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**WHITHER THE LEGAL PROTECTION FOR CRIME VICTIMS IN  
THE NEGOTIATED JUSTICE PROCESS?**

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***Abstract***

The increasing burden of criminal courts in Malaysia in handling the backlog of criminal cases has led to the introduction of the plea-bargaining process, which enables the prosecutor to negotiate reduced charges or sentences with the accused in exchange for the latter's cooperation and plea of guilty. Also, such process is envisaged to act as a filter of cases in the pre-trial stage and to promote an efficient delivery of procedural and negotiated justice to the accused person. However, the said process seems to neglect the interests of the victims of crimes who are not parties to the process. Besides, both the prosecutors and the courts are mainly concerned with the swift case management and seem to disregard the victim's interests. Hence, this paper aims at analysing the legal position of plea bargaining and the procedural protection afforded to victims of crimes. And secondly, to propose for reform on the statutory provision to protect the interest of the victim of crime. This article employs a doctrinal analysis and secondary data from the Criminal Procedure Code (CPC), law reports, academic journals, books, and online databases. The authors contend that the legal protection under the CPC for victims of crimes in the plea-bargaining process is rather non-existent. However, such a situation could be reformed through the restorative justice approach that seeks to restore the harm to the victim via reparation, offender responsibility, and communities of care.

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## 1. Introduction

Of late, the plea-bargaining process has emerged as a progressive model of a fast and swift justice around the globe. Such method promises a quick alternative to case disposal and reduces the burden on the judge and the prosecutor in dealing with the increasing number of criminal cases. In practice, the plea-bargaining process allows them to engage in an informal discussion with the accused person and the defence counsel, if any, on the progress of the criminal case (Newburn, 2011). The outcome of such process would include the reduction of the charge or the sentence in exchange for the accused's cooperation as well as self-incrimination (Wan, 2007). The prosecutor's discretionary power to decide on the type of the charge on certain crimes has laid the groundwork for the criminal justice system to embrace the plea-bargaining process. The process empowers the prosecutor to engage in three type of negotiation, namely the charge bargaining, the sentence agreement and the bargain for prosecutorial leniency (Ashworth & Redmayne, 2010). The plea-bargaining process is conducted at the pre-trial stage and thus, making it more of a conversational in nature rather than an oratorical in nature (Roberts & Wright, 2016).

The first part of this paper underlines the problem statement which generates the ground of this article. Next, the paper highlights the research question to address the issues in the problem statements. The article follows with the purpose of the study and the methodology adopted by this article. Subsequently, the paper outlines the findings and concludes that the plea-bargaining process in Malaysia requires a new approach that takes into account the legal protection for crime victims via the restorative justice model.

## 2. Problem Statement

Within the global context, many jurisdictions have created legislations regulating the plea-bargaining process. For instance, in 1974 the USA introduced the formal provision for plea-bargaining into their Federal Rule of Criminal Procedure under Rule 11 (Mulroy, 2017). In Malaysia, the Criminal Procedure Code (from now on "the CPC") was amended in 2010 to introduce the plea-bargaining process formally. The new amendment to the Malaysian added section 172C and 172D to include the practice of plea bargaining. The new law emphasises the procedures that the prosecutor should abide in bargaining with the accused. Similar to the other criminal justice mechanisms such as sentencing, the plea-bargaining process is centred primarily on the defendant (Ota, 2003).

However, the protection for the victims appears to be non-existent. In most cases, the bargain for the charge or sentence that are being struck between the prosecutors and the accused persons are not being disclosed to the victims (Moore, 2015). Such a situation may be because victims of crime are not parties to the plea-bargaining process (Pugach & Tamir, 2017). As such, the practice would render the victim impact statement, during the sentencing process, meaningless as the prosecutor may hold a retrospect opinion on the sentence that they would pray before the court (Sheley, 2017). Female victims of crimes might endure much more suffering in comparison to their male counterparts. A recent study suggests that male victims of crimes in Malaysia are more likely to suffer from violent crimes by 64 percent more than female victims (Muhammad Amin et al., 2014). However, the percentage does not include cases of rape, which would involve female victims (Muhammad Amin et al., 2014). The crimes of

sexual nature would often leave the victims physically and emotionally traumatized, unstable and it might take years to recover or not at all (Harber et al., 2015). Female victims of crime, particularly rape victims, are prone to hide from the public either due to fears of another sexual assault, or they may feel ashamed of being rape victims (Moore, 2015)

### **3. Research Questions**

This paper intends to address several important questions as follow. Firstly, what is the legal position of the victims of crimes within the plea-bargaining in Malaysia? Secondly, could the plea-bargaining process in Malaysia be reformed to protect the interests of the victims of crimes sufficiently?

### **4. Purpose of the Study**

In line with the research questions mentioned above, this paper intends to achieve several key objectives. Firstly, to analyse the legal position of the victims of crimes within the plea-bargaining process under the Malaysian Criminal Procedure Code. Secondly, to propose for reform on the statutory provision as well as to suggest some recommendations to protect the interests of the victims of crimes within such process.

### **5. Research Methods**

This study adopts a qualitative methodology using a library-based method to critically review the literature on the legal protection for the victims of crimes in the plea-bargaining process in Malaysia. The secondary data employed in this paper will be examined using the content analysis method. The primary source of such data relates to the Malaysian Criminal Procedure Code. The secondary sources involve textbooks, academic journals, international and local reports, working papers, commentaries on case laws, online resources from government, websites and online database sources such as HeinOnline, Lexis Nexis, Sage Publication and Emerald which is done to support the primary source.

### **6. Findings**

Below are the findings of the research:

#### **6.1.Lack of Legal Protection for Victims of Crimes**

For several decades, plea-negotiation has been part and parcel of the criminal justice system in many western jurisdictions such as the USA and the United Kingdom. Importantly, such plea-bargaining process has managed to reduce the backlog of cases in those jurisdictions (Ministry of Home Affairs, 2009; Moore, 2015). Such process is predominantly popular among the prosecutors as it eases their burden of preparing elaborate prosecutorial cases (Mohamad Amin et al., 2014; Akram, 2005). Also, the process allows the accused person to play an active role in the pre-trial setting by micro-managing the possible outcome of his trial (Karmen, 2012). The process was incorporated into the pre-trial stage and acts as a filter to sieve out the cases that could be solved without a full trial setting (Golden, 2014). Due to its informal environment, the pre-trial stage adequately equipped the plea-bargaining process with a very much needed approach to negotiation and discussion. (Roberts & Wright, 2016). Such a stage operates by

focusing on the role of several important players that accommodate the process (Sanders, 2016). Such actors within the plea-bargaining process include the prosecutors, the accused person, the defence counsel and the judge (Newburn, 2011). However, it is unfortunate that the current criminal justice system is concerned with the accused person rather than on the victim's rights (Karmen, 2012). The voice of the victims of crimes is considered as an accessory to supplement the role of the voice of the state and the view of the accused (Sidhu, 2015; Mohamad Amin et al., 2014; Akram, 2005).

The rights and the interests of the victims of crimes might not be addressed sufficiently within an offender-centred system (Pugach & Tamir, 2017). The empowerment of the criminal justice system is directed to ensure that the interests of the accused persons are protected, and the punishment would procedurally follow. Hence, the criminal justice system in many jurisdictions around the world punishes the offender, yet such system focuses less on the compensation for the victims (Finkelhor, Ormrod, Turner, & Hamby, 2005). Although the movement towards victim empowerment is growing rapidly in other jurisdiction such as the United States (Pathmanathan, 2013), however, such is not the case with the criminal justice system in Malaysia as the development are progressing at a much lower rate since 1990 (Ghafar, 2014). Similar to the legal position in the USA, the United Kingdom, Canada, and Australia have also established bodies that promote and protect the rights and the interests of the victims of crimes (Ismail, 2011; Sheley, 2017; Braun, 2013).

## **6.2. Inadequate Provision in the Malaysian Legislation**

As stated earlier, the 2010 amendment to the Criminal Procedure Code 1976 introduced the plea-bargaining process in Malaysia (Sharif & Asidah, 2012). The said amendment added two new provisions on such process under section 172C and 172D. Section 172C allows an accused person to apply to the court, which will hear his case to make a plea bargain before the trial. The said section provides that an accused charged with an offence and claims to be tried may make an application for plea bargaining in the Courts in which the offence is to be tried. Section 172C (2) continues to require the accused person to file Form 28A provided under the Second Schedule for the CPC. Such form must contain a brief description of the offence that the accused is charged with, a declaration of voluntariness by the accused person and his knowledge of the impact of entering a plea-bargaining process and the information of the type of bargaining that the accused person intended to engage with.

Subsequently, upon receiving the application under Form 28A, the court will notify the prosecutor and set the date for the hearing of the application. Section 172C (4) provides that the court will conduct an examination of the accused person in camera to ascertain the voluntariness of the plea made by the accused person. Section 172C (5) further states that upon satisfying the voluntariness of the accused person in the plea-bargaining process, the public prosecutor and the accused person shall proceed to draft an agreement on satisfactory disposition of the case. Such agreement shall be put in a writing and signed by the prosecutor and the accused person, and the court shall give effect to the agreement pursuant to section 172C (7) of the CPC. If both parties cannot reach a satisfactory disposition agreement, the court must record such observation and the case shall proceed to another court as stated under section 172C (8). However, if the court is not satisfied with the voluntariness of the plea by the accused person, section

172C (6) provides that the court shall dismiss the application and the case shall proceed before another court.

Section 172D provides for the right of the accused person to enter into a plea negotiation process and allow the prosecutor to negotiate the charge or sentence that the prosecutor seeks from the court. Section 172D underlines the possible reduction of the sentence that the accused may get, in return for entering the plea-bargaining application through Form 28A. Also, the said section set the limitations on the type of crimes that may not be entitled to receive half of the reduction of the sentence allowed in the previous subsection. Section 172D (3) provides that the reduction of half of sentence shall not apply where the accused has previous conviction for a related or same offence in the case of serious offence. The provision continues to include offences which the punishment under the law is by fine only, offences which the punishment under the law is imprisonment for natural life, sexually-related offences, any offences committed against a child who is below 12 years old and any other offence that may be specified by the Public Prosecutor by order published in the Gazette as not entitled to a half reduction of sentence in the plea-bargaining process.

The limitations imposed under section 172D(3)(b) provides that the plea-bargaining process that offers a reduction of not more than half of the sentence does not apply to any sexually-related offences (Sidhu, Muhamed, & Akram, 2015). In contrast to the legal position in the USA, such provision might provide a slightly better protection to the interests of female victims of rape in Malaysia. This is because, in the USA, a major reduction of sentence may still be allowed to the accused person after the bargain even in sexual and violent cases (Moore, 2015). It is also important to highlight that sections 172C and 172D does not include the need for the victim to make an impact statement. Such a statement is not required as the victims of crimes are not the parties to the plea-bargaining process (Sidhu, 2015). However, the prosecutors might deliberately keep the crime victims 'in the dark' on the plea-bargaining process so as to prevent the victims from raising any objection (Zimmerman, 2016). Although section 172D of the CPC allows the court to award compensation order to female victims of crimes, the Rape Trauma Syndrome (RTS) and Post Traumatic Stress Disorder (PTSD) occasionally suffered by women victims of sexual cases are impossible to be quantified by numbers (Ismail, 2011).

The landmark case of plea-bargaining is *New Tuck Shen v PP (1982)*, which was decided before the amendment of the CPC. In this case, the agreement was struck between the prosecutor and the defence counsel in which the prosecutor would not pray for the deterrent sentence. The prosecutor purposely disregarded the said agreement and subsequently the accused was sentenced to a six-month incarceration. During the appeal, the absence of any documents proving the existence of such agreement between the parties had caused the defendant his conviction (Hussin, 2010). In contrast to the landmark case, in a later case in *Public Prosecutor v Ravindran & Ors (1993)* the court acknowledged the advantages of the plea-bargaining process. The court took into consideration that the request would shorten the lengthy process of the trial and the fact that the trial will be an excruciating one as another two accused persons were still at large at that time. VisuSinnadurai J agreed to reduce the sentence to one-quarter of the sentence duration.

### **6.3.Recommendations for Reforms**

It is apparent that neither the interests nor the rights of victims of crimes are addressed in the existing legal framework on the plea-bargaining process in Malaysia. As such, legal reform is very much needed to fill in the loopholes in the existing law and to protect the interests of such victims. In the UK, Guideline B2 of the Attorney General's Guidelines on Plea Discussions in Cases of Serious or Complex Fraud makes it clear that the prosecutor should communicate with the victims before entering into any plea-bargaining process (Flynn, 2011). Section 172D of the CPC should be amended to include a new provision compelling the prosecutor to communicate with the victims before the plea-bargaining process. This provision should sufficiently provide that such victims may be allowed to stand and face the offenders at the pre-trial stage and inform the prosecutor the impact of such crime on them.

In the broader analysis, the reform as mentioned above involving the offender-victim mediation and the inclusion of female victims into the plea-bargaining process would signal the adoption of Restorative Justice (RJ) model in which four parties consisting of the victim, offender, community and government should be involved (Koman, 2016). While the victim's role is to describe the impact of the offence and what might be needed to assist with their healing, the offender's role is to accept the responsibility for his harmful actions and to make amends (Dancig-Rosenberg & Gal, 2013). The community's responsibility to the victim is to assist with their healing and to support rehabilitation for the offender. The government's role is to maintain order in the community and to ensure fairness to the offender and provides redress for the victim (Mbazira & Mubangizi, 2014). Studies on restorative justice and its impact on the victims of violent crimes in London indicated that restorative justice had reduced the crime victims' post-traumatic stress symptoms and related costs. Such an approach had also provided both victims and offenders with more satisfaction with restorative justice than criminal justice and reduced the crime victims' desire for violent revenge against their offenders (Gold, 2017).

Under section 426(1A) of the CPC, the prosecutor may apply for a compensation order and the court must fix a certain amount to be paid to the victims of crimes for any physical or reputational injuries or losses to income or property suffered by the victims resulting from the crimes committed against them. However, it is rightly argued that such section insufficient and limited (Hussin, 2010) and may be inadequate to address the psychological trauma suffered by female victims of sexually-related crimes. The female victim of the offence may be "re-victimised" by the system when the charge on the offence committed on her was bargained for, and the accused even received a discounted sentence after the deal (Moore, 2015). To address such deficiency, perhaps a criminal injuries compensation scheme that is modelled on the Criminal Injuries Compensation Authority in the United Kingdom should be created that could provide for the psychological and economic compensation for the losses and damages suffered from any crime committed upon the victims, mainly female victims.

## **7. Conclusion**

Some significant legal issues for the protection of the victims of crime in Malaysia, particularly under section 172(D) and section 426(1A) are identified by this paper. It is apparent that the legal protection for victims of crimes within the plea-bargaining process in Malaysia is rather non-existent. Despite certain advantages of the process to the prosecutors and the offenders, the same may not be the

case for the victims of crimes. The plea-bargaining process has completely taken the victims away from the criminal justice system and would seem to trample on the very interests that the criminal justice system aims to protect, which is public interest and the interests of crime victims. The impact of the plea-bargaining process on female victims of crimes is even worse as the process is deemed to neglect the interests of such victims. Such a case may occur in sexual offences in which female victims would most likely be physically hurt, psychologically traumatized and emotionally abused. In reforming the said process, it is recommended that such changes should significantly support such victims to heal and seek solace as well as reconciliation. Finally, such reform should create a legal culture that revolves around restorative justice, which seeks not only to restore the gendered harm to such victims but also to give voice to these marginalized victims through the ethos of victim reparation, offender responsibility, and communities of care. The experiences in other jurisdictions such as the USA, the UK and Australia on the plea-bargaining process and victims' protection in such process might prove to be invaluable lessons for Malaysia to learn. Future research on the similar legal positions to protect victims' rights in Malaysia and those jurisdictions would be vital to shine a light on such issue.

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