witness is seen as inherently less credible or reliable than an adult under evidential rules (Ananthalakshmi et al., 2016). Furthermore, Malaysia is one of few countries that does not per se criminalise child pornography and sexual grooming.

The SOACA 2017 had been introduced to address lacuna in the CSA issues in Malaysia. However, any existing sexual-related offences relevant to the CSA cases are still applicable concurrently with SOACA 2017 since the Malaysian government does not repeal or restrict those offences in CSA cases (Tong et al., 2017). Another initiative done by the Malaysian government is setting up a specialised court to deal with CSA cases only (Lai et al., 2021). There are three categories of offences in the SOACA 2017, child pornography (Part II), offences relating to child grooming (Part III) and offences relating to sexual assault on the child (Part IV). A CSA victim under the SOACA 2017 describes as a person aged under 18 years old. However, in the case of a child grooming offence to commit or facilitate a statutory rape, the age of the CSA victim is under 16 years old. Figures revealed by the Malaysian government detailing the prevalence of CSA in Malaysia (Zainudin, 2020).

Table 1: Detailing the prevalence of CSA in Malaysia

Year	Number of cases
2018	1705
2019	1865
January to September 2020	1373

CSA cases are alarming even during the Covid-19 pandemic. It is estimated that almost 30% of the 2,040 child abuse cases were classified as child physical and sexual abuse between January to April 2021 (Sarban et al., 2021). In Selangor alone, it is estimated that 514 out of 1,076 child abuse cases from January to September 2021 are classified as CSA (Bernama et al., 2021). It is also noted by Chief Justice Tun Tengku Maimun Tuan Mat that CSA issues are an alarming trend and advise the Malaysian government to increase the numbers of the specialised court to deal with CSA cases (Maimun et al., 2022). Her Ladyship's proposal is related to a 51.5% increment of CSA registered cases in Malaysia courts between 2020 (1,869) and 2021 (2,832) (Meikeng et al., 2022). Regardless of improvement in the success rate of prosecution in CSA cases, there is no indication from the Malaysian government to implement victims' rights, especially regarding the right to compensation for injuries suffered from CSA offences. Based on a study conducted by the United Nations (2000 -2003), Malaysian is one of the member of

Volume: 7 Issues: 46 [July, 2022] Special Issues pp. 250 - 262
Journal of Islamic, Social, Economics and Development (JISED)
eISSN: 0128-1755
Journal website: www.jised.com
DOI: 10.55573/JISED.07461526

States which does not provide data on whether there is a mechanism to obtain compensation for violence against children (Office of the United Nations High Commissioner for Human Rights., n.d.).

The victims of crime in Malaysia can seek compensation against offenders in the criminal court through the crime compensation order ("CCO") under Section 426 (1A) of the Criminal Procedure Code. CCO refers to a court order that forces the offender to be directly liable for the victim's losses or injuries by making the offender recompensate the victim in pecuniary terms (Izmi et al., 2021). In cases of CSA issues, the Malaysian judiciary publishes a non-mandatory standard operating procedure known as "Garis Panduan Khas Untuk Mengendalikan Kes Kesalahan Seksual Terhadap Kanak-Kanak Di Malaysia" ("CSA Guidelines"), and it is recommended that the criminal court use the CCO upon the offender pleads guilty. Nevertheless, the Malaysian government does not publish the data concerning the use of CCO in the criminal justice system even though the legal provision of CCO has existed since 1935. In the absence of the data by the judiciary for failure to use CCO, the only way to draw inference is based on reported cases from the court (Sharma et al., 2021). In terms of whether the CCO is ordered in CSA cases, there are several recent reported cases like Mohd Rasul bin Mat Lasi v PP ([2021] 1 LNS 1737), Mohd Khairul Azlan bin Mohd Napi v PP ([2021] 1 LNS 1160), David ak Alus (L) v PP ([2021] MLJU 617), and James Jeffery v PP ([2021] 8 CLJ 935) show that the criminal court has disregarded to use the CCO and do not provide grounds of the decision for its refusal to use the CCO. Case in point, in James Jeffery, the court had imposed a fine of RM 10 000 for exploiting a 16-year-old child to engage in prostitution, although the government does not suffer any monetary losses, and there is evidence that the child victim had been forced to engage in prosecution.

The right to seek compensation in the criminal justice system is not a novel concept as several international treaties and declarations, such as the Geneva Declaration of the Rights of the Child (1924), Universal Declaration of Human Rights (1948), Declaration of the Rights of the Child (1959), Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985), and Convention on the Rights of the Child (1989) and its related Protocols recognising the requirement for members of States to establish a legal system for CSA victims to seek the compensation in the criminal justice system (Binford et al., 2015). Therefore, the research objective is to examine the lack of CCO use before the criminal justice system. The applicable provision will be Section 426 (1A) of the Criminal Procedure Code. The literature on the lack of use of the CCO derives from the various international and local criminal justice systems. Therefore, the research question proposed in this article is why the court refuses or ignores the CCO in the criminal justice system, considering the impacts that occurred against CSA victims.

Literature Review

Impacts of child sexual abuse

There are several adverse effects on CSA victims as they associate with multiple problems in short and long-term implications on the daily lives of both female and male child victims. Studies reveal that CSA victims are susceptible to various degrees of physical injuries, ranging from scratches, bruises, wounds, and broken bones to even experiencing death situations (Zubaidah et al., 2011). CSA victims are also susceptible to sexually transmitted diseases and HIV/AIDS due to unwanted sexual activity (Hankivsky et al., 2003). At the same time, CSA victims are more likely to involve in various situations which may be detrimental to their wellbeing. For instance, living in a dysfunctional family environment (Kasmini et al., 1995),

Volume: 7 Issues: 46 [July, 2022] Special Issues pp. 250 - 262
Journal of Islamic, Social, Economics and Development (JISED)
eISSN: 0128-1755
Journal website: www.jised.com
DOI: 10.55573/JISED.07461526

homelessness, drug overdose, and addiction, difficulty functioning in the workplace (Hankivsky et al., 2003), running away from home, alcohol abuse and dependence, prone to lower educational and employment attainment (Farhana et al., 2018), loss of earnings due to time away from work or loss of earning capacity (Zubaidah et al., 2011), greater risk for psychiatric hospitalisation, and burdened with medical expenses (Davenport et al., 1994). Furthermore, the victims may become perpetrators if the victims have not been treated adequately (Hankivsky et al., 2003).

There are also likelihoods that CSA victims will suffer from mild to severe mental illnesses such as post-traumatic stress disorders, depression (Forster et al., 2000), anxiety disorders, somatic complaints (Farhana et al., 2018), panic disorders (Andrews et al., 2004), eating disorders, (Forster et al., 2000), social phobia (Azliza et al., 2012), personality disorders (Suzaily et al., 2013), schizophrenia (Davenport et al., 1994), dissociative disorder and intimacy dysfunction (Briere et al., n.d.). However, it is unlikely for the CSA victims to show a symptom of mental illness immediately, especially if they do not subject to physical injuries. There are two explanations, (a) the perpetrators' conducts are not forceable sexual abuse, and the consent was obtained through the act of grooming, and (b) the victims are subjected to a sleeper effect, a psychological condition in which the CSA victims are unable to foresee that they will suffer mental disorders until their reach to a certain age (Forster et al., 2000). There are two reasons why sleeper effects occurred, (a) the victims are victims of less severe forms of CSA conducts or (b) the victims are unable to comprehend that they are subject to sexual abuse conducts in the family atmosphere until they leave the abusive conditions (Trickett et al., 2011).

From the legal perspective, the sleeper effect was discussed in Stubbings v Webb ([1993] AC 498), Stingel v Clark ([2006] HCA 37), and A v Hoare ([2008] 1 AC 844) as the only two latter cases that recognised the correlation between the sleeper effect and the effects of mental injuries sustained due to abusive experiences. The central issue surrounding these cases is whether the CSA victims could pursue civil litigation against their abusers respectively according to the statutes of limitations, especially after several years of abusive conduct stops. Under English law, the Limitation Act 1980 limits action in tort six years from the date the cause of action accrues. However, this period is suspended during person infancy until Plaintiff attains his age of majority, 18 years old. Therefore, Plaintiff is allowed to pursue his legal action in tort within six years from the age of 18 years old or otherwise; the claim in tort will be statute-barred. The only way to extend the limitation period after 18 years old is through Section 11, which allows Plaintiff to take action within three years from the date of knowledge of the person injured as long the claim falls either negligence, nuisance, or breach of duty. However, in Stubbings v Webb, the House of Lords held that the victim, who was 30 years old at the time she filed a suit, alleging that her adoptive father sexually abused her between the ages of 2 and 14, and her stepbrother raped her when she was 12 was statute-barred despite that the victim only discovered that she suffered a psychological problem at the age of 27 years old. In that case, the House of Lords refused to extend the limitation period on the ground that Section 11 of the Limitation Act 1980 excludes the acts of intentional trespass to the person for the court to grant relief for an extension of time. Nonetheless, the House of Lords in A v Hoare departed from Stubbings v Webb's decision. Instead, in A v Hoare, the court relied on the High Court of Australia decision of Stingel v Clark which found that the phrase "breach of duty" does extend to cover the case of trespass to the person. Consequently, Section 11 includes claims for mental injuries caused by the sexual assault, which is not immediately foreseeable after years of abusive experiences as long as the claim files within the three-year time limit.

Volume: 7 Issues: 46 [July, 2022] Special Issues pp. 250 - 262
Journal of Islamic, Social, Economics and Development (JISED)
eISSN: 0128-1755
Journal website: www.jised.com
DOI: 10.55573/JISED.07461526

Reasons for lack of use the CCO

The literature highlights that the use of CCO is limited, and the following paragraphs critically highlighted the underpinning reasons for the underutilisation of the CCO in the criminal justice system; (a) financial ability of the offender, (b) lack of recognition of victim's rights in the criminal justice system, (c) oversight by government-appointed stakeholders on the legal principle of the crime compensation order, and (d) procedural rigidity in the assessment of CCO.

Means of the offender

The offender's means are crucial ingredients in deciding whether the court orders the CCO. Under English law, this criterion derives from the principle of English common law of R v Inwood ((1974) 60 Cr App Rep 70). In R v Inwood, the English Court of Appeal held that it is unlikely for a fraudster offender over 50 years old who does not have a stable income and is subject to four years imprisonment to be realistically able to pay the CCO. The principle in the R v Inwood sets out the legal principle among the English common law legal system on the need to determine the offender's means before the court decides whether to use the CCO. For instance, Australia (Morabito et al., 2000), Canada (Wemmers et al., 2017) and India (Sarwan et al., 1978), legal systems have accepted this criterion according to their judicial precedents of the appellate court. Meanwhile, several countries such as Malaysia (Section 426 (1C) of the Criminal Procedure Code), and the United Kingdom (Section 135 (3) of Sentencing Act 2020) embody the common law principle of R v Inwood into their legislations, respectively. The purpose of this criterion is based on the common-sense approach, which is to ensure the implementation of CCO is practical. It is unrealistic to force the offender to pay the CCO if there is a possibility that the offender is unable to comply with the CCO in the first place. Furthermore, while the criminal court may allow by law to disregard the offender's means in the assessment for the CCO, it may raise questions towards the enforcement of CCO against the impecunious offender. A study from Singapore literature suggests that the enforcement measure such as a warrant for levy and search available in the criminal justice system is only useful if the offender has sufficient means to pay the CCO (Yeo et al., 1984). Furthermore, if the offender is subjected to a punishment of imprisonment, it will effectively curtail any payment opportunity through gainful employment. A study by Dickman found that the US federal law approach, which allows the criminal court to omit the financial ability of the offender in the assessment of CCO, does not alter the paradigm of the offender's contribution in the payment of CCO (Dickman et al., 2009). He emphasises that this legal mechanism will further contribute to the high number of uncollectable criminal debt as convicted people often do not possess financial stability even after being released from prison. Furthermore, it is not appropriate to force the offenders to liquidate their assets to determine their actual financial ability, especially if they are not derived from crime proceeds. At the same time, the offender's means cannot be used as a mitigating factor in deciding the appropriate punishment against the offender. For instance, a study found that the English courts often emphasise that the wealthy offender cannot seek a CCO as a gateway to avoid deterrence sentences as it may raise questions on the seriousness of the offence in the public's eyes (Newburn et al., 1988). Furthermore, it will lead the courts to be criticised as too lenient on the criminals, which further undermines the confidence of the criminal justice system among the public (Hough et al., 2007).

Lack of recognition of victim's rights in the criminal justice system

Commentators such as Softley (Softley et al., 1978), Outlaw & Ruback (Outlaw et al., 1999), Strang & Sherman (Strang et al., 2003) and Hermann (Hermann et al., n.d.) observe that the legal principle of compensatory justice is not a novel concept in the criminal justice system.

Volume: 7 Issues: 46 [July, 2022] Special Issues pp. 250 - 262
Journal of Islamic, Social, Economics and Development (JISED)
eISSN: 0128-1755
Journal website: www.jised.com
DOI: 10.55573/JISED.07461526

During the Anglo-Saxon England period, the offender is allowed to restitute the victim's losses in the form of monetary value. The court commonly used the market value measurement in case of stolen property or tariffs fixed by rulers to assess the quantum of CCO. Throughout the historical development, the compensatory justice principle in the criminal court had been subjugated by several reforms introduced by the government to centralise and formalise the legal system. It may suggest the centralisation of the legal system is not based on the noble cause. The rulers of England often see punitive punishments such as fines and forfeiture against the convicted person's property as money-making opportunities to the aristocrat, clergy, and the rulers themselves. Similarly, before British colonial rule, compensatory justice was the predominant principle in sentencing offenders in the Malaysian legal system. Numerous Malay ancient kingdoms accept the concept of diyat (blood-money) under Islamic criminal law as part of sources of law (Ali et al., 2021). However, Islamic criminal law, including the concept of diyat, had been abandoned through the reception of English law. The introduction of English law solidified and legitimised the British empire's rules over the Malay states (Hamid et al., 2015). Today, the application of Islamic law in Malaysia is generally restrictive under Item 1 of List II of the State List of the Federal Constitution, which dominantly involves personal law. In contrast, English law forms the backbone of the Malaysian legal system.

The evolution from the ancient to a centralised modern legal system has led the policy on the criminal justice system to focus on public expectation rather than victim satisfaction. Therefore, the stereotype of public perception in the criminal justice system is based on two indicators: (a) whether the punishment imposed by the court meets with public confidence in the criminal justice system and (b) the conviction rate of prosecution (Hough et al., 1999). Therefore, the focus of the criminal court is to impose a deterrence sentence instead of whether the punishment will directly benefit victims. It is also noted the public does not recognise the CCO as a form of punitive punishment against violent crime as the sentiment towards the sentence tends to advocate a "get-tough" approach (Sims et al., 2000). In relation, sexual offences are often regarded as violent crimes requiring long-duration custodial punishment in the criminal justice system (King et al., n.d.). Therefore, the criminal code is often drafted based on retribution theory, in which the severity of punishment correlates with the seriousness of the offence. At the same time, law enforcement such as police forces and prosecutors often advocate the trial avoidance cultures in the criminal justice system to improve the conviction rate. For instance, a study by Brienen and Hoegen found that police forces often choose not to classify the cases as crimes, or the prosecutor encourages the offender to plead to reduce the sentence (Brienen et al., 2000). Therefore, it is unlikely the court will call the victims to assess their losses since neither police forces nor prosecutors represent victims. Consequently, society's demand for retributive punishment such as corporal punishment and long-duration custodial sentences has caused the government to disregard the need to compensate the victim in the criminal court.

Oversight by government-appointed stakeholders on the legal principle of the CCO.

Extent literature points out that any amendment to the legal principle of CCO will be futile unless it serves as a practical reason. For instance, only 8 (0.13%) out of 6343 cases in 2001 utilised the legal principle of CCO in the KL Magistrate Court despite that the provisions on CCO have existed in the Malaysian criminal justice system since 1935 (Hanum et al., 2003). One of the reasons that can be adduced is the lack of cognising among government-appointed stakeholders in the adversarial system, namely prosecutors, judges, and police forces, on the legal principle of CCO. The prosecutor's role is crucial in the application of CCO since the prosecutor is the one who has complete authority in prosecuting the offender on behalf of the

Volume: 7 Issues: 46 [July, 2022] Special Issues pp. 250 - 262
Journal of Islamic, Social, Economics and Development (JISED)
eISSN: 0128-1755
Journal website: www.jised.com
DOI: 10.55573/JISED.07461526

victim, including the application for the CCO and submission of evidence related to the victim's victim losses and injuries. However, an earlier study by Softley discovered one of the legal impediments in using CCO among the English Courts is that the prosecutor often fails to represent on behalf of the victim in the application of CCO (Softley et al., 1978). Similarly, the lack of cognising among prosecutors is also raised by various earlier Singaporean literature like Yeo (Yeo et al., 1984) and Chan (Chan et al., 2008). They found that the Singapore prosecutor often chooses not to inform the court on the availability of the legal principle CCO in the criminal justice system.

In Malaysia, the jurisdiction to use the CCO lies on the prosecutor. Before 2010, the court had unfettered and inherent discretion in exercising the jurisdiction of CCO against the offender under Section 426 (1) (b) of the Criminal Procedure Code. However, this has been changed upon the amendment in 2010, which transferred the jurisdiction of CCO to the prosecutor. Nevertheless, commentators such as Mazita et al. (Mazita et al., 2018) and Safri et al. (Safri et al., 2019) found that the amendment in 2010 does not make any drastic change to improve the usage rate of the CCO as the prosecutor often fails to exercise their discretion to apply the CCO on behalf of the victims of crime. Therefore, it is unlikely for the court to assess financial losses suffered by the victims since the judge does not involve in the crime investigation and relies heavily on the prosecutor to put forward any relevant evidence in the application of CCO. While the prosecutor is the one who holds unfettered discretion towards persecuting the offender, the judge is the one who is responsible for ensuring the flow of criminal proceedings is by the law, including the appropriate sentencing principle that should be applied against the offender. Therefore, the judge has a vital role in deciding the proper quantum for the CCO against the offender if there is an application by the Public Prosecutor. However, it is found that the lack of understanding among the Malaysian judge on the legal principle of CCO may influence them to ignore the value of CCO in the criminal justice system. It can be evident by two examples; first (a) there are no reported cases that use the CCO as a standalone order even though the Criminal Procedure Code has been an amendment in 1954 to allow the court to grant the CCO as a sole punishment and second (b) to date, the judges are continuing to impose the imprisonment in default of CCO despite that it is an ultra vires decision according to the Section 426 (2) of Criminal Procedure Code. Therefore, several Malaysian commentators such as Teichner et al. (Teichner et al., 2009), Izawati (Izawati et al., 2010), Zubaidah (Zubaidah et al., 2011) & Hakimah (Hakimah et al., 2013) suggest that there must be an imposition of a statutory duty to the court to provide written grounds if the court refuses to use the CCO. The provision of statutory duty had been implemented in various legal systems such as English (Section 55 of Sentencing Act 2020) and the Canadian (Section 737.1 (5) of Canadian Criminal Code) criminal justice systems. The purpose of statutory duty is to ensure the judge will take the legal value of CCO in the criminal justice system to sentence the offender. Therefore, the victims of crime will have an avenue to address their financial losses before the criminal court. Several studies have found that introducing the mandatory duty to the court will positively impact the use of CCO in the criminal justice system. For instance, a study by Moxon et al. found that the legal changes under the English law in 1988, which made the court under the duty to consider the CCO in every case, had improved the usage rate of CCO in the criminal justice system (Moxon et al., 1992). Furthermore, the victims of the crime will know the exact reason if the court fails to use the CCO. Other literature points out that the prosecutor should not be entirely blamed for failing to provide the information about the victim losses before the criminal court. In the adversarial system, investigating the crime lies on the police forces, and their focus is to ensure that the suspect is likely to be prosecuted rather than the victims' rehabilitation. It can be evident based on two studies in the United Kingdom. First, according to Newburn & Peyrecave, it is

Volume: 7 Issues: 46 [July, 2022] Special Issues pp. 250 - 262
Journal of Islamic, Social, Economics and Development (JISED)
eISSN: 0128-1755
Journal website: www.jised.com
DOI: 10.55573/JISED.07461526

found that there are several instances in which the English police forces are either failed to inform the victim about the possibility of CCO or to assist the victim in submitting the evidence of victim losses to the prosecutor since lack of awareness on the police forces on the legal principle of CCO (Newburn et al., 1988). Second, based on a recent report published by The Independent Inquiry into Child Sexual Abuse in England and Wales 2019 ("IICSA"), the inquiry found the police forces often felt that the CCO was not practical in the CSA cases as they are not trained on how to record the victims' injuries as evidence before the court (Jay et al., 2019). Furthermore, it has been informed that there is minimal guidance in the criminal courts equivalent to that in the civil courts to assist in the compensation process.

Procedural rigidity in the assessment of CCO

Literature also describes one of the legal obstacles in the use of the CCO is caused by the procedural rigidity in the assessment of the CCO. This procedural rigidity stemmed from the English common law of clear case principle, which is decided in R v Vivian ([1979] 1 All ER 48) and R v Horsham Justices, ex parte Richards ([1985] 2 All ER 1114). This principle has been widely accepted in various Commonwealth countries such as Canada (Wemmers et al., 2017), Australia (Morabito et al., 2000), Singapore (Woon et al., 1992), India (Kaur et al., 2013), and Malaysia (Nelson et al., 1992). The clear case principle embodies three conditions before the criminal court is allowed to use the CCO. First, the quantum of compensation must be agreed or proved before the court. Second, the court should not embark on the application of CCO if the assessment of CCO is too complicated or requires an extensive inquiry on the suitable quantum of CCO. Lastly, the victim's rights for compensation against the offenders are not abrogated merely because the criminal court has failed to use the CCO since the victim is still entitled to seek such remedy before the civil court.

The primary purpose of accepting the clear case principle is that the laws that govern civil and criminal proceedings are different, especially in establishing the burden of proof between convicting offenders under the criminal law and seeking compensation under the tortious liability of trespass a person. For instance, the burden of proof to establish tortious liability and quantum of damages depends on several factors such as the proximity between the seriousness of the wrongdoer conduct, actual losses suffered by the victim, and any defence to a tortious claim such as contributory negligence. However, those legal principles are not relevant in proving the offender is guilty. The criminal law only requires the prosecutor to prove criminal conduct (actus reus) and requisite guilty mind to commit a crime (mens rea) for a conviction. Furthermore, the higher burden of the standard of proof in the criminal court makes it is difficult to establish an appropriate quantum of compensation for the complete restoration of the victim, especially regarding the non-pecuniary losses suffered by the victim, such as pain and suffering, loss of amenities and loss of expectation of life (Miers et al., 2013).

Methodology

This research employs a doctrinal research method to examine the deficiency of law regarding compensation to CSA victims. The doctrinal research method's data gathering process only involves examining the primary and secondary sources as it is a form of library-based research. In this regard, this research primarily focused on primary and secondary sources related to CSA issues. Therefore, the related laws and policies will be the SOACA 2017, Penal Code, Criminal Procedure Code, CSA Guidelines, and cases related to CSA and any foreign law and literature relevant to the research.

Volume: 7 Issues: 46 [July, 2022] Special Issues pp. 250 - 262
Journal of Islamic, Social, Economics and Development (JISED)
eISSN: 0128-1755
Journal website: www.jised.com
DOI: 10.55573/JISED.07461526

Discussion and Findings

In Malaysia, various studies have established the correlation between abusive conduct and the impact on CSA victims (Rashid et al., 2021) (Y Y et al., 2021). However, there is a lack of literature on providing compensation to CSA victims despite the severity of injuries..In most CSA cases, like Mohd Rasul bin Mat Lasi v PP ([2021] 1 LNS 1737), Mohd Khairul Azlan bin Mohd Napi v PP ([2021] 1 LNS 1160), David ak Alus (L) v PP ([2021] MLJU 617), James Jeffery v PP ([2021] 8 CLJ 935) which show that the courts refuse or ignore the principle of CCO that been embodied in the Criminal Procedure Code. Based on the literature, it is clear that the use of the CCO is scarce in the criminal justice system and not just CSA victims only. However, the CSA victims are the most consequential victim in the criminal justice system as the impact of abuse extends beyond adulthood (Ferragut et al., 2021). The cases of Stubbings v Webb ([1993] AC 498), Stingel v Clark ([2006] HCA 37), and A v Hoare ([2008] 1 AC 844) expose the difficulties of CSA victims to pursue their claim before the civil court. Practically, civil litigation is almost rare even though the victims of crime are entitled to seek their losses before the civil court regardless of whether the offenders have been prosecuted or not. The nature of civil litigation itself is time-consuming, expensive, and procedural complicated, especially in preparing for a trial and enforcing the judgment debt, which makes the civil litigation effectively inaccessible to the ordinary public (Hebly et al., 2014). Furthermore, while in theory, CSA victims can pursue civil litigation against the abuser since there is no limitation age under the substantive law of cause of action, the stringent rule in the civil procedure interprets a child as a person under disability (Order 76 of the Rules of Court 2012). Therefore, the CSA victims must appoint the next friend or guardian ad litem as a litigation representative to commence a civil suit against the abuser. However, it is unlikely that the CSA victims can seek a volunteer willing to sue on behalf of CSA victims unless they receive a monetary benefit for assisting the CSA victims. Therefore, civil litigation is not an attractive avenue to redress the losses or injuries of the victim.

Therefore, there is a need for reform on procedural rules of the CCO to improve the victims' rights in the criminal justice system. First, the CCO must be recognised as one of the mechanisms to redress the victims' losses or injuries in the criminal justice system. It can be achieved by imposing a statutory duty for the court to make a preliminary inquiry on the CCO before pronouncing the punishment against offenders and to provide a justification if the court chooses not to use the CCO against offenders. This view is similar to the United Kingdom's Section 55 of Sentencing Act 2020 which the court must consider the CCO in every criminal case and give a reason if it fails to use the CCO. Therefore, it will be easier to determine whether the means of the offenders are a paramount consideration for the lack of use of the CCO or other reasons that may justify the offender to be excluded from the CCO. Other issues that need to address are sources of compensation to enforce the CCO if the offender does not have the financial ability to pay the CCO. The victims may be entitled to claim the CCO is either in two ways (a) a crime insurance policy which the victim is entitled to claim the compensation from an insurance company, and the insurance company will recover the victim's claim through the offender directly (b) a government-mandated employment project which offenders to earn a salary and compensate victims. For instance, Wemmers et al. suggest that the government should be allowed to retain up to 10% of the offender's income who has been subjected to a custodial sentence to be reserved for repaying the CCO or adjusting the length of payment based on the financial ability of offender (Wemmers et al., 2017). If there are no real prospects for victims to succeed on their CCO claim, CSA victims should be allowed to claim compensation through a public-funded victim compensation scheme. A victim compensation scheme is a

Volume: 7 Issues: 46 [July, 2022] Special Issues pp. 250 - 262
Journal of Islamic, Social, Economics and Development (JISED)
eISSN: 0128-1755
Journal website: www.jised.com
DOI: 10.55573/JISED.07461526

compensation funded by the government to particular victims which subjected to violent crimes.

Conclusion and Recommendations

It is essential to acknowledge that CSA victims are unlikely to seek a financial claim against the abuser before the civil court due to the nature of civil litigation itself. For instance, there is no reported case in Malaysia that the CSA victims sue their abusers. At the same, the criminal court rarely applies the CCO due to substantive and procedural challenges surrounding the principle of CCO. Furthermore, it is impossible to force the offender to pay the compensation if they are impecunious and subjected long term custodial sentence. Therefore, the Malaysian government should adopt the same approach in recognising the CSA victim's right to seek compensation from various sources, including through victim compensation schemes. This legal principle of compensatory justice is already embodied in the international customary law, making Malaysia in line with the international law if Malaysian adopts this approach as part of its criminal justice system.

References

(1974) 60 Cr App Rep 70.
[1979] 1 All ER 48.
[1985] 2 All ER 1114.
[1993] AC 498.
[2006] HCA 37.
[2008] 1 AC 844.
[2021] 1 LNS 1160.
[2021] 1 LNS 1737.
[2021] 8 CLJ 935 .
[2021] MLJU 617.
A. A. Hanum. "Restitution to victims of crime," Master academic project, University of Malaya, Kuala Lumpur, Malaysia, 2003.
A. A. M. Ali and M. A. Hassan. "British Administration of Malay Peninsula and Its Impact on the Status of Islamic Law," in Islamic Law in Malaysia, The Challenges of Implementation, A. Trakic, and H. A. T. Haydar. Singapore: Springer Nature, 2021, pp 9 -18.
A. A. Rashid, A. T. Cheong, N. H. Shamsuddin, D. Roslan, S. R. Hisham, Healthcare Professionals' Views for the Content of the Teddy Bear Hospital for a Child Sexual Abuse Prevention Module. Journal of Child Sexual Abuse, vol 30, no 4, pp 442-460, 2021.
A. Ananthalakshmi, "How Malaysia allows child abuse to go unpunished," Reuters, November 14, 2016. [Online]. Available: https://www.reuters.com/article/us-malaysia-sexcrimes-insight-idUSKBN1390AT [Accessed March 9, 2022].
A. Ananthalakshmi, "Malaysian communities in denial after major paedophile case: police," Reuters, January 15, 2017. [Online]. Available: https://www.reuters.com/article/us-malaysia-sexcrimes-huckle-idUSKBN14Z00M [Accessed March 9, 2022].
A. Jay, M. Evans, I. Frank, and D. Sharpling, "Accountability and Reparations. The Independent Inquiry into Child Sexual Abuse," London: Her Majesty's Stationery Office, 2019.
A. Jay, M. Evans, I. Frank, and D. Sharpling, "Children Outside the United Kingdom. Phase 2. The protection of children outside the United KingdomTravel restriction orders, extra-territorial prosecutions and disclosure and barring regimes," Her Majesty's Stationery Office, London, United Kingdom, 2020.

Volume: 7 Issues: 46 [July, 2022] Special Issues pp. 250 - 262
Journal of Islamic, Social, Economics and Development (JISED)
eISSN: 0128-1755
Journal website: www.jised.com
DOI: 10.55573/JISED.07461526

A. Lai, " 'Why the delay in setting up special court for children?" The Star, October 26, 2021. [Online]. Available: https://www.thestar.com.my/news/nation/2021/10/26/why-the-delay-in-setting-up-special-court-for-children [Accessed March 9, 2022].

A. Yarina and S. N. A. H. Fathanah, "Monster In The Family, Young Victims And Issues Across Border: Future Outlook Of Child Sexual Abuse In Malaysia," Journal of Critical Reviews, vol 7, no 8, 2020

B. Sims, Victim restitution: A review of the literature. The Justice Professional, vol 13, no 3, pp 247–269, 2000.

Bernama, "1,076 child abuse cases reported in Selangor in nine months," New Straits Times, December 1, 2021. [Online]. Available: https://www.nst.com.my/news/nation/2021/12/750385/1076-child-abuse-cases-reported-selangor-nine-months [Accessed March 9, 2022]

C. Davenport, K. Browne, and R. Palmer, "Opinions on the traumatizing effects of child sexual abuse: Evidence for consensus," Child Abuse & Neglect, vol 18, no 9, pp. 725–738, 1994.

C. Davenport, K. Browne, and R. Palmer, "Opinions on the traumatizing effects of child sexual abuse: Evidence for consensus," Child Abuse & Neglect, vol 18, no 9, 725–738, 1994.

C. Forster, and P. Parkinson, "Compensating Child Sexual Assault Victims Within Statutory Schemes: Imagining a More Effective Compensatory Framework," UNSW Law Journal, vol 23, no 2, pp. 172 – 195, 2000.

D. H. J. Hermann, Restorative Justice and Retributive Justice: An Opportunity for Cooperation or an Occasion for Conflflict in the Search for Justice, Seattle Journal for Social Justice, vol 16, issue 1, Article 11.

D. Miers, Offender and state compensation for victims of crime: Two decades of development and change. International Review of Victimology, vol 20, no 1, 145–168, 2013.

D. Moxon, J. M. Corkery, and C. Hedderman, "Developments in the compensation orders in Magistrates' courts since October 1988," London: Her Majesty's Stationery Office, 1992, Home Office Research Study No. 126.

F. Teichner, L. D. Pointon, and T. E. Siang, Remedies Available to Victims of Credit Card Frauds Under the Criminal Jurisdiction-A Comparative Study, Malayan Law Journal, [2009] 5 MLJ cxxix, 2009.

F. Zainudin, " 3,875 child abuse cases up to September, lower than previous years," Free Malaysia Today, December 14, 2020. [Online]. Available:https://www.freemalaysiatoday.com/category/nation/2020/12/14/3875-child-abuse-cases-up-to-september-lower-than-previous-years/ [Accessed March 9, 2022].

G. Andrews, J. Corry, T. Slade, C. Issakidis, and H. Swanston, "Child sexual abuse," in Comparative Quantification of Health Risks Global and Regional Burden of Disease Attributable to Selected Major Risk Factors, M. Ezzati, A. D. Lopez, A. Rodgers, and C. J. L. Murray, vol. 1, World Health Organization, 2004, pp. 1851-1940.

G. Tong, "Are new measures against child sexual crimes working?" Malaysiakini, August 12, 2017. [Online]. Available: https://www.malaysiakini.com/news/391684 [Accessed March 9, 2022].

H. Strang and L. W. Sherman, Repairing the Harm: Victims and Restorative Justice. Utah L. Rev. 15, 2003.

I. C. J. M. Izmi, A. Nadzriah and A. H. Rafizah, "A Legal Analysis on the Financial Remedies for Victims of Child Sexual Abuse Between Malaysia," International Framework and the United Kingdom" Malayan Law Journal [2021] 1 MLJ cxxxiii, 2021.

I. Kaur, "Emerging Trends of Compensatory Jurisprudence with Special Reference to Plea Bargaining Under the Code of Criminal Procedure, 1973," Doctoral thesis. Punjabi University, Punjab, India, 2013.

Volume: 7 Issues: 46 [July, 2022] Special Issues pp. 250 - 262
Journal of Islamic, Social, Economics and Development (JISED)
eISSN: 0128-1755
Journal website: www.jised.com
DOI: 10.55573/JISED.07461526

J. N. Briere, and D. M. Elliott, "Immediate and Long-Term Impacts of Child Sexual Abuse," The Future of Children, vol 4 no 2, 54,1994.

J. Nelson, Compensation Under Malaysian Criminal Law and The Principle Of "Diyat" In Shariah Law, Current Law Journal, [1992] 3 CLJ iii, 1992.

J. Wemmers, M. Manikis, and D. Sitoianu, "Restitution in the context of criminal justice" International Centre for Comparative Criminology, (Baveye, Trans.) 2017.

K. Kasmini, and M. K. Sham, "Child sexual abuse: Psychosocial aspects of 101 cases seen in an urban Malaysian setting," The International Journal Child Abuse & Neglect, vol 19, no 7, pp. 793-799, 1995.

L. L. King and J. J. Roberts. The Complexity of Public Attitudes Toward Sex Crimes, Victims & Offenders, vol 12, no 1, pp 71-89.

L. Y. Kuan and L. Y. Beng, Language and Child Abuse: An Analysis of the Richard Huckle Case in Malaysian Mainstream Newspapers, Social Sciences Postgraduate International Seminar (SSPIS) December 15, 2016, Bukit Jambul, Penang, Malaysia. Penang: School of Social Sciences, USM, 2016.

M, Hough and J. V. Roberts, "Public Opinion, Crime, And Criminal Justice," in The Oxford Handbook Of Criminology, M. Maguire, R. Morgan and R. Reiner, 4th ed. Oxford, United Kingdom: Oxford University Press, 2007, pp 279- 289.

M. C. Outlaw and R. B. Ruback, Predictors and outcomes of victim restitution orders. Justice Quarterly, vol 16 no 4, pp 847–869, 1999.

M. Dickman, "Should crime pay: A critical assessment of the Mandatory Victims Restitution Act of 1996," California Law Review, vol 97, no 6, pp 1687-1718, 2009.

M. E. I. Brienen, and E. H. Hoegen. Victims of Crime in 22 European Criminal Justice Systems, Nijmegen, Netherland: Wolf Legal Productions, 2000.

M. Ferragut, M. Ortiz-Tallo, M. J. Blanca. Victims and Perpetrators of Child Sexual Abuse: Abusive Contact and Penetration Experiences. MDPI, International Journal of Environmental Research and Public Health, vol 18, no 18:9593, 2021.

M. Hebly, J. D. M. van Dongen, and S. Lindenbergh, Crime Victims' Experiences with Seeking Compensation: A Qualitative Exploration. Utrecht Law Review, vol 10 no 3, pp 27 – 36, 2014.

M. Hough and J. V. Roberts, Sentencing Trends in Britain: Public Knowledge and Public Opinion. Punishment & Society-International Journal of Penology, vol 1 no 1, pp 11-26, 1999.

M. M. N, Safri, R. Rajamanickam, and N. Rohaida, Female Victims of Domestic Violence and Their Rights to Compensation in Malaysia. Journal of Nusantara Studies, vol 4, issue 1, pp 384-400, 2019.

M. Mazita., H. Marina, and A. R. Asmar, The right of compensation to the HIV victim in Malaysia: an analysis from the case of Abd Rahim bin Abd Rahman v Public Prosecutor. International Journal of Law, Government and Communication, vol 3, no 13, pp 275 – 283, 2018.

M. Sharma, "Compensatory justice to the victim of a crime and judicial practices in India: An empirical study," International Review of Victimology, pp. 1–24, 2021.

N, Z, Farhana, and M, A, Zakiah, "A Meta-Analysis: The Effects of Child Sexual Abuse Towards Children," Asian Social Science, vol 14, no 11, pp. 69 – 75, 2018.

O. Azliza, and W. A. W. Y. Jaafar, "Preliminary Investigation: Children's Awareness of Child Sexual Abuse in Malaysia," International Journal of Social Science and Humanity, vol 2, no 3, pp. 242 – 247, 2012.

O. Hankivsky, and D. A. Draker, "The Economic Costs of Child Sexual Abuse in Canada," Journal of Health & Social Policy, vol 17, no 2, pp. 1–33, 2003.

Volume: 7 Issues: 46 [July, 2022] Special Issues pp. 250 - 262
Journal of Islamic, Social, Economics and Development (JISED)
eISSN: 0128-1755
Journal website: www.jised.com
DOI: 10.55573/JISED.07461526

Office of the United Nations High Commissioner for Human Rights "United Nations Study on Violence against Children Response to questionnaire received from the Government of Malaysia." [online]. Available: https://www.ohchr.org/en/hrbodies/crc/study/pages/studyviolencechildren.aspx

P. K. Trickett, J. G. Noll and F. W. Putnam, "The impact of sexual abuse on female development: Lessons from a multigenerational, longitudinal research study," Development and Psychopathology, vol 23, no 02, 453–476, 2011.

P. Softley, "Compensation Orders in Magistrates' Courts," London, United Kingdom: Her Majesty's Stationery Office, 1978, Home Office Research Study No. 43.

S. I. Zubaidah, "Constructing Some Possibilities for Compensation as Part of Legal Remedies for Rape Survivors: The Case of Malaysia," European Journal of Social Sciences, 26(2), 176 – 184, 2011.

S. M. H. Yeo, "Compensating victims of crime in Singapore," Malaya Law Review, vol 26, no 2, pp. 219 -237, 1984.

S. Sarban, " 'Rina Harun: Seventeen children abused in a day from Jan-April this year," The Star, July 8, 2021. [Online]. Available: https://www.thestar.com.my/news/nation/2021/07/08/rina-harun-seventeen-children-abused-in-a-day-from-jan-april-this-year [Accessed March 9, 2022].

Sarwan Singh And Others v. State of Punjab 1978 AIR 1525.

T. A. M. Hamid and A. Trakic. The reception of English law in Malaysia and development of the Malaysian common law. Common Law World Review, vol. 44 no 2, pp 123–144, 2015.

T. Newburn, and H. Peyrecave, "The use and enforcement of compensation orders in Magistrates' Courts," London, United Kingdom: Her Majesty's Stationery Office, 1988, Home Office Research Study No. 102.

T. T. M. Maimun, The Opening Of The Legal Year 2022, Access To Justice And The New Normal, January 14, 2022, Palace Of Justice, Putrajaya, Malaysia. 2022.

V. Morabito, "Compensation Orders Against Offenders – An Australian Perspective," Singapore Journal of International & Comparative Law, vol 4, pp 59-114, 2000.

W. Binford, "A Global Survey of Country Efforts to Ensure Compensation for Child Pornography Victims," Ohio State Journal of Criminal Law, vol 13, no 1, pp 37 – 65, 2015.

W. C Chan, Compensation and restorative justice: Compensation orders in Singapore, Malaysia and India, A call for rejuvenation. In Support for Victims of Crime in Asia, W. C Chan, Oxon, United Kingdom: Routledge. 367 – 384, 2008.

W. Izawati, W. Compensation Order Provision by Criminal Courts in Malaysia And the United Kingdom, Malayan Law Journal, [2010] 2 MLJ li, 2010.

W. Suzaily, S. M. K. Tan., S. Marimuthu, R. Rosdinom and N. M. Asiah, "Young female survivors of sexual abuse in Malaysia and depression: What factors are associated with better outcome?" Asia-Pacific Psychiatry, vol 5, pp 95–102, 2013.

W. Woon, Compensation Orders in Criminal Cases. Singapore Academy of Law Journal, 4 S.Ac.L.J. Part II, 359-363, 1992.

Y. Hakimah. "Analysis on the rights of rape victims in Malaysia." Doctoral Thesis. International Islamic University Malaysia, Selangor, Malaysia, 2013.

Y. Meikeng, " 'Two new special courts to start operating this year," The Star, February 20, 2022. [Online]. Available: https://www.thestar.com.my/news/focus/2022/02/20/two-new-special-courts-to-start-operating-this-year [Accessed March 9, 2022].

Y.Y. Lim, S. Wahab, J. Kumar, F. Ibrahim, and M.R. Kamaluddin, Typologies and Psychological Profiles of Child Sexual Abusers: An Extensive Review. MDPI, Children, vol 8, no 5: 333, 2021.