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A STUDY ON REMEDIES FOR DOMESTIC VIOLENCE IN
MALAYSIA

BY

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MALAYSIA

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ABSTRACT

The main concern of this dissertation is to identify and examine the remedies provided under various legislations for the protection of victims of domestic violence in Malaysia. The discussion includes remedies under the law of torts, matrimonial law, criminal law and a brief discussion on a non-legal alternative i.e. counselling, which is also provided under the Domestic Violence Act 1994 (hereinafter referred to as "the DVA"). The aim of this study is to identify the most appropriate and effective approach towards protecting the said victims. This task is accomplished by evaluating the merits and demerits of each of the examined remedies. On this basis, a number of statutes and case law are widely examined to analyse the types of remedies available. The most important statute for this study is the DVA. Other relevant legislations which are also significant in this study are referred to throughout the discussion. It is a finding of this study that the role of the relevant government and non-government bodies is essential in providing effective protection to the victims. The most practical and suitable approach from other countries such as the United Kingdom, Canada and Australia is also discussed and evaluated. References to these countries are relevant in order to evaluate whether reforms found in those jurisdictions could be adopted to good effect in Malaysia. This study concludes that one of the most effective remedies to the victim of domestic violence is to modify the form of imprisonment in order to reform the abusers. This is because domestic violence is not an end to a marriage. Since the DVA is to be read with the Penal Code, imprisonment could not be avoided. Thus, it is a contention of this study that the modified form of imprisonment is the most suitable way to encourage the victims to cooperate with the police after the lodgement of a domestic violence report.

الملخص

إنّ الهدف الرئيسي من هذه الرسالة هو أن يتعرف على العلاج المقرر تحت التشريعات المتعددة لحماية ضحية العنف المترلي في ماليزيا. وهذه المناقشة تتضمن على الحلول المختلفة تحت قوانين الجُنْح، والأحوال الشخصية، وجرمي كما تحتوي على مناقشة مختصرة لبدليل غير قانوني مثل وسيلة الاستشارة، التي تنص أيضا تحت قانون العنف المترلي ١٩٩٤ (مشار إليه بعدئذ بالقانون DVA). إنّ هدف هذه الدراسة هو أن نتعرف عن الحلول الملائمة وأكثر فعالية لحماية الضحايا. وهذه المهمة ستتم بعد عملية التقييم الدقيقة للاستحقاقات والنقائص لكل العلاج والحلول المقررة. ومن أجل ذلك تم فحص عدد من القوانين والقضايا بحثا عن نوع العلاج المناسب. وأما القانون DVA فهو من أهم القانون لهذه الدراسة ولكن بعض التشريعات المعنية الأخرى سيشار إليها خلال المناقشة. وخلال جولتنا في هذه الدراسة تأكدنا من أن هناك عنصرين مهمين يتحملان مسؤولية أساسية في تزويد الحماية الفعالة للضحايا ألا وهما الحكومة وهيئات غير الحكومة. ومن هذه الهيئات أيضا سننظر وناقش القانون الملائم الذي يطبق في البلدان الأخرى مثل المملكة المتحدة، وكندا وأستراليا، وتقييمه لنتمكن من تطبيقه والاستفادة منه في ماليزيا. و تستنتج هذه الدراسة بأن من أهم العلاج وأكثره فعالية لحماية ضحية العنف المترلي هو أن يُعدّل شكل الحكم المطبق الحالي وهو السجن إلى إنصاف المنتهكين وإصلاحهم من جديد لأننا نرى أن هذا العنف المترلي ليس هو نهاية المطاف للزواج. ونظرا إلى أن القانون DVA يقرأ معا بقانون العقوبات لا نستطيع أن نتجنّب من السجن نهائيا. ومن خلال هذه الدراسة أيضا تم الاقتراح ليعدل شكل الحكم المطبق من السجن إلى ما هو أكثر مناسبة لتشجيع الضحايا على أن يتعاونوا مع الشرطة المسؤولة بعد إبلاغ المحضر عن العنف المترلي.

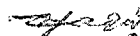
APPROVAL PAGE

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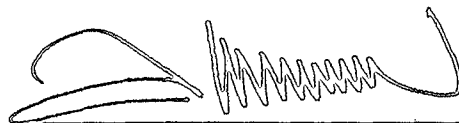
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This dissertation was submitted to the Kulliyyah of Laws and is accepted as partial fulfillment of the requirements for degree of Master of Comparative Laws.



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DECLARATION

I hereby declare that this dissertation is the result of my investigations, except where otherwise stated. Other sources are acknowledged by footnotes giving explicit references and a bibliography is appended.

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Date : 5 April 2000

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Domestic Violence and Matrimonial Proceedings Act, 1976

Federal Constitution

Islamic Family Law (Federal Territory) Act, 1984

Law Reform (Marriage and Divorce) Act, 1976

Married Women Act, 1957

Penal Code (F.M.S. Cap. 45)

Specific Reliefs Act, 1950

Women's Charter (Amendment) Act, 1996

LIST OF ABBREVIATIONS

| | | |
|---------------|---|--|
| A.L.R. | - | Adelaide Law Review. 1960 - |
| All E.R. | - | All England Reports |
| AWAM | - | All Women's Action Movement |
| C. & P. | - | Craig & Phillips' Chancery Reports. 1840-1 |
| CLA | - | Civil Law Act, 1956 |
| CPC | - | Criminal Procedure Code (F.M.S. Cap. 6) |
| Cr. App. Rep. | - | Criminal Appeal Reports. 1908- |
| Crim. L.J. | - | Criminal Law Journal |
| DVA | - | Domestic Violence Act, 1994 |
| E.R. | - | Eaot's Term Reports, King's Bench. 1800-1812 |
| Hagg. Ecc. | - | Haggard's (Ecclesiastical) Reports. 1827-33 |
| IFLA | - | Islamic Family Law (Federal Territory) Act, 1976 |
| IPO | - | Interim Protection Order |
| J.H. | - | Jernal Hukum |
| Keb. | - | Keble's King's Bench Reports. 1667-79 |
| K.B. | - | King's Bench (Law Reports 1901-52) |
| LRA | - | Law Reform (Marriage and Divorce) Act, 1984 |
| L.J. (P&M) | - | Law Journal Reports, New Series, Probate & Matrimonial. 1858-9, 1866-75 |
| M.L.J. | - | Malayan Law Journal |
| MWA | - | Married Women Act, 1957 |
| PO | - | Protection Order |

| | | |
|---------------|---|---|
| Q.B. | - | Queen's Bench Law Reports |
| SRA | - | Specific Reliefs Act, 1950 |
| Times L. Rep. | - | Times Law Reports, 1884-1952 |
| WAO | - | Women's Aid Organisation |
| ed. | - | edition |
| edit. | - | editor, edited by |
| etc | - | <i>(et cetera)</i> ; and so forth |
| ibid. | - | <i>(ibidem)</i> ; in the same place |
| p. / pp. | - | page / pages |
| S.A.W. | - | ṣallāhu ‘alayh wasallam (Peace Be Upon Him) |
| S.W.T. | - | ṣubḥānahu wa ta‘āla (Praise be to Allah and the Most High) |
| s. / ss. | - | section / sections |

TRANSLITERATION OF ARABIC ALPHABET

| | | | | |
|---|---|--|---|----|
| أ | ا | | ض | ḍ |
| ب | ب | | ط | ṭ |
| ت | ت | | ظ | ẓ |
| ث | ث | | ع | ʿ |
| ج | ج | | غ | gh |
| ح | ح | | ف | f |
| خ | خ | | ق | q |
| د | د | | ك | k |
| ذ | ذ | | ل | l |
| ر | ر | | م | m |
| ز | ز | | ن | n |
| س | س | | ه | h |
| ش | ش | | و | w |
| ص | ص | | ي | y |

Vowels and Diphthongs

Long Vowels

أ ā

و ū

ي ī

Short Vowels

 a

 u

 i

Diphthongs

و aw

ي ay

INTRODUCTION

1.1 Statement of Problem

The subject of this study is on the remedies provided under the Malaysian legislations for the victims of domestic violence. Although domestic violence is an age old problem that cuts across all classes, races and religions, it was only in 1996 that the DVA was enforced. The study strongly advocates that domestic violence should not be an isolated family problem. This is because such problem, if not properly remedied, is detrimental to the interest of the nation. Thus, the social malady has to be curbed and the victims properly protected. The need to conduct a study on this topic is due to the lack of comprehensive material describing in detail the remedies afforded to these victims. However, being a sensitive and controversial issue, appropriate and careful approach should be taken in dealing with this issue.

1.2 Methodology

This study is non-empirical, and thus, is based on research of the available literature. It is concerned with assessing the remedies for the victims of domestic violence. It also analyses the strengths and weaknesses of the remedies under the DVA, tort, matrimonial and criminal law. The literature consists of primary sources in the form of statutes and case law. The main statute for this study is the DVA. However, other statutes such as the Married Women Act 1957, the Federal Constitution, the Islamic Family Law (Federal Territory) Act 1984, the Law Reform (Marriage and Divorce) Act 1976, the Penal Code, the Criminal Procedure Code and the Specific Relief Act 1950 are also equally important.

Secondary sources in the form of dictionaries, books, journals, parliamentary papers and periodicals are extensively utilised. Newspaper reports and magazine articles are also fully used. Quranic translations are based on Abdullah Yusuf Ali's translation. A comparative law method is used in this study to identify the most suitable remedies for the victims on domestic violence. On the basis of this premise, the relevant and most suitable approach of several countries such as the United Kingdom, Canada, Australia and Singapore in providing the best remedies and protection are adopted.

1.3 Literature Review

The existing literature on the subject is extensively discussed and analysed. In discussing the meaning and scope of domestic violence, reference is made to the DVA. In comparison to the common law, *Halsbury's Laws of England* is an important reference. In discussing domestic violence from the Islamic perspective, besides the Qur'an, Professor Hamka's *Tafsir Al-Azhar* is referred to. The issue of jurisdiction is also an inevitable subject to be settled. The possible complications surrounding this issue are sufficiently evident in the case of *Mohamed Habibullah v. Faridah* [1992] 2 MLJ 793. The issue was temporarily resolved when the Supreme Court referred to Article 121 (1A) of the Federal Constitution and held that civil courts shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts. However, the issue arose again when the DVA was enacted. This is because the DVA gives sole jurisdiction to the civil court in dealing with domestic violence.

In discussing remedies for the victims, the legal maxim *ubi jus ibi remedium* is referred to support the theory that the victims of domestic violence shall be remedied and protected. The importance of this legal principle is sufficiently evident in the discussion by Kersley, *A Selection of Legal Maxims*, p. 118. The effect of tortious action between a husband and a wife is an important issue to pave the way for the discussion on the civil remedies or the remedies under the tort law. An important reference is the Married Women Act 1957. The amendment to the Act in 1994 which introduced section 4A is significant in that it enabled the parties in a marriage to sue each other in tort. Among references for the discussion on relevant remedies under the tort law are Hoggett & Pearl, *The Family Law and Society*, p. 390. Hoggett & Pearls discussed on the remedy of injunction against molestation and exclusion order. Cretney, *Elements of Family Law*, p. 76, in discussing injunction has also supplied the meaning of molestation in the non-molestation order. The discussion by Hoggett & Pearl and Cretney are significant in this study since the two injunctions mentioned above are the model for the protection order and excluding order under the DVA. Another civil law remedy of self-defence is referred to in Brazier, *Street on Torts*, p. 86. On the Islamic literature on self-defence, Niazi, *Islamic Law of Tort*, pp. 350-351 wrote that "In Islam, reasonable defence to oneself negates any liability in tort". According to Niazi, the right to self-defence has a basis in Islamic law to ward off a threatened injury. His writings are used to support the theory that a threatened victim of domestic violence has the right to self-defence.

Local articles written on the DVA dated back as far as 1990, i.e. when the Act was still in proposal form. Before the enactment of the DVA, the articles mostly reflected a

very high expectation on the provision of the protection order, which is new under Malaysian law, but has been in force in the United Kingdom more than 20 years ago. Salbiah Ahmad, *Towards a Common Law on the Domestic Violence for Malaysians*, pp. 312-316, highlighted on "the new injunction called a 'protection order' [which] can be made *ex-parte* and it can issue within twenty-four hours". However, some of these proposals, for example, temporary custody of the children of the victims of domestic violence are not incorporated in the DVA. Salbiah also called for the abolition of section 9 (2) of the Married Women Ordinance 1957 and to adopt the Islamic criminal justice remedy which allows claims for damages for injuries irrespective of the relationship of the parties. Likewise, Faridah Hamid, *The Horror of Domestic Violence*, pp. 12-14, also pointed out the advantage of the protection order. According to Faridah, "Perhaps the single most important clause in the proposed DVA is that an abused spouse can get legal protection from the abuser as soon as report is made". Rasamani Kandiah, *The Domestic Violence Act 1994 and The Need for A Family Court*, pp. 1-6, also discussed on the provisions of the DVA. According to her, "one must view the Act with caution as it involves family set-ups i.e. members involved in intimate personal relationship". The issue whether the DVA provides a civil or a criminal remedy is discussed by Chan Swee Yoke, *The Domestic Violence Act 1994 and the Need for A Family Court*, pp. 19-26. Chan has highlighted the problems in consequence of the requirement that the DVA shall be read together with the Penal Code.

After the enforcement of the DVA in 1996, critics tend to write on the weaknesses of the DVA. The main issue is the dependence on the Penal Code. The possible

complications surrounding this issue are sufficiently evident in the discussion by Faridah Hamid, *DVA Passed But For Whom?*, pp. 27-28 and Nor Aini bte Abdullah, *DVA 1994: An End To A Nightmare?*, pp. xli-xlv. Faridah has pointed out six issues concerning the weaknesses of the DVA. She is not satisfied that domestic violence is not recognised as a specific crime, on the definition of domestic violence and the fact that the police only has power to investigate when the victim has suffered a serious injury. She also highlighted the implication when a case cannot be investigated unless there is an order to do so from the public prosecutor. She is also unhappy that an interim protection order could only be obtained pending an investigation. The provision that if a victim has found alternative accommodation, the assailant can reside in the matrimonial home was also criticised by her. Nor Aini was also not satisfied with the DVA and discussed on the consequences that domestic violence is not stated as a specific crime. She also touched on the problems that could arise from the protection order. Mohamad Azam Mohamad Adil, *Remedi Mangsa Keganasan Dalam Rumahtangga Mengikut Undang-Undang Jenayah dan Sivil*, pp. 79-91, is the only author who has covered both the topics on civil law and criminal law remedies. The significance of his article is the attempt to scrutinise the remedy of victims in the criminal and civil laws. Azam also focused on the family laws applied in Malaysia on the Muslims as well as the non-Muslims in regard to domestic violence.

1.4. **Scope and Limitation**

The scope of this study is limited to the direct victims of domestic violence. Contrary to the common assumption, men are also victims of domestic violence, although the number is small compared to women. The impact of domestic violence on the

indirect victims such as the children of the spouses are not discussed here since such topic needs an extensive independent discussion. Although domestic violence is a socio-legal study, the main purpose of this research is to analyse the remedies for the victims. Thus, this study only briefly touches on the discussion for the reasons and statistics of domestic violence. The areas where reforms are needed are also discussed with a view of finding a workable solution for the protection of the victims. Although this study is mainly concerned with the law in Malaysia, the approach of other countries that are more advanced in providing the best remedies are suggested to be adopted.

This study is divided into four chapters. Chapter One deals with the general understanding of domestic violence. The main emphasis is on the law and scope of domestic violence in Malaysia. Chapter Two examines the remedies available to the victims in Malaysia. The merits and demerits of these remedies are evaluated in order to identify the most appropriate method of protecting the victims. Chapter Three assesses the effectiveness of the DVA as the primary tool in protecting the victims. This task is undertaken by identifying the main problems encountered in enforcing the DVA. Suggestions are proposed in order to make the DVA more effective and pro-active. Chapter Four contains the conclusion of the study. The study proposes the suitability of adopting alternative criminal remedies in order to encourage the victims to seek professional help.

CHAPTER 1

STATUTORY PROVISIONS ON DOMESTIC VIOLENCE

1.0. Introduction

This chapter deals with the historical aspect and the development of the law on domestic violence. Emphasis is made on general provisions of various laws and a brief survey on the statistics on domestic violence. The main concern of this chapter is on the development of the law on domestic violence in Malaysia. Reference is also made to the law in England which is more advanced in this area.

1.1. What is Domestic Violence ?

Violence in the family used to be an isolated problem confined under the scope of family matters, and as such prevented any intrusion from outsiders. Aggression between family members was considered to be part of the pattern of family life. Hence, violence in the family is not a new phenomenon, but it was only until recently that domestic violence is recognised as a crime and a civil wrong. There are various forms of domestic violence but the most persistent and most severe in nature having impact on society is violence against wives and vice-versa. This is because domestic violence affects the congenial environment of a family. For example, violence against the family has tremendous implication on the quality and morality of the nation.

There seems to have been an increase in domestic violence in recent years although it may be that such cases were not reported in the past.¹ Historically, violence was accepted as a means to exert power and control over one's dependents. Under the old common law a husband was allowed to beat his wife so long as he did it with a stick no bigger than his thumb.² A husband might beat his wife (but not in a violent or cruel matter) and confine her.³ In fact, in 1663 in *Bradley v. His Wife*,⁴ an English court refused to bind a husband over to keep the peace unless the wife could prove that her life be in danger because by law, he has power of castigation.⁵ It was only in 1891, in England, that the case of *R v. Jackson*⁶ abolished the common law defences of reasonable chastisement and confinement.⁷ The above discussion proves that wife-battering was accepted as a norm rather than an offence in the present understanding of domestic violence.

However, the attitude of the court had changed towards the end of the nineteenth century whereby violence within the family, in particular spouse abuse was regarded as an offence. The British Parliament intervened in 1878, following a campaign drawing attention to the brutal treatment of many working-class women.⁸ The result was the enactment of the Matrimonial Causes Act of 1878. According to the Act, where a man

¹ Ahmad Ibrahim, *Family Law in Malaysia*, 3rd ed., Malayan Law Journal, Kuala Lumpur, 1997, p. 374.

² Per Lord Denning MR in *Davies v. Johnson* (1979) AC 264, at pp. 270-271.

³ See *Bacon's Abridgment*, 7th ed., London, 1832, vol. 1, p. 693, quoted from P.M. Bromley & N.V. Lowe, *Bromley's Family Law*, 8th ed., Butterworths, London, 1992, p. 148.

⁴ 1 Keb. 637; 83 E.R. 1157.

⁵ Balwant Singh Sidhu, "Domestic Violence And The Need For A Family Court", 10th *Malaysian Law Conference*, The Malaysian Current Law Journal, 28-30 November, 1994, p. 27.

⁶ (1891) 1 Q.B. 671.

⁷ Sidhu, p. 27.

⁸ See Frances Power Cobbe, *Wife Torture in England (1878)*, quoted from Bromley, p. 148.