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**DOMESTIC VIOLENCE AGAINST WOMEN: LEGAL
PROTECTION UNDER THE DOMESTIC VIOLENCE ACT 1994**

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Abstract

Domestic violence against women is an age-old topic and occurs indiscriminately amongst the population regardless of race, religion and status. It has often been discussed and debated in the mass media. Domestic violence against women is a serious issue as it harms both the physical and mental well-being of women. In general, victims of domestic violence including women may seek protections as provided for in the Domestic Violence Act 1994 (hereinafter "DVA 1994"). The DVA 1994 aims to provide legal protections in situations of domestic violence. Pursuant to the DVA 1994, female victims of domestic violence (hereinafter "FVDV") are able to seek legal protections namely protection orders, compensation, and access to rehabilitation programmes. The aim of this paper is to examine the legal protections afforded to WVDV under the DVA 1994. This paper contains an analysis of the DVA 1994, Criminal Procedure Code (hereinafter "CPC"), Penal Code (Act 574), case laws, journals, newspapers and scholarly writings related to this area. This paper found that some of the legal protections conferred by the DVA 1994 are still inadequate and can be further improvised to ensure the interests of WVDV can be more effectively protected.

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1. Introduction

After the Domestic Violence Act 1994¹ (hereinafter “DVA 1994”) (Act 521) was amended in 2017², the term “domestic violence” has been expanded where the definition has compressive coverage of the commission of a variety of acts which include causing physical injury, psychological abuse, sexual abuse, financial abuse as well as abuse of victim’s modesty by a person against someone who has either intimate or familial relationship with the person.³ At the international level, the term “domestic violence” usually refers to “intimate partner violence” (“hereinafter “IPV”) (Clark, 2013). The World Health Organization in its 2010 report defines IPV as “a behaviour in an intimate relationship that causes physical, sexual or psychological harm, including physical aggression, sexual coercion, psychological abuse and controlling behaviour.” This definition infers that IPV occurs in intimate relationships including spouses, ex-spouses and loving couples (Modi, Palmer, & Armstrong, 2014). Under the DVA 1994, the exact term used is “domestic violence” and not “IPV” whereby the former encompasses a wider meaning of violence not only in the context of IPV but also familial relationship. However, it is important to note that in Malaysia, in the context of IPV, the DVA 1994 only provides legal protections for a person who is abused by his or her spouse or his or her former spouse. For the purpose of this paper, the authors will focus on women who are abused by their husbands or by former husbands (collectively refers to as “Abusive Husbands”).

Domestic violence against women is a global phenomenon and occurs indiscriminately amongst the population regardless of race, religion and status (Enemo, 2018). The paper focusses on females victimised in domestic violence (hereinafter “FVDV”) because the number of FVDV is increasing (Mahdzir, Rahman, Rahim, & Ismail, 2016). This was reported by the former Deputy Minister of the Ministry of Women, Family and Community Development, Datin Paduka Chew Mei Fun in the Dewan Negara on 26th April 2017 that around 23,212 cases of domestic violence against women were reported between 2010 and March 2017 (Chow, 2017). Additionally, FVDV suffer physical and emotional harms greater than men (Alejo, 2014).

2. Problem Statement

The government has enhanced the legal protections provided for in the DVA 1994 twice particularly in 2012 and more recently in 2017. However, it appears that some of the legal protections conferred by the DVA 1994 are still inadequate and can be further improvised to ensure the interests of FVDV can be more effectively protected.

3. Research Questions

3.1 What are the legal protections accorded to FVDV under the DVA 1994?

3.2 What are the weaknesses inherent to the existing legal protections contained in the DVA 1994?

¹ The DVA 1994 was passed by the Parliament on 24th June 1994 and came into operation on 1st June 1996.

² The DVA 1994 was amended by the Domestic Violence (Amendment) Act 2017 [PU(B) 601/2017] which came into force on 1st January 2018.

³ Paragraphs (a) to (h) of section 2 of the DVA 1994.

3.3 To what extent can the legal protections conferred by the DVA 1994 effectively protect the interest of the WVDV?

4. Purpose of the Study

The aim of this paper is to investigate the extent of the legal protections accorded to FVDV under the DVA 1994 as well as examine weaknesses inherent to the existing legal protections contained in the DVA 1994. Apart from that, the paper will propose amendments to the DVA 1994 and section 426 (1A) of the Criminal Procedure Code (hereinafter “CPC”) (Act 593) to provide more protection for the interest of the WVDV.

5. Research Methods

A qualitative approach was used consisting of a detailed analysis of the DVA 1994, Criminal Procedure Code (CPC), Penal Code (Act 574), case laws, journals, newspapers and scholarly writings related to this area.

6. Findings

6.1. Legal Protections Provided for in the DVA 1994

Article 8(1) of the Federal Constitution of Malaysia clearly sets out that “All persons are equal before the law and entitled to equal protection of the law”. While the legal status of victims is not explicitly made clear in the Federal Constitution, the term “persons” referred to therein may be construed as referring to any individual, including victims. Thus, by virtue of the said Article, victims should also be assured of being given equal rights of protection under the law (Hussin, 2011). The FVDV’s rights to obtain legal protections can be seen in the DVA 1994. Among the legal protections available to WVDV are protection orders, compensation and rehabilitation programmes.

6.2. Protection Order

One of the main features of the DVA 1994 is the protection order. The protection order aims to protect victims of domestic violence from further harm from their Abusive Husbands by directing them to refrain from doing certain specified acts for a certain period of time (Graca, 2017). Prior to 2017, there were only two types of protection orders issued by the court, namely: (i) an interim protection order (hereinafter “IPO”) that can be issued by the court during the pendency of investigations relating to the commission of an offence involving domestic violence; and (ii) protection order (hereinafter “PO”) that can be issued by the court after the Abusive Husbands have been charged in court with offences under the Penal Code involving domestic violence. More recently, in 2017, section 3A of the DVA 1994 was inserted to provide additional protection order known as an emergency protection order (hereinafter “EPO”) which serves as a speedy response to victims’ immediate needs that can be issued by a welfare officer without having to lodge a police report and go through court process.

6.3. EPO

The EPO is a new protection order introduced in section 3A of the DVA 1994 in 2017. The EPO is basically an immediate response to a domestic violence without having to lodge a police report.⁴ It offers immediate protection for WVDV in emergency situations. Evidently, EPO can only be requested by FVDV who are experiencing domestic violence in the case of paragraph (a) or (b) of section 2 of the DVA 1994 where the Abusive Husbands place or attempt to place the FVDV in fear of physical injury or causing physical injury.⁵ The aim of the EPO is to enable FVDV to secure immediate protection orders even in the weekends (Bernama, 2017). An application for an EPO shall be made *ex-parte* by FVDV or FVDV's lawyer.⁶ The application is made to a social welfare officer authorized in writing by the Director General of Social Welfare.⁷ Compared to applications of IPO and PO, application of EPO is easier because the latter may be made without first lodging a police report. Having said that, the FVDV or their lawyers still need to make the application to the social welfare officer and Form 1, Domestic Violence (Prescribed Forms) Regulations 2018 needs to be filled in. The information needed is the name of applicant, name of the victim, name of the person against whom the order is sought and description of the domestic violence. Such information is important in helping the social welfare officer to make a decision. The EPO application may also be made at any time whether or not IPO or PO has been made.⁸ Most importantly, the period of issuance of the EPO is clearly stated in section 3A(5) of the DVA 1994 where it is stated that if practicable, the EPO must be issued within two (2) hours from the application.⁹ It should be noted that the EPO shall be valid for seven (7) days from the issuance of the order and enforceable when a copy of the order is served on the person against whom the order is made in accordance with section 3B of the DVA 1994.¹⁰ However, a reading of section 3A of the DVA 1994 indicates that the scope of EPO is limited to domestic violence cases falling under paragraphs (a) and (b) of section 2 of the DVA 1994, which are to place or attempt to place the victim in fear of physical injury or causing physical injury.¹¹ It is proposed that the scope of EPO application also to be extended to paragraph (c) of the same section namely compelling the victim by force or threat to engage in sexual conduct. This is because paragraph (c) does not necessarily involve physical injury but it is also harmful to FVDV and is also associated with a range of sexual health problems. Then, it is also recommended that the EPO should not be limited to preventing the Abusive Husbands from committing domestic violence mentioned in paragraphs (a) and (b) only but allow a social welfare officer to refrain the Abusive Husbands from committing domestic violence under paragraph (c). With this amendment, it will further protect the interests of WVDV.

⁴ Section 3A(6) of the DVA 1994.

⁵ *Ibid.*, section 3A(1)

⁶ Section 3A(3) of the DVA 1994.

⁷ *Ibid.*, section 3A(1).

⁸ *Ibid.*, section 3A(9).

⁹ *Ibid.*, section 3A(5).

¹⁰ *Ibid.*, section 3A(8).

¹¹ *Ibid.*, section 3A(7)

6.4. IPO

The IPO is a temporary protection provided by the court to victims of domestic violence during the pendency of investigations relating to the commission of an offence relating to domestic violence.¹² IPO shall be made *ex-parte* by either the FVDV or FVDV's lawyers or a social welfare officer on behalf of the FVDV.¹³ IPO will be issued by the court if the court is satisfied that it is necessary for the protection and personal safety of the FVDV.¹⁴ Police investigations usually start when the police receive the lodged police report. Then, the investigation papers will be opened to determine whether there is an offence under the Penal Code or any other written law. Unlike EPO and PO, the IPO does not specify how long it will take effect. That is to say, it depends on how long the investigation takes to complete. The duration of the investigation depends on the complexity and uniqueness of a case. For an easy case, the investigation could be resolved in a short period of time. However, there are complicated cases requiring a thorough investigation before prosecution can be initiated against the suspected person. Therefore, if the duration of the investigation takes a long time, the FVDV will still be able to obtain protection under the IPO. Section 4(4) of the DVA 1994 was amended in 2017 to further elucidate when the IPO ceases to be in force. This is to enable the victim to know more accurately when they are no longer protected under the EPO. Before section 4(4) of the DVA 1994 was amended in 2017, the IPO will cease automatically upon the completion of investigation or when the Abusive Husbands are charged in court without prior notice by police officers. This caused inconvenience to the FVDV as some of them were not informed by police officers when the Abusive Husbands would be charged. The effect of IPO ceases automatically before they applied for PO. Thus, between the period where the Abusive Husbands are charged in court and the application of PO is made, FVDV are no longer covered by the IPO. With the latest amendment, the law requires a police officer to inform first the FVDV in writing about the status of investigations whether or not any action is to be taken against the Abusive Husbands. If no further action is to be taken, then only shall the IPO cease to have effect.¹⁵ Besides, charging the Abusive Husbands in court is by itself not sufficient to bring the IPO to an end unless it is preceded by notification in writing by a police officer to the FVDV to charge the Abusive Husbands and WVDV make no application to obtain PO within seven (7) days after being so informed.¹⁶

It is important to note that the IPO issued by the court may be set aside in accordance with section 12B of the DVA 1994. This matter was decided by the court in the case of *Mangaleswary Ponnampalam v Giritharan E Rajaratnam*¹⁷ where the court allowed the IPO to be set aside. But the question arises if there is a delay in completing the investigation and the delay is not due to the FVDV but due to other factors, whether it can be used as a reason to set aside the IPO. The answer is not mentioned in the DVA 1994, but based on the case of *Mangaleswary Ponnampalam*, it could be a ground for the court to set aside the IPO.

In general, the police play an important role in completing investigations in a criminal case. FVDV do not have access to the investigation papers that have been opened and only know the progress of the

¹² *Ibid.*, section 4(1).

¹³ *Ibid.*, section 12A.

¹⁴ *Ibid.*, section 4(3A).

¹⁵ Section 4(4)(a) of the DVA 1994.

¹⁶ *Ibid.*, section 4(4)(b).

¹⁷ [2015] 6 CLJ 561.

case if informed by the police from time to time. Recognizing this fact, section 19 (2) of the DVA 1994 was amended by inserting paragraph (c) where the police officer has the responsibility to inform the victim of the status of the investigation relating to the offence involving domestic offenses. Hence, constant monitoring on the investigation of domestic violence cases should be strengthened and the status of the investigation should be communicated from time to time to the FVDV to avoid any unwanted delays which may affect the welfare of the FVDV.

6.5. PO

The PO is an order issued by the court. The PO should be applied either by the FVDV, FVDV's lawyer, a social welfare officer on behalf of the WVDV or a police officer on behalf of the FVDV.¹⁸ Before the DVA 1994 was amended in 2017, the PO could only be applied when a criminal proceeding had been instituted against the Abusive Husbands under the Penal Code that falls within the definition of domestic violence. After section 13 of the DVA 1994 was amended in 2017, the application of PO can be made either before or after criminal proceeding relating to domestic violence has been instituted against the Abusive Husbands. For the former, the PO can be applied within seven days after the FVDV has been informed in writing by a police officer that a criminal proceeding relating to the commission of an offence involving domestic violence will be instituted against the Abusive Husbands.¹⁹ Meanwhile, in respect of the latter, the application of PO can be made at any stage of the criminal proceeding under the Penal Code or any another written law where the Abusive Husbands are charged with offences involving domestic violence.²⁰ Standard of proof required for a successful application is on a balance of probabilities that is necessary for the protection and personal safety of the victim.²¹ Any PO is effective for a period not exceeding twelve (12) months²² and may be extended for another twelve (12) months.²³ In general, section 5 of the DVA 1994 allowed the court to prevent the person against whom the order was made from committing domestic violence against the victim. It is important to note that the scope of PO is greater than the IPO because the court may include additional orders in the PO as provided under paragraphs (a) to (f) of section 6 of the DVA 1994. Noticeably, the significant amendments made in 2017 are in paragraphs (a) and (e) of the said section. The purpose of amending paragraph (a) is to delete the words "or specified part thereof" after the words "by excluding the person against whom the order is made from the shared residence" to emphasize the granting of the right of exclusive occupation to the FVDV of the shared residence may be issued even if the shared residence is wholly owned or leased by the Abusive Husbands or jointly owned or leased by the parties. The former Minister of Ministry of Women, Family and Community Development, Datuk Seri Rohani Abdul Karim gave reasons (House of Representative, 2017) that the granting of the right of exclusive occupation strives to be a deterrent to the offender not to repeat the same. The amendment is important because there has previously been a situation where the FVDV had to share a home with the Abusive Husband and this affected their emotions and instilled fears in their mind. Arguably, this order can

¹⁸ Section 13A of the DVA 1994.

¹⁹ *Ibid.*, section 13(1)(a).

²⁰ Section 13(1)(b) of the DVA 1994.

²¹ *Ibid.*, section 6(1).

²² *Ibid.*, section 6(1A).

²³ *Ibid.*, section 6(2)(b).

result in the offender having to bear a financial burden and depriving them of a home (Jeffries, Bond, & Field, 2013). However, in view of the fact that an incident of domestic violence has occurred in the residence, granting the court order can be justified (McFerran & Wilcox, 2009). The other amendment was paragraph (e) which prohibits the Abusive Husbands from taking away the vehicle normally used by the FVDV or protected persons. It appears that the recent amendments to the DVA 1994 were intended to protect the interests of the FVDV by ensuring that they are protected in terms of material needs and able to survive especially in cases of FVDV who are financially dependent on the Abusive Husbands.

6.6. Compensation

Pursuance to section 10(1) of the DVA 1994, FVDV who suffered injury or damage to property or financial loss as a result of domestic violence, may apply to the court for compensation in respect to the injury or damage or loss as it deems just and reasonable. For the purposes of section 10 of the DVA 1994, it is more of a civil application as described in section 2 of the DVA 1994 stating “in respect of civil proceedings for compensation under section 10, the court competent to hear such claims in tort.” However, it does not mean that compensation can only be made by a civil court alone, as the criminal court also has a broad jurisdiction to issue a compensation order as provided under section 426(1A) of the CPC. The difference between the two is in terms of the burden of proof and the standard of proof. In civil cases, the burden is on the FVDV to prove her case on a balance of probabilities. Meanwhile, for the criminal case the burden lies on the Public Prosecutor and the standard of proof required is beyond reasonable doubt.

In the context of a criminal case, there are various forms of financial penalties that can be imposed by criminal courts which include fines and compensation for damage suffered. Although both bring financial implications upon the offender, it is important to note that there are differences between the two. Fines are imposed by the court and are payable to the state. Meanwhile, compensation is also imposed by the court but is payable to the victim and not to the State. This can be seen in *Raja Izzuddin Shah v Public Prosecutor*²⁴ where the court made an order under section 426(i) (b) of the CPC directing the appellant to pay a compensation amounting to \$200 to the complainant in addition to an order made under section 294(i) of the CPC. In general, a fine is the more common financial penalty imposed on criminal offenders as compared to compensation (Hussin, 2011). Courts may impose fines on the offender in addition to the sentence of imprisonment or may mete out the sentence of fines alone, depending on the applicable sentencing provision. For example, when a husband abuses his wife and hurts her, he may be charged with the offence of causing hurt under section 323 of the Penal Code. Since the offence falls under the purview of domestic violence, then the charge should be read with section 326A of the Penal Code. In light of the section, if the Abusive Husbands are found guilty, the court may sentence the Abusive Husbands to imprisonment for a term which may extend to twice the maximum term for which he would have been liable on conviction for that offence. Since under section 323 of the Penal Code, the maximum sentence of imprisonment is one year, the husband can be sentenced to imprisonment for up to two years, or a fine which may extend to two thousand ringgit or both. It should be noted that the sentence of imprisonment as stipulated under section 323 of the Penal Code is not mandatory but optional. Thus, if the court is of the

²⁴ [1978] 1 LNS 165.

view that the imposition of fines alone is sufficient, then a sentence of imprisonment does not need to be passed. In this regard, it can be seen that a fine is a common form of financial penalty expressly available as an alternative to the sentence of imprisonment as stipulated in the sentencing provision itself. Meanwhile, compensation is not incorporated in the sentencing provision as an alternative punishment. Rather, it is a separate provision provided for under section 426(1A) of the CPC. In light of the section, the court may make an order of compensation to a victim upon application made by the Public Prosecutor. Hence, when FVDV suffers harms or losses as a result of the commission of crime, then it is important for the Public Prosecutor to invoke this provision and apply to court for compensation to be awarded to the FVDV. The compensation serves to make up for the injury suffered and the financial expenses incurred such as medical cost and loss of income resulting from the offence committed. In addition, it is also worth highlighting that pursuant to section 183A of the CPC, the court shall allow a victim to make a statement on the impact of the offence on the victim, before the sentence is passed accordingly. Given the spirit of section 183A of the CPC which allows victims to make a statement on the impact of the offence on the victim, it is proposed that section 426(1A) of the CPC be expanded to not only allow the Public Prosecutor to make an application for compensation to be paid to victim but also to permit the victim to make such an application to court by himself or herself. Through this, the statutory provision will no longer be overlooked and can be fully utilised to protect the interest of the FVDV. Further, it will go a long way to ensure that the sentence imposed does not only uphold the interest of the public but also adequate to address the needs and plight of the FVDV.

As an alternative to the method detailed above, some countries set up a fund for providing damages to the FVDV. The idea of recompensing victims in general is not unusual. A victim's right to compensation has gained traction and has been practiced by other countries. Many nations, such as the United Kingdom, Northern Ireland, United States, Canada and Australia have formed non-profit organizations known as the Criminal Injuries Compensation Board (Ismail, 2011). For example, the United Kingdom first started a compensation scheme funded by the state, for victims of crimes in 1964. The Criminal Injuries Compensation Scheme was set up in 1964 to compensate blameless victims of violent crime for loss or harms in consequence of crime victimization. Subsequent to the enactment of the Criminal Injuries Compensation Act 1995, the Criminal Injuries Compensation Authority was established to administer a tariff-based compensation scheme in England, Wales, and Scotland (Criminal Injuries Compensation Authority, 2017). It is noted, however, at home in Malaysia this idea has not garnered momentum or gained widespread recognition (Ismail, 2011). Thus, it is worthwhile for the Malaysian government to analyse and assess the cost and benefits of such scheme and seriously consider adopting the scheme to effectively support the WVDV financially.

6.7. Rehabilitation Programme

In light of section 11(1) of the DVA 1994, where the application for PO is made, in addition to issuing a PO, the court may make an order that one or more of the parties to the dispute be referred to a rehabilitation programme, provided that an order to refer the victim to a rehabilitation programme shall be made only with the consent of the victim. When considering any questions relating to the making of an order under section 11(1) of the DVA 1994, the court may, whenever it is practicable, take the advice of a

social welfare officer or some other trained or experienced person.²⁵ The Rehabilitation programme refers to the programme provided by the Ministry responsible for welfare services for the purposes of family and community development.²⁶ The rehabilitation programme, was established under the management of the Ministry of Women, Family and Community Development to raise awareness and educate victims and perpetrators of domestic violence issues such as family, financial management and emotional management during the period of PO to address the root cause of domestic violence problems (Hasnan, 2017). It is important to note that this programme is conditional upon the victim's consent. However, the section is silent as to whether the consent, if given, can be withdrawn at any stage of the programme. Therefore, it is recommended that even if the FVDV have given their consent to join the programme, the consent given may at any time be withdrawn without any implications if they feel intimidated, scared or threatened. More importantly, the programme should not in any way threaten or influence any FVDV to withdraw the police report lodged against the Abusive Husbands.

7. Conclusion

Domestic violence against FVDV is a global phenomenon that occurs in all sections of society regardless of race, religion and status. The Malaysian government must adopt a serious stance against domestic violence to eradicate this disease from society at large and ensure that FVDV are kept safe and their interests are adequately protected. The government has made some headway in addressing this issue by amending the DVA twice in 2012 and more recently in 2017. However, there is still much that can be done to ensure the effectiveness of the Act in safeguarding the interests of FVDV. The following recommendations are suggested to ensure the interests of FVDV are more protected. First, it is proposed that the scope of EPO application be also extended to paragraph (c) of section 2 of the DVA 1994, namely compelling the victim by force or threat to engage in sexual conduct. Next, the investigation of the police during interim protection order should be monitored and enhanced to avoid any unwanted delays which may affect the welfare of the FVDV. Besides, it is also proposed that section 426(1A) of the CPC to be expanded to not only allow the Public Prosecutor to make an application for compensation to be paid to FVDV but also to permit the FVDV to make such application by themselves. Alternatively, a state-funded compensation scheme may be considered to provide immediate financial assistance to the FVDV without going through court process for their survival. Then, in respect of the rehabilitation programme, FVDV should be allowed to withdraw their earlier consent if they feel scared and threatened to ensure there is no element of force and coercion applied. It is hoped that the recommendations outlined will effectively protect the interests of FVDV.

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²⁵ Section 11(3) of the DVA 1994.

²⁶ *Ibid.*, section 11(4).

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