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**THE PROTECTIONS AGAINST DOMESTIC VIOLENCE
SURVIVORS UNDER THE PENAL CODE IN MALAYSIA**

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Abstract

Domestic violence is a serious offence and more common than most people realize. This problem is often seen as a gender issue where women are more prone to be the victims of assaults compared to men. The victims suffered multiple forms of abuse but psychological abuse remains as the most common form of domestic violence. In combatting this problem, Malaysia has passed the Domestic Violence Act (Act 521) in 1994 (DVA 1994). The DVA 1994 must be read together with the Penal Code (Act 574) (PC) or any other written law involving offences relating to domestic violence. The objective of this paper is to analyse the legal protection available to domestic violence under the PC. Thus, provisions relating to offences against person under the PC will be examined. victim where offences where force or violence is threatened or directed against a person under the PC namely Section 351 (assault), Section 350 (criminal force), Section 319 (hurt) and Section 320 (grievous hurt). By applying a descriptive and analytical approach in data analysis, the study found that the survivors of domestic violence in Malaysia are well protected under the PC which becomes the platforms for them to bring the perpetrator to the court. However the offences and punishments available are subject to the degree of injury suffered and evidence produce by the victims. Unfortunately the legal protection becomes fertile, if the survivors refuse to bring the perpetrators to the court due to some barriers faced by them.

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1. Introduction

Domestic violence was not an international issue 28 years ago when this it was merely treated as a private matter between partners, husbands and wives (Shuib et al., 2013). Today it is considered as everyone's problem (Women's Aid Organisation, 2017). The domestic violence becomes a crucial problem to the society all around the world and a traumatic episode which is influenced by complex social, cultural, and psychological factors (Ghani, 2014). Generally "domestic violence" is described as a pattern of abusive behaviour in any relationship, committed by one party to gain or maintain control over another. It can be physical, sexual, emotional, economic, or psychological actions (or threats of actions) that impacts another person. This can happen to anyone regardless of race, age, sexual orientation, religion, or gender, and can affect people of all backgrounds and education levels (Buang, 2017). But this problem is often seen as a gender issue where women are more prone to be the victims of assaults compared to men.

By passing the Resolution 49.25, World Health Assembly had acknowledged violence (including violence against women) as a serious public health issue and called for urgent actions by governments and health agencies (World Health Organization, 1996). World Health Organization reported that 35% of women worldwide have experienced some form of domestic violence by their intimate partner in their lifetime (World Health Organization, 2016). In Malaysia, a 2014 survey revealed that nine percent of married women in Malaysia have experienced the same (Women's Aid Organization, 2017). Even though domestic violence is often seen as a gender issue where women are more prone to be the victims of assaults compared to men but recently according to Women's Aid Organization report, from January 2014 to January 2016 there are 2,651 cases involving male victims (Buang, 2017).

2. Problem Statement

For over the past two decades Malaysia has made significant advances in protecting survivors of domestic violence through laws and policies (Women's Aid Organization, 2017).

(a) The Domestic Violence Act 1994 (DVA 1994)

The Domestic Violence Act 1994 (DVA 1994) was introduced in 1994 but only implemented two years later. The passing of the DVA 1994 (and its subsequent implementation in 1996) was sent a clear message that domestic violence is not just a family matter, but is a crime (Women's Aid Organization, 2017). The DVA 1994 has gone through few amendments, firstly in 2006 and recently in 2012 by the Domestic Violence (Amendment) Act 2012 (Act A1414). The main purpose of the DVA 1994 is to provide legal protection in situations of domestic violence and matters incidental thereto. In general, The DVA 1994 recognizes all forms of domestic violence as sizeable offences (Section 18 A DVA, 1994), guarantees protection for the survivor (Sections 4, 5, 6, 7, 8, 9, 12, 12A, 12B, 13, 14, 15, 16, 17 and 17A, DVA 1994) as well as provides suitable support for them (Section 10 and 11 DVA, 1994). The DVA 1994 was designed to grant both civil and criminal remedies for the victims of domestic violence, irrespective of race, religion, cultural and family background differences (Soh, 2010) but the Act does not recognize domestic violence as crime *per se* (See & Essau, 2012). In order for these acts to be categorised

as a crime under the DVA 1994, the legislation would have to be read together with the provisions of the Penal Code (Act 574) (PC).

Under the DVA 1994, the domestic violence survivor can take legal action against any act which causes physical injury or placing the survivor in fear of physical injury; compelling the survivor by force or by threat to engage in any conduct, sexual or otherwise; destruction or damage of property; confining or detaining the survivor against her will; physical and psychological abuse such as put-downs and insults (section 2, DVA 1994) perpetrated against women by their spouse, former spouse or family members (Mahdzir, Rahman, Rahim & Ismail, 2016). To commence the legal action against the perpetrator, the domestic violence survivor must lodge a police report. The perpetrator may be charged under the PC per se for causing personal injury to the wife where force or violence is threatened or directed against a person under the PC.

In practice, all the cases of domestic violence in Malaysia are heard by ordinary courts and subject to the same procedures as other criminal cases (Sambo & Abdulkadir, 2012). This has serious implications when the DVA 1994 has to read with the Penal Code where the domestic violence survivors would have to invoke on the provisions for assault in the latter in order to criminalise the act. It is also necessarily to invoke the Criminal Procedure Code (CPC), which governs police investigations in domestic violence cases (Hassan, 2009). Further, the issue on the legal enforcement of the DVA 1994 still focuses more on physical injury rather than non-physical form of violence. The power of arrest by police officials is still based on any physical injury caused by the perpetrator. Section 7(1) of the DVA 1994 states:

“Where the court is satisfied that the person against whom a protection order or interim protection order is made is likely to cause actual physical injury to the protected person or persons, the court may attach a power of arrest to such protection order, as the case may be.”

For this reason, victims who suffer non-physical form of abuse will face difficulties to prove their case since only physical evidence is considered by the court.

(b) The Penal Code (Act 574)

The PC grades the non-fatal offences against the persons by reference to two primary considerations: the nature and degree of harm that is caused and the degree of culpability (Yeo, Morgan & Cheong, 2009). In criminalizing the perpetrator, the actus res and men res are very important. The degree of injury suffered by the domestic violence survivors will determined the kind of charges and punishment to the perpetrator. The 2012 amendment further elevates the categorization of domestic violence to a seizable offence (crimes for which the perpetrator can be arrested without a warrant). Under the Criminal Procedure Code, the police must first determine the nature of the offence, i.e. whether it is seizable or non-seizable. The police are only required to conduct immediate investigations in cases of seizable offences. Prior to the amendment, victims of domestic violence would have to file a private summons in a Magistrate Court themselves to prosecute the perpetrator as domestic offence is categorized as non-seizable offence (Rahman, Ismail, Rahim & Mahdzir, 2017).

This rule posed significant problem to the victims and only very few would go through this process as it is time-consuming and costly. As such, the amendment is most welcomed and has solved one of the biggest hurdles faced by the victims and law enforcement authorities.

A 2014 survey revealed that 40% of domestic violence victim’s experienced domestic violence for more than five years; 41% of between one and five years and 19% less than one year. This means 81% could be classified as having faced sustained and prolonged violence at home. According to police statistic, a total of 57,519 cases of violence against women were reported since 2010 until March 2017 (Borneo Post, 2017) but the number of cases brought to court sadly not as much (Mahdzir, Rahman, Rahim & Ismail, 2016).

Between year 2013 to 2015, a total number of 13,944 reports were lodged of which 4,612 (33%) were charged in court. However, only 658 (14%) resulted in a conviction (Rahman, Ismail, Rahim & Mahdzir, 2016) as follows:-

Table 01. Statistics of Domestic Violence Cases (Reported/ Charged/ Convicted) from 2013 to 2015

Year	2013	2014	2015	Total
Total Reports Lodged	4123	4807	5014	13944
Charged	1746	1462	1404	4612
Percentage of Total Cases Charged	42%	30%	28%	33%
Convicted	155	358	145	658
Percentage of Total Cases Convicted	9%	24%	10%	14%

Source: WCC, 2016

3. Research Questions

This paper attempts to answer the following research question:

1. What are the legal protections against the domestic violence survivors under the PC in Malaysia?

4. Purpose of the Study

The purpose of this paper is to analyse the legal protections for domestic violence survivors in Malaysia with reference to the PC.

5. Research Methods

This paper is library based by using a descriptive and analytical approach in data analysis.

6. Findings

6.1. The scope of the definition of domestic violence under the DVA 1994 has been extended

The DVA 1994 defines domestic violence includes physical injury or placing the survivor in fear of physical injury; compelling the survivor by force or by threat to engage in any conduct, sexual or otherwise; destruction or damage of property; confining or detaining the survivor against her will; physical and psychological abuse such as put-downs and insults which perpetrated by their spouse, former spouse or family members (section 2, DVA 1994). However on April 4th 2017, the Dewan Rakyat heard

on the first reading to reform the Domestic Violence (Amendment) Bill 2017, where the three new paragraphs has been proposed to enlarge the term “domestic violence” (i) dishonestly misappropriating the victim’s property, which causes the victim to suffer distress due to financial loss; (ii) threatening the victim with intent to cause the victim to fear for his safety or the safety of his property, to fear for the safety of a third person, or to suffer distress; and (iii) communicating with the victim, or communicating about the victim to a third person, with intent to insult the modesty of the victim through any means, electronic or otherwise. By inserting these new paragraphs threatening to expose a nude photo of the victim in the social media is also domestic violence (Buang, 2017).

6.2. The legal protections under the Penal Code (Act 574) are available for the survivors of the domestic violence

In criminalizing the perpetrator, the offences where force or violence is threatened or directed against a person under the PC can be invoked. These include:-

(a) Section 350 – Criminal Force

Under this section force becomes criminal in connection with human body when it is used (i) without consent and (ii) in order to the committing of an offence or he intends or knowing used to cause injury, fear, or annoyance to the person to whom the force is used (Ranchhoddas & Thokore, 1982). The main ingredients of this section which need to prove by the survivors are (1) the intention use of force to any person, (2) such force must have been used without that person’s consent and (3) it must have been used (a) in order to the committing of any offence; or (b) with the intention to cause, or knowing it to likely that he will cause, injury, fear or annoyance to the person to whom the force is used. For example, if the perpetrator intentionally pulls up the women’s hair without her consent, intending or knowing it to be likely to cause injury, frighten or annoy her, he has used criminal force to her. Under this section, the perpetrator shall be punished with imprisonment for a term which may extend to three months or fine which may extend to MYR1,000.00, or with both (section 352 of the PC).

(b) Section 351 –Assault

An assault is something less than the use of criminal force. The offence of assault is committed against a person and not to the public (Ranchhoddas & Thokore, 1982). Mere words do not amount to an assault. However if the words used by a person may give to his gesture or preparation, it is amount to an assault. The important ingredients under this section which need to be proved by survivor are; (1) making of any gesture or preparation by a person in the present of another and (2) intention or knowledge that gesture or preparation will cause the victim believe that the perpetrator is about to use criminal force to her. Thus, if the perpetrator intending or knowing by shaking his fist and the domestic violence survivors believe that the perpetrator is about to strike, he has committed an assault. This offence shall be punished with imprisonment for a term which may extend to three months or fine which may extend to MYR1,000.00, or with both (section 352 of the PC). Furthermore, section 352A provides that anyone who assaults or exerts criminal force on his spouse during a marriage may be sentenced up to six months imprisonment, fined up to MYR2,000.00 or both.

(c) Section 319 – Hurt

Hurt is defined as to contemplate the causing of pain by one person to another (Ranchhoddas & Thokore, 1982). Section 319 of the PC defines hurt as “whoever causes bodily pain, disease or infirmity to any person”. Bodily hurt or pain may be caused by many acts. However there is nothing in the definition of hurt to suggest that hurt should be caused by direct physical contact between the accused and his victim (Ranchhoddas & Thokore, 1982). In the case of domestic violence, the survivor has to prove to the court that she was suffered any bodily pain (a physical body pain) and the perpetrator does any act with the intention to cause hurt or with knowledge that he is likely to cause hurt to her. The general punishment for causing hurt is an imprisonment for a term which may extend to one year or fine up to two thousand ringgit or both. The new section 326A of the PC essentially provides that anyone who causes hurt to his spouse during a marriage shall receive heavy imprisonment sentences.

(d) Section 320 – Grievous Hurt

Under section 320 of the Penal Code, there are eight situations designated as “grievous” namely (a) emasculation, (b) permanent privation of the sight of either eye, (c) permanent privation of the hearing of either ear, (d) privation of any member or joint, (e) destruction or permanent impairing of the powers of any member or joint, (f) permanent disfiguration of the head or face, (g) fracture or dislocation of a bone or tooth and (h) any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits. To make the offence of voluntary grievous hurt, there must be specific hurt, voluntarily inflicted and fall within the above situations. The offence shall be punished with imprisonment for a term which may extend to seven years and fine (Section 325). The heavier punishment will be imposed to the perpetrator if he using dangerous weapon or means to cause grievous hurt to the domestic violence survivor where he shall be punished with imprisonment for a maximum term up to 20 years and also liable to fine and whipping.

6.3. Women’s Barriers in the Fight against Domestic Violence

Apart from weaknesses of the law, combating domestic violence in Malaysia poses significant challenges due to some barriers facing by women in bringing their abused partners to justice (Women’s Aid Organisation, 2015). The main barrier strongly related to the victim’s cultural values and beliefs. These beliefs have affected their decision to hide their abuse from others. At the same time, the feelings of shame and self-blame combined with financial dependency on the abuser make the problem worse (Othman & Mat, 2008).

Normally, the victims were convinced that their husband will change his behaviour in time if he is given opportunity and time. Not only that, the religious understanding of the victims influenced help-seeking behaviours. Muslim women talked about submission to fate. While Buddhists mentioned about *karma*. These belief have led them to their acceptance of abuse. In Islam, the victim was threatened to be *nusyuz* by her husband and his family. For this reason, the women fears had stopped and prevented her from making any effort to ask for help (Women’s Aid Organisation, 2015).

Another barrier is the perception that domestic violence is a marital problem that needs to be solved between the couple and is best to overcome without involving third parties. Marriage the notion

that husband and wife were one and that one was the husband-made domestic violence permissible and acceptable. Indeed, this perception should be avoided as domestic violence may results in numerous social ills. Apart from the wives, children can be victims directly and indirectly of the violence occurring between their parents. The effects on children of witnessing and experiencing violence within the family are physically, psychologically, emotionally and cognitively damaging (Munir & Abdullah, 1995).

In the meantime, lack of knowledge about the victim's rights under the law can be another significant barrier (Women's Aid Organisation, 2015). To make matters worse, court proceeding which are too formal and costly hinder the victims to bring their case to the court of law (Arshad and Soh, 2012). It was suggested that the introduction of Family Court can overcome this problem (Mahdzir, Rahman, Rahim, & Ismail, 2016). The Family Court could be structured in accordance with the juvenile court model, where there is almost a complete absence of adversary procedure. Domestic disputes should be resolved in accordance to more helpful, non- competitive and therapeutic concept that motivated the involvement of the victims (Munir & Abdullah, 1995).

7. Conclusion

It is submitted that the DVA 1994 and Penal Code (Act 574) are a complete set of laws in curbing the domestic violence in Malaysia. The changes implemented into the laws from time to time were made in view of national security to safeguard public interest and afford better protection to victims of crime. The influence of many factors such as the patriarchal society, religious matters and the cultural dimension need to be considered while dealing with this problem. As such, effective collaboration between all stakeholders such as police, welfare, health and judicial services is critical in ensuring the victims get the assistance needed and more importantly, bring the perpetrators to justice. Indeed, domestic violence victim's access to justice and protection is fundamental in combating the menace.

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