



ANALYSIS ON THE RIGHTS OF RAPE VICTIMS IN
MALAYSIA

BY

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degree of Doctor of Philosophy in Law

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ABSTRACT

Rape is a distressing and traumatic experience. The rights of rape victims remain neglected under the existing Malaysian legislation, particularly in relation to the physical, financial, emotional, and social losses. The main objective of this thesis is to examine the Malaysian legislation on rights of rape victims. The study begins with the elaboration on the growth of victimology where rape victims are being heard. The study has detailed the clinical management for rape survivors and the effects of rape on victims from psychological, physical, emotional and economic perspectives. The analysis is valuable in drawing the attention of the criminal justice system which is based on retributive and rehabilitative models shifting towards restorative justice as an alternative avenue to ensure the rights of rape victims. The study found that there are few reformative steps taken by the criminal justice system in ensuring the victims' rights even at the reformative stage. However, there are still many rooms for improvement that could be made. The thesis concludes with suggestions and recommendations for the adoption by the authority with the highlight of some directions for future research. The methodology employs in this study are library research and extensive interviews with personnel involved directly with victims of rape. This method is further supported by statistical data obtained from the authority. It is hoped that this effort will promote the way forward for recognising the rights of rape victims in Malaysia.

خلاصة البحث

الإغتصاب هو تجربة محزنة مؤلمة. ومع ذلك فإن حقوق ضحايا الإغتصاب تحت القانون الماليزي لا تزال مهمولة فضلا بما تتعلق بالخسارة الجسدية والمالية والعاطفية والاجتماعية. فالهدف الرئيسي من هذه الأطروحة بحث القانون الماليزي عن حقوق ضحايا الإغتصاب حيث يبدأ البحث بتقديم نمو الضحايا بما في ذلك ضحايا الإغتصاب، ويليه البحث عن الإدارة السريية للإغتصاب الناجين وأثر الإغتصاب للضحايا من الجانب النفسي والجسدي والعاطفي والإقتصادي. إن هذا البحث مهم وقيم في لفت انتباه نظام العدالة الجنائية القائم على أساس نموذج التعزير والتأهيل، والذي ينتقل إلى نظام العدالة التصالحية كبديل في تحقيق حقوق ضحايا الإغتصاب. وقد وصل البحث الى الإستنتاج أن نظام العدالة الجنائية قد أخذ الخطوة الإصلاحية في حفظ حقوق الضحايا الى المرحلة الإصلاحية. ومع ذلك فهناك مجال للتحسين. واستخلصت الأطروحة بتقديم بعض الإقتراحات والتوصيات للحكومة وكذلك الإتجاهات لمزيد البحث في المستقبل. فمنهج البحث في هذه الأطروحة هو البحث المكتبي والمقابلة الممتدة مع الأطراف ذات الصلة بضحايا الإغتصاب، والذي أيدته البيانات الإحصائيات. فالمرجو من هذا الجهد تعزيز مستقبل حقوق ضحايا الإغتصاب في ماليزيا.

APPROVAL PAGE

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DECLARATION

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

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Signature.....

Date.....

INTERNATIONAL ISLAMIC UNIVERSITY MALAYSIA

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IN MALAYSIA**

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TABLE OF CONTENTS

Abstract	ii
Abstract in Arabic	iii
Approval Page.....	iv
Declaration Page	v
Declaration of Copyright	vi
Acknowledgements.....	vii
List of Cases.....	xi
List of Statutes	xiii
List of Treatises.....	xiv
List of Abbreviation.....	xv
Table of Transliteration.....	xvi
CHAPTER ONE: INTRODUCTION	1
1.0 Background of the study	1
1.1 Research Questions	10
1.2 Research methodology	15
1.2.1 Data collection	15
1.2.2 Field work	16
1.3 Hypothesis.....	17
1.4 Scope and Limitations of study.....	17
1.5 Confidentiality	18
1.6 Limitations and encountered problems	18
1.8 Getting access.....	19
1.9 Obtaining statistical data	19
1.10 The objectives of the thesis	19
1.11 Significance and importance of the research	20
1.12 Outline of Chapters	21
1.13 Literature Review	23
CHAPTER TWO: SETTING THE CONTEXT FOR RAPE VICTIMOLOGY	33
2.0 Introduction	33
2.1 Definition of victimology.....	33
2.1.1 Literal definition.....	33
2.1.2 Technical definition	34
2.2 Historical development of victimology.....	38
2.2.1 A Brief history ofF victim Rights.....	49
2.3 Theories in Victimology	50
2.3.1 Von Hentig’s Theory of Victimisation	51
2.3.2 Mendelsohn’s Theory of Victimisation	55
2.3.3 Contemporary theory on victimology	59
2.4 Rape Victimology	62
2.5 Conclusion.....	66

CHAPTER THREE: THE PREVALENCE OF RAPE INCIDENTS IN MALAYSIA	68
3.0 Introduction	68
3.3 Reported rape cases in selected States	75
3.3.1 Perlis.....	75
3.3.2 Kedah	76
3.2.3 Pulau Pinang	78
3.3.6 Kuala Lumpur	82
3.3.7 Negeri Sembilan.....	83
3.4 Analysis of rape according to the age of suspects.....	84
3.5 Analysis of Incest cases in Malaysia.....	87
3.6 Conclusion.....	89
CHAPTER FOUR: THE EFFECTS OF RAPE ON VICTIMS	91
4.0 Introduction	91
4.1 Different rape patterns.....	92
4.1.1 Anger rape.....	92
4.1.2 Power rape.....	93
4.1.3 Sadistic rape	94
4.2 Types of rape.....	96
4.2.1 Statutory rape	97
4.2.2 Marital rape	98
4.2.3 Gang rape	100
4.2.4 Date rape	102
4.2.5 Prison rape.....	102
4.2.6 War rape	103
4.2.7 Incest	104
4.2.8 Penile penetration of the surgically-constructed vagina of a transsexual.....	107
4.3 The Effects of rape on the victims	113
4.3.1 Psychological injury.....	114
4.3.2 Physical injury.....	119
4.3.3 The financial impact on the Victim.....	122
4.4 The financial impact of rape on the government	130
4.5 Conclusion.....	131
CHAPTER FIVE: CLINICAL MANAGEMENT FOR RAPE SURVIVORS IN MALAYSIA	133
5.0 Introduction	133
5.1 The setting up of OSCC, SCAN and INSAN	133
5.2 The medical procedures for rape victims	136
5.2.1 Phase 1	136
5.2.2 Phase 2	137
5.2.3 Phase 3	139
5.3 Medical procedures for rape victims who become pregnant as a result of the rape crime.....	141
5.4 Medical procedures for suspected child rape victimS.....	143
5.6 Government and non governmental institutions for victim support	145

5.7 Conclusion.....	145
CHAPTER SIX: RAPE LEGISLATION IN MALAYSIA	147
6.0 Introduction	147
6.1 Rape law in malaysia	147
6.2 Punishment of rape crime.....	153
CHAPTER SEVEN: ANALYSIS ON HOW FAR THE LAW SAFEGUARDING THE RIGHTS OF RAPE VICTIMS.....	165
7.0 Introduction	165
7.1 Analysis on the adequacies of the criminal justice system	165
7.2.1 Financial compensation for crime victims	166
7.3 Establishing evidence.....	176
7.4 Conclusion.....	183
CHAPTER EIGHT: RESTORATIVE JUSTICE: ALTERNATIVE PROSPECTS FOR RAPE VICTIMS IN MALAYSIA	205
8.0 Introduction	205
8.1 Scope And Concept of Restorative Justice	205
8.2 Definition of restorative justice.....	210
8.3 Principles of restorative justice	214
8.4 Benefits of restorative justice programmes	216
8.5 Objectives OF restorative justice	217
8.6 models and programmes in restorative justice	220
8.6.1 Victim-Offender Mediation	221
8.6.2 Family or Community Group Conferencing	222
8.6.3 Peacemaking or Sentencing Circles	223
8.6.4 Restitution	224
8.6.5 Community service	225
8.6.6 Victim, offender and community meetings.....	225
8.6.7 Compensation.....	226
8.7 Conclusion.....	227
CHAPTER NINE: FINDINGS AND CONCLUSIONS	229
9.0 Introduction	229
9.1 Research Findings	230
9.2 Recommendations	234
9.3 Conclusion.....	241
BIBLIOGRAPHY	245

LIST OF CASES

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Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)
Convention on the Rights of the Child (CRC)
Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power
Declaration on the Elimination of Violence against Women
Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
Declaration on the Protection of All Persons from Enforced Disappearance
International Convention on Civil and Political Right (ICCPR)
Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)
Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW-OP)
Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (CRC-OPSC)
Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
Safeguards guaranteeing protection of the rights of those facing the death penalty
Standard Minimum Rules for the Treatment of Prisoners
The Bangkok Declaration-synergies and responses: Strategic Alliances in Crime Prevention and Criminal Justice
The Vienna Declaration on Crime and Justice
United Nation Declaration of Basic Principles of Justices for Victims of Crime and Crimes and Abuse of Power
United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules)
United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)

LIST OF ABBREVIATIONS

AG	Attorney General
ALL ER	All England Report
AMR	All Malayan Report
AWAM	All Women Action Malaysia
CLJ	Current Law Journal
CPC	Criminal Procedure Code
DVA	Domestic Violence Act
FPI	Federal Prison Industry
HKL	Hospital Kuala Lumpur
MLJ	Malayan Law Journal
NADRAC	National Alternative Dispute Resolution Advisory Council
NOVA	National Organisation for Victim Assistance
OSCC	One Stop Crisis Centre
PC	Penal Code
PDRM	Polis DiRaja Malaysia
PP	Public Prosecutor
PTSD	Post Trauma System Disorder
SCC	Supreme Court Cases
SSLR	Strait Settlement Law Report
SUHAKAM	Suruhanjaya Hak Asasi Manusia Malaysia
TIVI	Tokiwa International Victimology Institute
UNDHR	United Nation Declaration o Human Rights
UN	United Nation
VIS	Victim impact statement
WCC	Women Crisis Centre
WGPA	Women and Girls Protection Act
WSV	World Society of Victimology
FGC	family group conference
CJC	Community Justice Committee
LNS	Legal Network Series
P	Page

TABLE OF TRANSLITERATION

Á	'
<small>sallallāhu 'alayhi wa sallam</small>	B
ī	T
ū	Th
ḍ	J
ḥ	ḥ
ṣ	Kh
ṭ	D
ẓ	Dh
ʿ	R
'	Z
Ā	S
Ī	Sh

Short vowel	
أ	a
إ	i
ؤ	u

Long vowel	
ا+-'	ā
ي+-'	ī
و+-'	ū

Ū	ṣ
Ḍ	ḍ
Ṣ	ṭ
Ṭ	ẓ
Ẓ	ʿ
<small>raḍiyallāhu 'anhu</small>	gh
<small>raḍiyallāhu 'anhumā</small>	f
<small>raḍiyallāhu 'anhum</small>	q
<small>raḍiyallāhu 'anhunna</small>	k
á	l
ã	m
ä	n
å	h
æ	w
í	y

CHAPTER ONE

INTRODUCTION

1.0 BACKGROUND OF THE STUDY

Rape is an emotionally and physically distressing and traumatic experience for those individuals who fall victim to it. Victims may have been raped by any number of people in any number of various situations. They may have been raped by the police, family members, friends, boyfriends, husbands, fathers, uncles or strangers. They may have been raped over a period of years or months or just once. Rape victims are individuals of either gender and can be women or men, girls or boys, and even just month old infants, but in most cases the victims are girls and women.

Rape victims may react differently to the inflicted trauma which can be suffered a a short term trauma or can evolve into a long term trauma affecting them negatively throughout the rest of their life. By seeking medical treatment, the victim is admitting that physical and/or emotional damage has occurred. Usually, victims of rape will seek immediate help either via medical treatment or by lodging a police report. The criminal justice system needs to become more receptive towards ensuring the rights of rape victims. The various health care providers which exist can support rape victims actively by addressing these concerns and help rape survivors begin their recovery process by providing compassionate, thorough, empathetic and high-quality medical care. The victims' immediate needs have to be provided for, especially their most basic needs in the immediate aftermath of the crime. They also need to be made aware of the setting-specific circumstances that may affect the care provided.

Rape imposes a huge cost on victims, the community, society and the criminal justice system. One of the objectives in criminal justice system is “to reduce crime and the fear of crime and their social and economic loss”.¹ Cost of crime is essentially understood as the far reaching impact of crime on its victims, society and criminal justice. By defining the actual impact of crime in terms of a definite and quantifiable amount of cost, it successively provides avenues to measure the impact of policies drafted aimed at reducing crime and its consequences. This study on the main impact of crime and the relative seriousness of different types of crime is vital in highlighting areas in which criminal policy needs to focus, amend and reform. Cost benefit analysis to measure the effectiveness of the criminal justice system and other associated agencies about the most effective combination of policies to reduce the cost of crime.

Based on the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by the General Assembly Resolution 40/34 issued on 29 November 1985, victims of crime have been officially and legally recognised². The Declaration elaborates that a person may be defined as a victim regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim³. The term "victim" also includes, where appropriate, the immediate family or dependants of

¹ See D Faulkner, *Crime, State and Citizens* (Winchester: Waterside Press, 2001), p. 133. See also A. James and J. Raine, *The New Politics of Criminal Justice* (London: Longman, 1998) and D. Smith, “Less Crime Without More Punishment”, *Edinburgh Law Review*, 1999, Vol 3, p. 296.

² Article 1 of the Declaration defines a victim as “a person who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.” The United Nation Declaration constitutes an important recognition of the need to set norms and minimum standards in international law for the protection of victims of crimes. This definition confirms the guarantees of victims to seek protection under the legal systems. Crime victim refers to “any person, group or entity who has suffered injury or loss due to illegal activity. The damage can be physical, psychological or economic.”

³ The Seventh United Nation Declaration of Basic Principles of Justices for Victims of Crime and Crimes and Abuse of Power, A/RES/40/34.

the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimisation⁴.

The legal definition of victim typically includes a person “who has suffered direct, threatened, physical, emotional or pecuniary harm as a result of the commission of a crime; or in the case of a victim being an institutional entity, any of the same harms by an individual or authorised representative of another entity.”⁵

Besides "primary crime victims", there are also "secondary crime victims" who experience the harm second-hand, such as intimate partners, spouse, parents or children of rape victims or children of battered women⁶. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW⁷) also guarantees the rights of women from discrimination and injustice. The complaint mechanism for the Convention is contained in an Optional Protocol⁸, which was adopted on 6 October 1999.

⁴ Ibid.

⁵ Art 1, The Seventh United Nation Declaration of Basic Principles of Justices for Victims of Crime and Crimes and Abuse of Power, A/RES/40/34.

⁶ For details on the definition of victim, refer to p. 58.

⁷ The Convention on the Elimination of All Forms of Discrimination against Women adopted on 18 December 1979 guarantees the right of all women to be free from discrimination and sets out obligations for state parties designed to ensure legal and practical enjoyment of that right. Although the International Covenant on Civil and Political Rights also contains free-standing provisions for non-discrimination on the basis of gender, the Convention is a specialized treaty that deals with a wide variety of issues arising in this area. The Committee established under the Convention also possesses expertise on issues of discrimination against women. The substantive obligations are set out in Article 1 to 16 of the Convention, comprising Parts I to IV.

⁸ Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW-OP) see also Declaration on the Elimination of Violence against Women Proclaimed by General Assembly resolution 3318 (XXIX) of 14 December 1974.

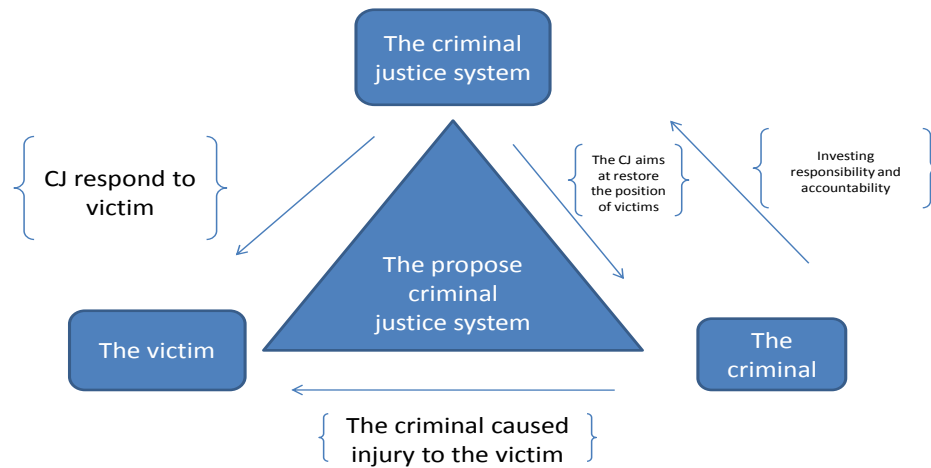


Figure 1.1: Unique relationship between criminal events, criminal perpetrators, crime victims, and criminal justice.

Based on Figure 1.1, the criminal justice system is inter-related with the perpetrator of the crime and his or her victims. However, the system focuses exclusively on criminal persecution and fails to give proper attention to the victim. It is the study of victimology, namely the scientific study of victimisation, which incorporates the relationships between the victim and the offender, the interactions between the victim and the criminal justice system (police and courts) and corrections officials. It also studies the connections between the victim and other societal groups and institutions, such as the media, businesses and social movements. From this definition, we note that victimology encompasses the study of:

- victimisation
- victim-offender relationships
- victim-criminal justice system relationships
- victim and the media
- victim and the costs of crime
- victim and social movements

For the purpose of this research, the focus shall be on issues relating to the victims of rape and the impact of crime viewed from the psychological, economic and emotional angles. The study also addresses the status of rape victims in the criminal justice system, medical examination processes and discusses restorative justice as one of the most viable and successful remedial solutions. The restorative models as part of victimology are discussed in detail in Chapter 8. It is arguable that no amount of money can adequately compensate the victims of crime and/or their families. In the case of homicide, a family may have lost one important member who used to contribute substantially to the family's earnings. This means that the victim's expected earnings throughout the remainder of his or her natural life accumulating to hundred thousands and perhaps millions are irretrievably lost. However, the loss to the victims and their families far exceeds this amount of money. A holistic assessment of the victim's family's losses must take also into account the tremendous emotional pain and suffering and loss of quality of life and other grievances which are born at such an event. The criminal justice system constitutes the only legitimate locus of redress where the victim and/or the victim's family can seek justice. In the case of rape crimes, the victims have suffered physical as well as non-physical injury such as psychological damage and economic loss.⁹ Here, Article 8 of the Federal Constitution appears to guarantee that all victims have equal rights and treatment before the law.

Although there are many victimisation cases in Malaysia, the status and definition of a victim is neither expressly stated in the Federal Constitution nor can a

⁹ The rights of victims are alluded to in the Federal Constitution concerning fundamental liberties. Article 8 on Equality reads;

(1) All persons are equal before the law and entitled to the equal protection of the law.
(2) Except as expressly authorised by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment. Refer to Federal Constitution (Act 000).

definition of “victim” be tracked down in any of its legal provisions. Despite the existence of statutory measures on victim protection such as the Criminal Procedure Code (CPC), the Domestic Violence Act 1994 (DVA) and the Child Act 2001, these statutes provide rather inadequate financial compensation¹⁰ and provide only physical but no emotional, financial or psychological protection. Also, a viable system of reimbursing transportation, issuing allowances and accommodation expenses for victims navigating through the criminal justice systems does not exist¹¹.

Restitution and compensation are considerably the most constructive alternative methods of repaying losses. Under restitution lies the personal responsibility of the offender to pay for the harm the victim has suffered whereas the financial obligation of compensation is shouldered by government-run funds or private insurance companies. Public funds can also be set up and used for this purpose.¹² It is submitted in the context of Malaysia that unfortunately most of the insurance policies do not cover medical trauma and other injuries and losses resulting from crime. For example, the definition of “accident” according to the policy of a popular insurance scheme, *Takāful Ikhlas* is narrowly interpreted and the coverage is very limited. This is most regrettable, particularly since “accident” is here defined as “any event of violent, accidental, external and visible nature which shall, independently of any other cause, be the sole cause of bodily injury”.¹³

Looking into the definition given in most Takaful policies, accident means solely and directly from accidental external violent and visible means (including as the

¹⁰ Section 173A CPC provides that the court may order the offender to pay compensation for injury or for loss (in the form of restitution) not exceeding the sum of RM50 which is such a small amount of money that it belittles the crime in consequence and further humiliates the victim. The other provision of compensation is section 426 (Order for Payment of Costs of Prosecution and Compensation).

¹¹ For a detailed discussion on the Malaysian Law, refer to Chapter 6 and 7.

¹² For more details, kindly refer to Chapter 9.

¹³ Other Malaysian insurance policies contain the same definition of accident. Please refer to ING Insurance Policy at www.ing.com or www.etiqa.com.my.

direct result of exposure to the elements) and does not include sickness, disease, parasite, bacterial or viral infection or any naturally occurring condition or degenerative process.¹⁴ In the eyes of a victim, rape is an accidental event that involves violence to one's physical and emotional well-being.

Rape undoubtedly results in post traumatic system disorder (PTSD)¹⁵ which will normally result in serious trauma and pregnancy. Many insurance policies do not cover pregnancy, eyesight injuries, sexual dysfunction and trauma.¹⁶

In relation to the above, it is well known that tort and criminal law are two different areas. As asserted by Al-Sagoff¹⁷, it is very surprising to see the law compensate the action in tort which is caused by negligence while ignoring compensation in crime whereby most of it is committed intentionally. Crime is understood as an offence against the state while tort is an action of civil wrong. While the prosecution part is handled by the public prosecutor in criminal cases, in tort it would lie with the plaintiff who has to decide whether or not to bring forth an action, i.e. involving the litigants (plaintiff and defendant). The law of tort is defined as “a wrongful conduct done by one human being to another human being, whether deliberately, intentionally or by way of negligence such as battery, invasion to privacy or intentional infliction of mental suffering”.¹⁸ All these kinds of offences, be they considered criminal or tort, cause the same result, namely physical injury, emotional or psychological injury, pecuniary loss and social stigma. It is submitted that crime and especially rape is generally associated with grave and serious injury that ought to

¹⁴ Refer to Etiqa Takaful, Personal Accident Takaful Certificate, Source Malaysian Takaful Association (MTA), at www.mta.com

¹⁵ PTSD stands for Post Traumatic System Disorder. More details are discussed in Chapter 4.

¹⁶ Opted by many insurance policies in Malaysia such as Takāful Ikhlas, ING, Prudential, Takāful Malaysia, Etiqa, etc. Information gathered from a briefing on insurance coverage by insurance groups attended on Friday 4th December 2009, AIBIM, Level 23, Menara Tun Razak.

¹⁷ Al-Sagoff, *Al-diyat in homicide and wounding*, PhD thesis (Kuala Lumpur: IIUM Publications, 2008).

¹⁸ Ibid.

be covered under the definition of accident. Consequently, the insurance policy has no right to exclude the rights of the policy holder in claiming any medical treatment as a result of rape such as miscarriage, pregnancy, HIV infections, abortion, etc.¹⁹

¹⁹ Refer to www.etiqa.commy and www.mta.com. For example Etiqa policy on Personal Accident exclusion clause on the policy holder or known as participants as follows; This Takaful shall not apply to any Event consequent upon or caused by or contributed by or arising from:

1. the Participant committing or attempting to commit any unlawful act; or
 2. the Participant engaging in professional sports, speed contest, racing of any kind (other than on foot), mountaineering requiring the use of ropes or the use of wood-working machinery driven by mechanical power whilst at work;
 3. the Participant engaging in training or performing of any form of martial arts; or
 4. the Participant whilst travelling in an aircraft as a member of air crew or for the purpose of any trade or technical operations or in any other aerial activities except whilst travelling as a passenger over established air routes in a fully licensed aircraft operated by recognized airline; or
 5. the Participant engaging in or taking part in government regular police, arm forces, naval, military operations, air force service or operations or participation in operations of an offensive nature planned or conducted by the civil or military authorities against bandits, terrorists or other elements; or
 6. the Participant engaging in diving, mining, logging, underground works, explosive making or handling or custodians or blasters, gas manufacturing or whilst on duty as a ship crew or fisherman; or
 7. committing or attempting to commit suicide (whether sane or insane), intentional self-inflicted injury, insanity or any attempt threat; or
 8. a complication of pregnancy, childbirth, miscarriage (except accidental miscarriage) or abortion; or
 9. provoked murder or assault; or
 10. the Participant being affected (temporarily or otherwise) by drugs or narcotics unless taken as prescribed by qualified registered Medical Practitioner or alcohol unless it can be established to the Takaful Operator 's satisfaction that alcohol was not a factor contributing to the happening of the Event; or
 11. HIV (Human Immune Deficiency Virus) and/or any HIV related Illness including AIDS (Acquired Immune Deficiency Syndrome (AIDS) and/or AIDS Related Complex (ARC) and/or any mutant derivative or variations howsoever this syndrome has been acquired or may be named; or
 12. traceable to sickness, disease, parasite, bacteria or viral infection even if contracted by Accident; or
 13. anthrax, blood-poisoning, erysipelas, ptomaine-poisoning, pyaemia, septicaemia and/or tetanus; or
 14. any pre-existing physical defect or infirmity; or
 15. any actual or alleged liability whatsoever for any claim or claims in respect of loss or losses directly or indirectly arising out of, resulting from or in consequence of, contributed to or aggravated by asbestos in whatever form or quantity; or
 16. death or disablement directly or indirectly caused by or contributed by or arising from:
 - (i) Loss or destruction of or damage to any property whatsoever or any loss or expense whatsoever resulting or arising therefrom or any consequential loss directly or indirectly caused by or contributed to by or arising from ionising radiations or contamination by radioactivity from any nuclear radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel. For the purpose of this exception combustion shall include any self-sustaining process of nuclear fission.
 - (ii) Any Accident loss damage or liability directly or indirectly caused by or contributed to by or arising from nuclear weapons material.
- Any “act of nuclear, chemical, biological terrorism” (as defined below) regardless of any other cause or event contributing or in any other sequence to the loss.
- For the purpose of this exclusion:
- “Nuclear, chemical, biological terrorism” shall mean the use of any nuclear weapon or device or the emission, discharge, dispersal, release, or escape of any solid, liquid or gaseous chemical agent and/or biological agent during the Period of this Takaful by any person or group(s) of persons, whether acting alone or on behalf or in connection with any organization(s) or government(s), committed for political, religious or ideological purposes or reasons including the intention to influence any government and/or to put the public, in fear.