

The Dilemma of Rape Victims in Malaysia: Could Compensation Award Be a Solution?

Dilema Mangsa Rogol di Malaysia: Bolehkah Penganugerahan Pampasan Menjadi Suatu Penyelesaian?

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ABSTRACT

The crime of rape is very much rampant in the society. It is a cruel form of sexual offence which leads to injuries to the party against whom it was committed coercively. The legal provisions to punish rape offenders are undoubtedly in existence under the Malaysian criminal law. However, these legal provisions are deemed inadequate in protecting the rights of the rape victims who suffered injuries as a result of such horrendous ordeal. This includes the absence of adequate provision which provides monetary compensation for rape victims. This paper aims at analyzing existing legal provisions under Malaysian criminal law. It then identifies the actual legal problem in the form of inadequate legal protection towards injurious rape victims. The paper simultaneously analyzes Syariah criminal principles on rape and diyyah (compensation or blood money in Islamic law). It consequently recommends solutions on how Malaysian criminal law can be amended to implement diyyah as monetary compensation for future rape victims. The paper adopts a doctrinal approach in its legal analysis. All data collected from library research as well as semi-structured interview are analyzed qualitatively and critically. The paper additionally adopts referential method in comparing between the existing Malaysian criminal law and the syariah criminal principles on rape and diyyah. It also uses referential method in suggesting solutions in the form of legal amendments. The paper ultimately proposes the amendment of the relevant provision under the present Malaysian criminal law, paving the way for the implementation of diyyah as monetary compensation for future rape victims.

Keywords: rape; compensation; legal provisions; syariah principles; diyyah

ABSTRAK

Jenayah rogol amat berleluasa dalam masyarakat. Ia merupakan suatu jenayah seksual yang kejam yang membawa kepada kecederaan kepada mangsa yang diperlakukan secara paksa. Tidak dapat dinafikan bahawa peruntukan undang-undang untuk menghukum penjenayah rogol memang wujud di bawah undang-undang jenayah Malaysia. Walau bagaimanapun, peruntukan undang-undang tersebut dianggap tidak mencukupi dalam melindungi hak mangsa rogol yang mengalami kecederaan akibat jenayah kejam tersebut. Ini termasuklah ketiadaan undang-undang yang memadai untuk memperuntukkan ganti rugi kewangan buat mangsa rogol. Justeru, kajian ini berhasrat untuk menganalisis peruntukan undang-undang sedia ada di bawah undang-undang jenayah Malaysia. Kajian ini kemudiannya mengenal pasti permasalahan sebenar dalam bentuk ketidakcukupan perlindungan undang-undang terhadap mangsa rogol yang mengalami kecederaan. Dalam masa yang sama, penulisan ini menganalisis prinsip jenayah Syariah berkaitan rogol dan diyyah (pampasan atau wang darah dalam undang-undang Islam). Seterusnya, kajian ini mengesyorkan penyelesaian tentang bagaimana undang-undang jenayah Malaysia boleh dipinda untuk melaksanakan diyyah sebagai pampasan kewangan kepada mangsa rogol pada masa hadapan. Penulisan ini mengambil pendekatan doktrinal dalam penganalisisan undang-undangannya. Semua data yang dikumpul daripada penyelidikan perpustakaan serta temu bual semi-struktur dianalisis secara kualitatif serta secara kritis. Penulisan ini juga mengguna pakai kaedah rujukan perbandingan dalam membandingkan antara undang-undang jenayah Malaysia yang sedia ada dengan prinsip jenayah syariah mengenai rogol dan diyyah. Ia juga mengguna pakai kaedah rujukan perbandingan dalam mencadangkan penyelesaian dalam bentuk pindaan undang-undang. Penulisan ini akhirnya mencadangkan pindaan terhadap peruntukan berkaitan di bawah undang-undang jenayah Malaysia sedia ada, sekali gus membuka jalan bagi pelaksanaan diyyah sebagai pampasan kewangan kepada mangsa rogol pada masa hadapan.

Kata Kunci: rogol; pampasan; peruntukan undang-undang; prinsip syariah; diyyah

INTRODUCTION

The news in Malaysia nowadays often revolves around the crimes of sexual violence and abuse. Not long ago for instance, a Malaysian father was sentenced by the Session Court of Muar to 702 years of imprisonment alongside 234 strokes of rotan after being proven guilty for 30 counts of rape and sexual assaults against his own little daughters (Bernama, 2023). Indeed, there are many similar cases on rape and incest that have been reported over the years. Sexual cases of such nature are very much alarming as it concerns the safety of every woman. Evidently, sexual assaults are very much rampant these days, especially involving the offence of rape. Such heinous sexual violence is committed non-consensually towards a person and could be regarded as a violation of the victim's dignity.

According to the recent Crime Statistic Report released by the Department of Statistics Malaysia (DOSM), sexual offences cases have recorded an increase of 2.9% from 2021 to 2022. Amongst all crimes within the ambit of sexual offences, rape was recorded to have the highest increase of 10%, from 1,553 cases in 2021 to 1,712 cases in 2022 (DOSM, 2023). As can be seen from the news and data, any random woman could become rape victims. Shockingly, there have also been rape cases involving the perpetrator's own family members as victims.

It is however crucial to note that despite the rampant nature of such crime, its horrendous effects on rape victims are seldomly addressed. In actual fact, it is never easy for rape victims to recover from the traumatizing experience and violence. Majority of them, if not all, suffered from injuries physically and emotionally. Such injuries include sexual dysfunction, suicidal thoughts, post-traumatic stress disorder and depression (Zubaidah, 2011; Anish et.al, 2022). Some of them cannot even work anymore due to the injuries suffered in consequence of the incident, leading to loss of income (Aida, 2017; Asmadi, Fahmi & Norillah, 2021).

Needless to say, rape falls within the ambit of federal criminal law and it is being criminalized under the Malaysian Penal Code. The current crime of rape under the Penal Code carries a grievous punishment of 20 years of imprisonment in maximum as well as whipping. Nonetheless, the above-said provision is merely punishing the offender rather than providing due legal remedy to the rape victims who have tremendously suffered from the crime committed. In other words, the laws do not provide any punishment against the rape offenders that will adequately compensate rape victims for the injuries suffered. Even though there is a general existing provision for compensation under the Criminal Procedure Code, numerous issues have been raised in the past in respect of its inadequacy, especially since it has never been applied by the Malaysian courts in granting compensation for rape victims (Mazlina & Umar, 2014).

Numerous proposals have previously been brought up by academicians and practitioners in the legal fraternity in providing better safeguard for rape victims. This includes the establishment of the Victim Compensation Scheme with cooperation with the ministries in order to financially aid and mentally support rape victims in the continuation of their life (Ismail, 2017). Nonetheless, the effectiveness of this scheme is very much in doubt.

METHODOLOGY

The paper adopts a doctrinal approach in its legal analysis. As a whole, all data collected from library research as well as semi-structured interview are qualitatively and critically analyzed (Kamel, Adibah & Azhan, 2021; Creswell, 2022).

The paper strives at achieving a four-fold objectives. First of all, it aims at analyzing existing legal provisions under the Malaysian criminal law. Secondly, it identifies the actual legal problem in the form of inadequate legal protection towards injurious rape victims. Thirdly, it analyzes syariah legal principles on rape and diyyah. Finally, it recommends solutions on how the Malaysian criminal law is to be amended in proposing and implementing diyyah as monetary compensation for future rape victims.

In achieving the above four objectives, a doctrinal approach is adopted by collecting data and materials as well as information via a library research (Ain, Azam & Azhan, 2024). Relevant legal provisions in the Penal Code and the Criminal Procedure Code, criminal cases as well as books, articles in journals, internet, academic websites as well as online newspapers on the crime of rape are gathered. Simultaneously, syariah sources containing rape and diyyah in the forms of Quranic verses and Hadith as well as other written sources are obtained and gathered. In addition to the above doctrinal method, a semi-structured interview was also conducted on a respondent, a Deputy Public Prosecutor in the sexual offenses department in the Sessions Court of Johor Bahru, who is also equipped with a Syariah background. All data obtained from the library research and the said semi-structured interview are then analyzed qualitatively (Hezzrin et.al, 2023).

In conducting this research, the method of critical analysis is adopted. The existing Malaysian legal provisions, case laws and other data and materials revolving rape are critically analyzed. Additionally, all syariah principles on rape and diyyah are critically analyzed too. The issue and question of whether or not the doctrine of diyyah be immersed and adapted into the current Malaysian legal provisions on rape to allow rape victims to be monetarily compensated under the Malaysian criminal legislation are critically analyzed as well.

The paper also adopts referential method in its analysis. Such method is adopted in comparing between the existing Malaysian criminal law and the syariah principles on rape and compensation. It simultaneously adopts referential method in suggesting some solutions in the form of legal amendments.

DISCUSSION AND FINDINGS

Inadequate legal safeguard for rape victims in respect of the injuries suffered during the ordeal has been identified as the legal problem here. It has in fact been judicially accepted by the Malaysian courts that rape is a serious crime that causes physical, mental and psychological damage and trauma (Janet & Azmawaty, 2024). As the analysis unravels, it is evident that the current provision fails to protect injurious rape victims adequately. It fails to provide adequate legal protection towards injurious rape victims as there is insufficient legal recourse for these victims to seek for monetary compensation. The above legal problem in which there is insufficient legal recourse for rape victims in Malaysia to seek for monetary compensation yields the following discussions and findings:

REALITY OF CURRENT APPLICATION OF MALAYSIAN CRIMINAL LAW ON RAPE

The Malaysian laws that govern for rape offence falls under Section 375 of the Penal Code. The section reads as follows:

A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the following descriptions:

- (a) against her will;
- (b) without her consent;
- (c) with her consent, when her consent has been obtained by putting her in fear of death or hurt to herself or any other person, or obtained under a misconception of fact and the man knows or has reason to believe that the consent was given in consequence of such misconception;
- (d) with her consent, when the man knows that he is not her husband, and her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married or to whom she would consent;
- (e) with her consent, when, at the time of giving such consent, she is unable to understand the nature and consequences of that to which she gives consent;
- (f) with her consent, when the consent is obtained by using his position of authority over her or because of professional relationship or other relationship of trust in relation to her;
- (g) with or without her consent, when she is under sixteen years of age.

Explanation - Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception - Sexual intercourse by a man with his own wife by a marriage which is valid under any written law for the time being in force, or is recognized in Malaysia as valid, is not rape.

Explanation 1 - A woman-

- (a) living separately from her husband under a decree of judicial separation or a decree nisi not made absolute; or
- (b) who has obtained an injunction restraining her husband from having sexual intercourse with her, shall be deemed not to be his wife for the purposes of this section.

Explanation 2 - A Muslim woman living separately from her husband during the period of 'iddah, which shall be calculated in accordance with Hukum Syara', shall be deemed not to be his wife for the purposes of this section.

Section 375 provides for situations where an action can be considered as rape, to which one of the situations involved the fear of injury to the victims. It is also worth noting that the punishment for an offender convicted for rape as prescribed under Section 376 of the Penal Code is an imprisonment for a term of not less than five years and not more than twenty years. Not limited to that, a rape offender shall also be liable to whipping. Such punishment clearly depicts the grievousness of the offence. Nonetheless based on the case laws that have been heard in the court of laws in so far as the offence of rape is concerned, the court has never ordered a convicted rapist to pay compensation to the rape victims (Aida, 2017). This is evident from the recent rape cases.

To enlighten this matter, it is prudent to firstly examine Section 426 (1A) of the Criminal Procedure Code, hereinafter referred to as the CPC, which could be opted by the rape victims to obtain compensation. Section 426 (1A) of the CPC reads:

(1A) Without prejudice to subsection (1), the Court before which an accused is convicted of an offence shall, upon the application of the Public Prosecutor, make an order against the convicted accused for the payment by him, or where the convicted accused is a child, by his parent or guardian, of a sum to be fixed by the Court as compensation to a person who is the victim of the offence committed by the convicted accused in respect of the injury to his person or character, or loss of his income or property, as a result of the offence committed.

The above section 426 (1A) provides the court with the discretionary power to award compensation to any victim from the offence committed by the convicted accused for any injury caused to the person or character, or his income or property loss which resulted from the offence committed. It can be opted upon an application made by the Public Prosecutor and is discretionary in nature subject to the finding of guilt of the accused person. In other words, a conviction shall be made first by the court before allowing for any amount of money to be made as monetary compensation in favour of a victim, like a rape victim as in our case.

In exercising its discretion, the court shall consider several factors before ordering the convicted accused to pay compensation to the victims. Firstly, the court shall consider the nature of the offence, the nature of the injury sustained by the victim, the total of expenses incurred by the victims, the damage of loss of property or income suffered by the victim, the ability of the convicted accused to pay the said compensation and any other factors deemed relevant by the court to be considered. Therefore, it can be seen here that the laws governing the compensation right of a victim are discretionary matters. It will be very much dependent on the court hearing the rape case to assess and finally order for the convicted accused to pay compensation to the victims.

It is also worth noting that the victims are still not deprived of their right to resort to civil suit in the civil court. This is in fact a better option according to some as the victims can demand for certain sum of money as much as she thinks she deserved due to the injury and any loss or damage that she suffered from the rape. This situation is very much different from the discretion of the court to grant compensation as stipulated under Section 426 of the CPC which is relatively considered as too low in comparison to the injury and damage sustained by the victims.

As convincing as it sounds, this provision, however, has never been applied by the court in any rape case so far. As such, this provision fails to adequately provide justice for rape victims (Mazlina & Umar, 2014). In fact, Section 426 of the CPC has sometimes been applied in other criminal cases in which the court award very minimal compensations. For instance, in a murder case of *Pendakwa raya lwn Low Lu Keng*, the court ordered the respondent to pay RM10,000 as compensation to the deceased's widow pursuant to Section 426 of the CPC. In this instance, the amount of compensation awarded is clearly too minimal and inadequate for such a grievous offence like murder.

Yet it is worth noting that this compensation can only be claimed against the accused person that has been convicted and punished under the legal provision as decided by the court in *Pendakwaraya lwn Ng Tiak Chuan*. In other words, even if the offence is committed but the accused is acquitted on technical ground, the court cannot exercise its discretion to order for compensation payment to the victims. This is another downside of the said provision other than it being discretionary in nature.

Some argue for the victims to resort to civil suits in order to obtain tort remedy for the injury sustained as provided under Section 426(4) of the CPC (Zubaidah, 2011). This is due to several factors such as the fact that a civil suit can be brought against an accused regardless of whether or not he is acquitted from the offence in the criminal prosecution. To add on, the rape victim can also act against any third party for the injury that she sustained. However, such action will depend on the ability to prove the legal duty owed by the third party to the victim and that there has been a breach to such duty. From a certain spectacle, civil proceedings will offer a better prospect in respect of financial remedy for the victim rather than the one provided under Section 426 of the CPC. It is also worth noting that opting for a civil suit is easier too due to the fact that its standard of proof is lower than that of a criminal case (Mazlina & Umar, 2014).

However, it shall also be borne in mind that any civil suit will definitely incur extra cost and time for the victims in order to secure what she is actually entitled to in respect of the injury that she suffered in the rape ordeal. She will have to undergo her traumatizing experience to make a fresh civil suit in the civil court just to claim for her own right. Plus, there is no civil cases that have ever reported a rape victim claiming for compensation in the civil court, making the revenue to not be utilized as it should (Rozilawati, 2010).

It is to be noted that both remedy under Section 426 of the CPC as well as the civil suit are inadequate and lacking in safeguarding and providing due justice to the rape victims. Section 426

is ineffective as the judicial power to award minimal compensation is only discretionary and have not been applied so far in any rape case. On the other hand, the extra mile that rape victims need to endure in fighting for their rightful rights of securing a deserved monetary compensation would render such alternative legal option ineffective as well. In the light of the above legal inadequacies, there is a need to find another legal solution which would enable rape victims to seek for monetary compensation for their own justice and redemption.

This paper strives at analyzing and comparing the present conventional criminal system with that of the syariah principles on rape and diyyah. The purpose of coming up with such analysis is to look into possibilities of adopting and incorporating the syariah principles of monetary compensation or diyyah into the present conventional criminal law in allowing rape victims to be legally compensated monetarily.

SYARIAH CRIMINAL PRINCIPLES ON ZINA, RAPE AND DIYYAT

The crime of rape as well as the principle of diyyah have their own basis in the Shariah regardless of the fact that compensation for rape victims is not specifically mentioned under the primary source. Yet, it can however be derived from several Shariah principles. It is firstly crucial to understand the standing of rape under the Islamic criminal law. Beginning from the Quran, in surah Al Isra' verse 32, Allah SWT mentioned:

"Do not go near adultery. It is truly a shameful deed and an evil way."

This Quranic verse stipulates the prohibition of Shariah on the crime of zina i.e. adultery or fornication. Zina can generally be defined as a consensual sexual intercourse between a man and a woman outside wedlock. In surah An Nur verse 2, Allah SWT provided the punishment for zina:

"As for female and male fornicators, give each of them one hundred lashes"

The punishment for such consensual illegal sexual intercourse is clearly mentioned in the Quran. However such offence and punishment are only related to consensual sexual intercourse.

The syariah criminal principle differentiates the above crime of zina from that of the offence of rape. Rape, or otherwise known as *jināyah 'alā rakibah al mar'ah* (crime against the woman), *ifdā'u al mar'ah* (causing physical rupture to a woman), *zinā bi al ikrāh* (forcible sexual intercourse), *ighṭisāb al unthā* (female rape) and *zinā bi al jabr* (coerced unlawful intercourse) (Rozilawati, 2010) is defined as a coercive form of illegal sex or fornication (Hajar, 2014). The point of difference between zina and rape is with regards to the element of coercion that exists in rape in contrast to zina which is done by mutual consent of both parties (Nala, Sutisna & Hambari, 2023). It follows that the syariah punishment on rape somewhat differs from that of zina. This could be seen from two perspectives. Firstly, in the offence of rape, only the rapist is to be convicted upon sufficient proof whilst the rape victim will be protected from conviction and punishment due to being coerced. This can be seen from the practice of the Prophet as well as the sahabah in various instances. For example, Rasulullah SAW in a hadith has punished the rape offender with hudud but has released the woman who was coerced to the sexual intercourse. Similar practice was done by Khalifah Abu Bakar as-Siddiq and Umar al-Khattab when sentencing punishment in rape cases. In some instances, compensation was also awarded by the Caliph to the rape victim (Hina, 2013). This indicates that a rape victim is not to be treated similarly as a woman who committed adultery. In such an instance, she stands as a helpless victim as she is forced to

submit herself to such sexual conduct against her will, resulting in the absence of mens rea in her action (Azhan, Muqri & Datu, 2023).

Secondly, some Sunni ulama', such as Ibn al-'Arabi (1958) and Ibn Hazm (1988), contend that the punishment on the convicted rapist should be heavier than that of the punishment of the regular zina. Such argument is of course contentious among the Sunni school of thought. The Sunni ulama' who are in favour of a heavier punishment for rape based their arguments from the following Quranic verse and Hadith of the Prophet SAW. Allah SWT says in al Maidah, verse 45:

"We ordained them in the Torah, "A life for a life, an eye for an eye, a nose for a nose, an ear for an ear, a tooth for a tooth—and for wounds equal retaliation (qisas)." But whoever waives it charitably, it will be atonement for them. And those who do not judge by what Allah has revealed are 'truly' the wrongdoers."

In al Nisa', verse 92, Allah SWT further says to the following effect:

"And whoever kills a believer by mistake - then the freeing of a believing slave and a compensation payment [diyyah] presented to his [i.e., the deceased's] family [is required], unless they give [up their right as] charity."

In a hadith narrated by Abu Hurairah, Rasulullah SAW said (An-Nawawi, n.d., Hadith No. 1527):

"The blood, property and honor of a Muslim is inviolable for another Muslim"

While both Quranic verses and the subsequent Hadith stipulates on qisas, it has always been argued by the proponents that the offence of qisas draws some striking resemblance and similarities with rape. Indeed, the above Hadith explains that blood, property and honor are protected and thus should not be transgressed on. Indirectly, it could be deduced that like in qisas offences, any form of transgression and violation on one's physical body and decency, such as in rape, should also be criminalized and punished. This is because, rape is a crime that caused injury or *jirah* to its victims due to the coercion of the sexual intercourse against the will of the woman. However, since the *jirah* here is inflicted on the female reproductive organ which is non-existent on the male offender, the convicted rapist will be liable to compensate the rape victim through the payment of diyyah. Hence, the punishment of diyyah or monetary compensation should be made available as an alternative punishment (Qusairi, Ruzman, & Zaidi, 2021), a view which is agreed upon by the scholars from Shafie (Rozilawati, 2010).

What is, then, the amount of diyyah that should be inflicted upon the convicted rapist as the said monetary compensation? The Shariah principle for this matter can be derived from the letter written by Rasulullah SAW to 'Amr bin Hazm when he was appointed to represent Rasulullah SAW in Yaman, whereby Rasulullah SAW has explained the fixed amount of diyyah as the following (*Sunan An-Nasai*, Hadith No. 4853; An-Nasai, n.d.)

"The blood money for a life is a hundred camels; that full blood money must be paid for the complete cutting off of a nose, eyes, the tongue, the lips, the penis, the testicles and the backbone; that for one foot half the blood money must be paid, for the wound in the head a third of the blood money, for a thrust which penetrates the body a third of the blood money, for a head wound which removes a bone fifteen camels, for each finger and toe ten camels, for a tooth five camels, and for a wound which lays bare the bone five camels."

The full amount of diyyah based on the letter is 100 camels whilst the amount of diyyah for a thrust which penetrates the body is a third of the blood money i.e. one third of 100 camels (Zubaidah, 2024). This body part is also known as *ja'ifah* in Shariah. The bodily part of *ja'ifah*

shall also include a woman 's reproductive organ injured in rape, entitling her for one third of diyyah. This view is also supported by Ibnu Qudamah from Hanbali school (Rozilawati, 2010).

Nevertheless, if the injury from the rape is not to the whole organ, or if the loss of function of the sexual reproductive organ is difficult to be evaluated by the judge, then special formula of assessment shall be undertaken. This assessment is known as *hukumat al-adl*, whereby the appropriate compensation for the victim is to be made by expert opinion (Aisyah, 2020). This view is also supported by the scholars from Hanafi school. In such a situation, it would be up to the government (ulul amri) to determine the amount of diyyah entitled for rape victims. The enactment of such rape offence, together with the said diyyah punishment by ulul amri are actually based on the principles of masalih al mursalah and siyasah syar'iyah due to its violence and rampancy (Mushtaq, 2014).

In determining the amount to be awarded to a rape victim, the Shariah principle of darar is also very much relevant. This is at par with the qawaid al-fiqhiyyah, whereby one of the five methods of jurisprudence under the qawaid al-kubra which means harm must be removed. This qawaid is based on the hadith (Ibn Majah, n.d., Hadith No. 2340):

“There should be neither harming nor reciprocating harm”

In the context of rape victims, the harm that have been inflicted against them shall definitely be removed and eliminated (Mek, Naimah & Saidatolakma, 2020). The judge, when determining the actual award of monetary compensation or diyyah, shall carefully examine the extent of harm suffered by a rape victim. In the light of the dharar principle, it must be ensured that the monetary compensation awarded to the rape victim is sufficient to restore her loss due to the darar from the rape offence committed against her. This is also in line with the qawaid al-fiqhiyyah which means the policy and action of a ruler on his subjects is bound by the maslahah. This means that the ruling and order of the judge shall always be made based on the maslahah of the society. Similarly, as in rape cases, the order in granting of monetary compensation shall be based on the maslahah of the rape victims and the public as a whole. Consequentially, the amount of diyyah or monetary compensation to be awarded should vary from one rape case to the other, depending on the extent of injuries suffered by the victims due to the rape offence committed against them (Halim et.al, 2022).

By ordering a rape offender to pay certain amount of monetary compensation to the rape victim, one might argue that such act is as if committing a darar to the rape offender. Nonetheless, it is worth mentioning that there is another qawaid that inflicting specific darar on the rape offender is very much necessary to save several other future rape victims in the society which ought to be the bigger and more substantial darar here. Indeed, it is in fact an act of committing the lesser evil (Murshidi & Noraini, 2022).

FORCEABLE CHALLENGES IN THE IDEA AND IMPLEMENTATION OF MONETARY COMPENSATION FOR RAPE VICTIMS

Hence, this article is proposing for the Islamic criminal law principle of diyyah to be incorporated under the laws as the foundation to ensure that every rape victim is duly compensated monetarily for the injuries that were suffered. This will at the same time provide an additional punishment to the rape offender.

However, there are several arising issues that are crucial to be analysed in so far as proposing diyyah as monetary compensation for rape victims is concerned. The first issue is in

respect of whether the offence of rape falls within the ambit of hudud or takzir. This issue is pertinent to be determined so as to see whether diyyah can be implemented to be the additional punishment for a rape offender in order to ensure that the rape victims are equipped with the rights to obtain monetary compensation for the injuries suffered from the rape.

Not limited to that, it is also crucial to observe within this ambit as to whether the existing laws under the Malaysian legal provision, specifically the Criminal Procedure Code, in respect of compensation or the alternative civil suit is sufficient and adequate to compensate the rape victims for the injuries that she suffered as a result of the rape. At this juncture, the relevant legal provisions and case laws will be reviewed to examine the current practice in Malaysia so far as the right of the rape victims to compensation is concerned.

This issue arises due to the nonexistence of any case law that ever-applied Section 426 of the Criminal Procedure Code in respect of rape cases. Even in cases where the victim suffered from tremendous trauma, such compensation was never granted by the court. This is evident based on the case of *Che Mohd Sufian @ Che Bastian bin Che Rashid v Public Prosecutor*, despite the multiple injuries as well as trauma suffered by the rape victim here in consequence of the rape, the High Court did not award any compensation to the victim.

Besides that, another crucial matter to be deduced is with regards to the execution of the proposal to implement diyyah as compensation to the rape victims. Several issues arise at this juncture. Firstly, is on the value and amount of diyyah to be paid to the rape victims, is the value of diyyah fixed for every case based on the amount stated by Rasulullah SAW in the letter to Amr bin Hazm, or the amount shall differ from case-to-case basis.

Under this issue, it is also pertinent to analyse the types of compensation to be granted to the rape victims based on the categories of injuries suffered. The next aspect to be delved into is on who shall be the party obliged to pay the diyyah to the rape victims in order to ensure that the amount of the diyyah compensation reached her without any obstacles on the part of its execution.

RECOMMENDATIONS

The paper proposes for the syariah principle of diyyah to be incorporated into the current legal provision under the Malaysian criminal law. It should be deemed compulsory for rape victims to be monetarily compensated under the modern criminal law. The basis for such argument and proposal has been derived from the Shariah principle of zina bil ikrah and diyyah (Qusairi, Ruzman & Zaidi, 2021). This is pertinent so as to aggravate the punishment that is to be borne by a convicted rapist which will eventually provide better deterrent. Such punishment would also allow rape victims to be fairly and substantially compensated after going through such traumatic experience.

Hence, a due recommendation shall be proposed in order to ensure justice is served to the rape victims by awarding them monetary compensation. Previously, there were a number of proposals made by various entities to safeguard the right of the rape victims in Malaysia. This includes the establishment of several anti-rape task force NGOs such as the All-Women's Action Society (AWAM), the Women's Centre for Change, the Sisters in Islam, and the Women's Aid Organization (Aida, 2017). However, despite their existence in Malaysia, there is no due mechanisms executed to properly protect the rights of rape victims in Malaysia.

There were also schemes that were introduced to cater to the issues pertaining to rape victims in Malaysia. Firstly is the scheme for victims compensation by a special statutory body as

implemented in the Western countries. This body will administer and arrange for financial assistance in respect of the rape victims in accordance with the procedure. Nonetheless, there are a lot of difficulties in its implementation as it incurs higher cost as well as a complex bureaucracy throughout the whole process. Another suggestion is to implement a scheme from a special takaful fund which is to be paid by the government or corporate bodies (Sadad, 2021).

Nonetheless, this suggestion might raise an issue regarding its implementation as not all takaful participants will consent to the fund been used to pay for rape victims' compensation. Despite it being seen as a commendable action on one hand, it is however a sort of financial assistance to the rape offender on the other as such scheme will help him in fulfilling his punishment liability and such proposal should not have been allowed. This is due to the fact that the concept of compensation being a punishment against the rape offender will be diminished if the convicted rapist is assisted in the payment of monetary assistance via such scheme. A firmer approach is very much needed to ensure that every rape victim in Malaysia is duly compensated for every injury suffered as a result of the rape.

Therefore, this paper suggests that the existing rape punishment under Malaysian Penal Code should be amended as the current punishment of 20 years imprisonment as well as whipping are clearly insufficient due to Section 426 of the CPC not being applied by the judge due to its discretionary nature. Even if the court is to apply the said provision, only a minimal compensation would be awarded. As such, section 376 of the Penal Code should be amended to include monetary compensation as a mandatory order to be ordered by the court against convicted rapists unless the execution is stayed pending appeal. By proposing for such provisional amendment, monetary compensation based on the principle of diyyah can be duly incorporated under the law so as to cater and protect the rights of the rape victims in Malaysia. It will also concurrently serve as a deterrent to rape offenders.

On the issue of amount of compensation, the amount to be granted by the court for the compensation will all be based on the principal of diyyah. The amount will be in accordance with the amount stipulated by Rasulullah in the letter to Amr bin Hazm. If the injuries or darar are extended to other organs, or if it goes beyond the physical injuries, then due consideration shall also be given by the judge in determining the amount to be paid. Basically, if the rape victim sustains further injuries, then the appropriate amount of monetary compensation should be granted. The most suitable medium of payment is in accordance with the current market value of gold.

As for its execution, it will be based on the principle of 'aqilah, whereby the offender, upon being convicted of rape, will have to pay the whole amount of monetary compensation towards the rape victim. The full amount shall be settled first before the money could be transferred to the victim. Overall, enforcement of such monetary compensation should be accompanied by a sound application in ensuring its smooth-running (Rozilawati, 2010).

CONCLUSION

In conclusion, rape is a horrendous sexual offence committed against the victim's consent. It is most definitely a transgression on one's intimate decency and dignity. The existing approach via NGOs and external schemes are insufficient as it does not provide a guarantee to the execution. Hence, the matter shall be catered from root which is via law amendment. The existing legal provisions and practices concerning the compensation are very much lacking, prompting for a

better approach to be taken. Indeed, there is a dire need to implement a more comprehensive method for monetary compensation in respect of rape victims in Malaysia.

As such, this paper suggests that the current law be amended to allow the award of monetary compensation to rape victims in Malaysia. Such a suggestion finds its basis in the syariah criminal principles of rape and diyyah. Such a suggestion is very much holistic as it provides not only for the entitlement of compensation for rape victims injured as a result of rape, but also in respect of its amount and execution. In fact, the sequence of every darar shall also be considered by the judge, making the system to be so comprehensive and complete.

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AUTHOR'S CONTRIBUTION

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