

Constructing Some Possibilities for Compensation as Part of Legal Remedies for Rape Survivors: The Case of Malaysia

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Abstract

The idea of compensating rape victims is fast gaining momentum around the globe amidst the cry to seek justice for crime victims in general. Several NGOs in Malaysia see the importance of setting up an agency to response to the plight of these women. The law is seen as inadequately responsive towards the victims. Even by imposing stiffer punishment on the rapists, this does not bring any good to the victims. Some are left with various physical injuries, contracting sexually-related diseases and unwanted pregnancy, but almost all find it hard to overcome the psychological trauma, the effects that are more difficult to recognize than physical hurt. This study examines why compensation for rape victims is significantly necessary after the incident. The writer is of the opinion that compensation is one of the reparation possibilities and the relevant authority should not overlook the compensation probability to address the plight of the victims.

Keywords: Compensation, rape, rape victims, restitution

1. Introduction: Proposing Compensation

Cases where a girl was raped and murdered is not something that is unheralded in Malaysia. In the year 2000, when Noor Suzaili Mokhtar died out of that heinous crime, it shocked the whole nation. Even if the case settled with the death sentence received by the perpetrator, the wound and suffering remain with the family. Nine years after that, when Nurin Jazlin Jazimin, a 9-year old girl with asthmatic problem was raped, sodomised and brutally murdered in 2009, the public became outrageous and many questions lingered in minds, were left unanswered. One and a half years later, the case has become "a cold file". The police admitted that they reached a deadlock with this case. In a case like this where justice is yet to be seen, one wonders whether, the dead girl and her family will be able to rest in peace. While crime investigation is under the police duty, the victim's family is seen to be at the losing end: left alone and forced to wait for the outcome of the investigation. The 'failure' merely left the family with depression and double loss. In a case where the victim is not dead but continue to suffer from various kinds of injuries, the trauma and after-effect are always there to swallow.

The general idea of compensation for victims of crime should be approached as a general issue instead of being for specific victims such as rape victims. At the same time, the idea of compensating rape victims is not new, in fact it has gained a momentum around the globe. Several NGOs in Malaysia see the importance of setting up an agency to response to the plight of these women. In September 2003, they submitted a *Memorandum on Laws Related to Rape: Proposals for Amendments* to the government. NGOs involve with Anti-Rape Task Force are All Women's Action Society (AWAM), Women's Centre for Change, Sisters in Islam, Women's Aid Organization and Protect and Save the

Children. In 2004, a memorandum was presented to the Select Committee on Penal Code (Amendment) 2004 and Criminal Procedure Code (Amendment) 2004 suggesting few changes to make way for some legal amendments. They called themselves Joint Action Group Against Violence Against Women (JAG). One of the suggestions in the Memorandum is to set up a body dealing with compensation for rape victims or their family. This was later supported by the National Commission of Human Rights (SUHAKAM), however, when tabled in the Parliament, it was welcomed with sceptical and negative reactions. (Oral Answer for Questions regarding Compensation for Crime Bill in the 9th Parliamentary Debate, 3rd Term, 1st Meeting, Vol.3, No.18, 24th April 1997 at <http://www.parlimen.gov.my/hindex/pdf/DR-24-04-1997.pdf> (22nd Feb 2011)).

2. Rape Incidents and its Familiar Response

In rape cases, reported with increasing frequency in the media, the focus of public outrage is on the brutality of attack, the age of victim and the inability of the police to apprehend the suspect. When involving child victims, the attention also includes the failure of the family to protect her daughter (Ewing, 2003:54-60). Many studies on rape victims usually focus on legal, clinical and social responses (Campbell, 2008; Koss, 1999; Birt, 1991), including how attitudes towards women in different societies, cultures and religions influence the reactions towards rape incident as well as attitude towards women (Shalhoub-Kevorkian, 1999). While it is generally true that raped women received help, the incidents of rape itself has both acute and long term physical and psychological effects on the them. Many rape victims suffer varying degrees of mental health consequences, the effects that are more difficult to recognize than physical trauma. Psychological responses to trauma in the immediate and longer term include feelings of powerlessness, worthlessness, and self disgust, as well as depression, suicidal thoughts, post traumatic stress disorder, sexual dysfunction, social phobia, and recurrent feelings of shame (Weiss, 2010; Koss & Harvey, 1991). In many occasions, no injuries incurred because life was at stake with threatening knife at the neck (Rees, 2010:371). However, when the victims fought back and struggled, they may also incur physical injuries including scratches, bruises, knife wounds or even broken bones. Such aggravated injuries proves that rape could result more than mere invasion to the private part by way of penile penetration, which is said to be sufficient to constitute the sexual intercourse necessary to the offence of rape. In some cases, the penetration was not penile but with objects. Thrusting blunt object, inserting fingers and so on into the vagina, when not recognized as rape according to law, gives a perception that the impact they have on their victims are ignored. From the victim's perspective these other acts are no less if not more, violent and traumatic than penile penetration. Among many cases highlighted in the media for the past five years or so, was where a 10 foot pole was thrust into the vagina of a school-girl, Nurul Hanis Kamil. In another case, a victim was sodomised, sexually and physically assaulted, and brutally strangled to death. Not only physical consequence, victims are also at risk for contracting sexually-related diseases, or they might also find themselves pregnant.

In some societies, rape myths are used to respond to the plight. 'Rape myth' refers to, among others, a false belief used mainly to shift the blame of rape from perpetrators to victims (Burt:1991:26). Many studies have shown that victims are blamed by society for 'contributing' to the rape occurrence (Capezza & Arriaga, 2008; Simonson et.al, 1999), while others find that rape survivors often feel and believe that they are being blamed by society for the occurrence of the sexual assault, because of: seductive-dressing, resistance rather than remain passive, intoxication, possessing suggestive condom and many more. These are all despite the fact that they suffered from psychological consequences. It becomes double sufferings. Therefore, response toward rape occurrence demands an all-rounding attention from many parties to assist rape victims in dealing with the traumatic episode. Having understood the implication and the plight of the victims, this paper suggests another important venue to assist rape victims, that is monetary compensation.

3. Arguments in Support of Compensation for Rape Victims

The idea of compensating rape victims and others in general is not new. Many countries, including the United Kingdom, Northern Ireland, United States, Canada and Australia had already established a non-profit organization called Criminal Injuries Compensation Board (Chan,2007). United Kingdom first started the compensation scheme for crime victims in 1964. This scheme, known as *The Criminal Injuries Compensation Scheme* is a corporate body administered by Criminal Injuries Compensation Board. This board determines the fate of the application, make assessment, and determine the value of losses and finally pay the approved applicants.(Miers,1997). On 1st of April 1994, the government had introduced a fixed tariff comprising values for more than 186 types of injuries. The value is as low as £1,000 to a whopping £250,000 according to Section 108 (1) and (2) Criminal Justice Act 1988.

Apart from CICS, victims can also gain compensation either through a civil action or personal insurance. In Northern Ireland for example, victims do not have to apply for compensation while the proceeding is taking place. The court will ask the accused to pay for her after his conviction, based on the *Criminal Justice Order 1994* (Northern Ireland). In the United States, many centres like *Rape Crisis Center of Catawba County*, *Crossroad Sexual Assault and Response Center* and *North Carolina Coalition Against Sexual Assault* not only provide with compensation to deal with medical cost, but also other types of assistance like counseling and legal advice.

Even the International Criminal Court (ICC) has been suggested to consider the plight of the victims of sexual violence and give a special concern (De Brouwer,2007). On the general part, the United Nation, since 2006 has been promoting justice for victims and had come out with a draft called UN Convention on Justice and Support for Victims of Crime and Abuse of Power. There are many reasons given as to why the government should carry the burden instead of the offender, among them, are "*as a tangible expression of the state's sympathy and concern for those who, through no fault of their own suffer unjustifiable invasions of their personal integrity*" and "*because states is not doing enough to prevent crime*" (Veitch & Meirs, 1975:150). At the same time, with organization like this, not only that the justice is done for victims, but also guaranteed. Without so-called "protection", they have to go through on their own seeking compensation under various causes of action which take long time to settle. For real rape victims, the traumatized episode could stay throughout their lives.

In general, there are many arguments for and against setting up a proper board, agency or organization which is given power to cater for the needs of crime victims. However, this paper will only focus on arguments supporting its establishment, as below:

3.1. Justice and Compensation

Victim's right to reparation (comprising restitution, compensation and rehabilitation) have been widely recognized at international level but has not gained any momentum yet in country like Malaysia. A rape victim expects two things. One: that the offender be arrested, charged, convicted and sentenced with a stiff punishment. Two: compensation, or more precisely, restitution for what happened to her. What is expected is that, it can be achieved through the justice system. Compensation/restitution is needed and could be used to 'restore' the victims to the original condition, more or less. It is a well established fact that these survivors experience grave emotional trauma. Post-rape trauma and post-traumatic stress disorder (PTSD) are not uncommon, which necessitate continuous medical attention. In addition to that, it may result in loss of earnings due to time away from work, or loss of earning capacity. Apart from that, there may be medical expenses for various "complications": miscarriage of pregnancy, abortion of unwanted fetus, sexually transmitted disease contracted from the offender and in a case of death (like the case of Nurin mentioned above), it is also imperative that the surviving family be compensated for the grievance and funeral expenses. Therefore, the monetary compensation would be used to cover all that. To assess quantum of damages, it would depend on the gravity of injuries: the long or short-term effect of trauma, physical injuries and other typical losses. As far as compensation is concerned, the government support is needed to make this a reality.

3.2. Inadequacy of Legal Provision for Compensation

Justice for rape victims in Malaysia is long overdue. In Malaysia, there seems to be apparent lack of concern from the legal fraternity when it comes to compensating rape victims or any crime victim at all. The only provision under Criminal Procedure Code as discussed below is hardly used by judges in rape cases. This is mainly due to the fact that the provision is discretionary and not mandatory in nature.

Section 426 (1) of the Criminal Procedure Code gives power to the court to order compensation to victims of offences and costs or prosecution. It provides as follow:

“The Court before which a person is convicted of any crime or offence, may in its discretion, make either or both of the following orders against him, namely:

- a) *An order for the payment by him of the costs of his prosecution or such part thereof as the Court directs;*
- b) *An order for the payment by him of a sum to be fixed by the court by way of compensation to any person or to the representatives of any person injured in respect of his person, character or property by the crime or offence for which the sentence is passed.”*

It should be highlighted that the above provision (b) is allocated as a venue for crime victims to get justice for themselves. Since this provision is general and merely discretionary in nature, therefore, it is very seldom to find any criminal case decision which sees the convicted party being ordered – apart from the criminal punishment - to pay compensation for his or her victim. Hence, it would be advantageous for the victims (of any crime) if both prosecutor and judge are aware of this provision. The offender, however, must be convicted first prior to the order. The Court shall specify the person or the representative of the injured party to whom any sum in respect of costs or compensation as aforesaid is to be paid.

As far the amount to be paid, the law does not specify it, but left to the discretion and decision of a committee. Section 428 of the Criminal Procedure Code outlines rules as to the rate of payment:

The rule committee may make rules as to the rates or scales of payment of the expenses or compensation to be ordered as aforesaid and concerning the form of the certificates hereinafter mentioned and the details to be inserted in it.

Section 432 of Criminal Procedure Code empowers the court to allow time for the payment of any sum of compensation or costs. The court may direct payment to be made by installments or issue a warrant for the levy of the said sum by distress and sale of any property belonging to such person.

It is so obvious that the above provision is capable of being seen as punitive damages for the victims. However, it is hardly used in any criminal cases, let alone in rape cases. What more, it does not specify the amount or quantum to be paid. Such statutory basis is not strong to justify the necessary of compensating rape victims. The main restriction is because the power vested to the court is discretionary, and therefore, it is not surprising to see that judges hardly used them. What more, when the amount of compensation is not regularly stated, the committee only rely on facts of the cases. In other words, it becomes a case-basis regulation. One case ever traced with a very low amount of compensation is in *Raja Izzuddin Shah* [1979] 1 MLJ 270. In this case, the accused had assaulted a public officer. In the appeal, the judge reduced a three-month prison sentence to a good behavior bond for two years under section 294 Criminal Procedure Code and ordered the appellant-accused to pay a compensation of two hundred Ringgit (50 Euro) to the victim-complainant within one month from the date of the order.

In another case, *PP v Low Lu Keng*, R Tallalla J on 21 January 1992 ordered, *inter alia*, that the respondent pay a sum of RM10,000 as compensation to one Too Choo widow of the victim of a culpable homicide. As it is, Federal Court in *PP v. Johan Mutalib* felt that section 426 contemplates the injured person and not the Government, therefore the government cannot be the recipient of such compensation. G.F Nelson in his article entitled “Compensation under Malaysian Criminal Law and The Principle of Diyat in Shariah Law- A Case Note” [1992] 3 CLJ iii emphasizes that the role of a

criminal court is more sanction- prescribing and less as an economic adjuster, for which the civil court are there. Therefore, he suggests that a civil action is deemed necessary to seek compensation out of personal injuries.

In some countries like Singapore, fine is one of the punishment for rape to be imposed in lieu of caning. Subsection (1) of 376 states this:

'Subject to subsection (2), whoever commits rape shall be punished with imprisonment for a term which may extend to twenty (20) years, and shall also be liable to fine or to caning.'

However, in the case of Singapore, they have enacted a new Criminal Procedure Code – now called the Criminal Procedure Code 2010 (Act 15 of 2010). It came into operation on 2nd January 2011. The change is that it is now mandatory for a court to consider making a compensation order (“shall” instead of “may” in the old law) and it extends to offences which have been taken into consideration for sentencing purposes as well (as compared to the old law where the court only considers offences for which the person is convicted).

Section 359 of CPC 2010 provides the order for payment of compensation as below:

359.—(1) *The court before which a person is convicted of any offence shall, after the conviction, consider whether or not to make an order for the payment by that person of a sum to be fixed by the court by way of compensation to the person injured, or his representative, in respect of his person, character or property by —*

- a) *the offence or offences for which the sentence is passed; and*
- b) *any offence that has been taken into consideration for the purposes of sentencing only.*

(2) *If the court is of the view that it is appropriate to make such an order referred to in subsection (1), it must do so.*

(3) *If an accused is acquitted of any charge for any offence, and if it is proved to the satisfaction of the court that the prosecution was frivolous or vexatious, the court may order the prosecution or the complainant or the person on whose information the prosecution was instituted to pay as compensation to the accused a sum not exceeding \$10,000.*

(4) *Any order for compensation made under subsection (1) shall not affect any right to a civil remedy for the recovery of any property or for the recovery of damages beyond the amount of compensation paid under the order, but any claim by a person or his representative for civil damages in respect of the same injury arising from the offence, shall be deemed to have been satisfied to the extent of the amount paid to him under an order for compensation.*

(5) *The order for compensation made under subsection (3) shall not affect any right to a claim for civil damages for malicious prosecution or false imprisonment beyond the amount of compensation paid under the order, but any claim by the accused for civil damages in respect of the malicious prosecution or false imprisonment shall be deemed to have been satisfied to the extent of the amount paid to him under an order for compensation.*

Section 360 deals with provisions as to money payable as compensation:

360.—(1) *Subject to the provisions of this Code, where any person is, under this Code, for any reason whatsoever, ordered to pay any sum of money by way of compensation, the court making the order may at any time before that sum has been paid in full, in its discretion, do all or any of the following things:*

- a) *allow and extend time for the payment of that sum;*
- b) *direct payment to be made of that sum by instalments;*
- c) *order the attachment of any property, movable or immovable, belonging to the person*
 - (i) *by seizure;*
 - (ii) *by appointing a receiver; or*
 - (iii) *by directing any other person who owes money to the person to pay the court the amount of that debt due or accruing or the amount that is sufficient to pay off the compensation sum;*

- d) *direct that in default of payment of the compensation sum, that person must suffer imprisonment for a certain term, which imprisonment must be consecutive with any other imprisonment to which he may be sentenced or to which he may be liable under a commutation of sentence;*
- e) *direct that that person be searched, and that any money found on him when so searched or which, in the event of his being committed to prison, may be found on him when taken to prison, shall be applied towards the payment of that sum; the surplus, if any, being returned to him.*
 - 1) *Before allowing time for payment of any sum under subsection (1)(a) or directing payment of it to be made by instalments under subsection (1)(b), the court may require that person to execute a bond with or without sureties on condition that he pays that sum or the instalments, as the case may be, on the day or days directed; and if that sum or any instalment is not paid as ordered, then the whole of that sum remaining unpaid becomes due and payable and the court may issue a warrant for the person's arrest.*
 - 2) *Any money found on a person under subsection (1)(e) shall not be so applied if the court is satisfied that the money does not belong to the person on whom it was found.*
 - 3) *The term for which the court directs that person to be imprisoned in default of payment of the compensation sum shall not exceed the following scale:*
 - a) *when the money to be paid does not exceed \$50, the imprisonment may be for any term not exceeding 2 months;*
 - b) *when the money to be paid exceeds \$50 but does not exceed \$100, the imprisonment may be for any term not exceeding 4 months;*
 - c) *in any other case, the imprisonment may be for a term not exceeding 6 months.*
 - 4) *The imprisonment which the court imposes under this section shall terminate whenever the money is paid or levied by process of law.*
 - 5) *If before the end of the period of imprisonment imposed in default of payment of the compensation sum, such a proportion of the money is paid or levied that the time of imprisonment already suffered in default of payment of the compensation sum is at least equivalent to the part of the sum still unpaid, then the imprisonment must end.*
 - 6) *If the person fails to pay the court the amount which he is directed to pay under subsection (1)(c)(iii), it shall be recoverable as though it were a judgment debt due to the court.*

3.3. Inadequate Protection

Rape management crisis program has gained momentum, thanks to several organizations actively involved in assisting rape survivors dealing with the ordeal. While it is true that raped women are not left behind, the programs for them are usually catered by non-governmental organization. How effective their programmes is remained to be seen. Although the government through Ministry of Women, Family and Community Development supported their course, it is always inadequate because they are just side and not in the mainstream. These NGOs like All Women's Action Society (AWAM), Women's Centre for Change, Sisters in Islam, Women's Aid Organization are all on their foot and live on donation for their survival. They provide temporary shelters for homeless survivors, counseling, medical aid and many more. However, they cannot be considered as within the formal system.

3.4. The Inspiration from Religion: the Principle of *Diyat* (Bloodmoney) in Islamic Law

Islamic law encourages restorative justice when it comes to settling the criminal offences pertaining to personal injuries. Restorative means In the process, both the victim and offender are brought together in a conference where they both have the opportunity to narrate both sides of story. Once the party responsible and the nature of crimes identified, the responsible party will have to be ensured that the compensation can be paid towards the victim or his or her family. Islamic law also encourages pardon but if the victims forgives the offender, he must pay the amount of compensation known as *diyât* (loosely translate as blood money). We could also resort to Islamic principle because there is a fixed quantum for all kinds of injuries.

4. The Establishment of a Compensation Body

It is important to avoid the notion of compensation as “easy money” where claimants can receive compensation from a rape incident. This accusation, positions claimants as “potentially fraudulent (Frewin,Pond&Tuffin,2009:29). Prior to setting up compensation scheme, a statute which aims at governing the scheme must be enacted. From appointing members of the board to distribution of compensation and tariff, this statute will legalize the function of the body. Among other things, it will outline these items as necessary for proving the rape occurrence:

- a. location of the assaults,
- b. identifying real rape victims or eligibility to apply for /to receive compensation,
- c. types and limits of compensation,
- d. standard amount of compensation,
- e. application process and etc.
- f. medical examination or proof of the incidence
- g. proper legal corroboration: police report and charges pressed against the suspect.

5. Another Avenue: Tort Law

Yet the criminal justice system is surprisingly hostile to civil suits by rape survivors. Judges in criminal cases virtually always allow impeachment of accusers with evidence of civil suits against the alleged assailants or third parties. This Article surveys every published decision on the subject since the 1970s, and it notes judges' general agreement that civil litigation "corrupts" accusers in prosecutions for rape. The courts' aversion to civil litigation reflects a misapprehension of the theoretical principles underlying the impeachment rules; it also reflects assumptions that injuries caused by rape are not remediable in tort.

Rape could be seen as fall under some sorts of “personal injuries”. Hence, if someone asks: Is it possible to sue for rape and does our system opens up to civil suits by rape survivors? The answer should be in the affirmative. In theory it would be so, but not very well accepted in practice. Let us approach the issue of rape from the perspective of tort. Within the ambit of tort, victims can seek compensation for injuries and loss sustained as a result of the wrong of another party, and in this context of non-consensual sexual acts. The cause of action would clearly be trespass to person (assaults and battery) which are considered as intentional torts. The basic principle underlying the assessment of the quantum of damages is *restitution in integrum*, which is best defined by Lord Blackburn as below:

Where any injury is to be compensated by damages, in settling the sum of money to be given..., you should as nearly as possible get at that sum of money which will put the person who has been injured... in the same position as he would have been in if he had not sustained the wrong.

Losses recoverable include special damages and general damages for pain, suffering and loss of amenities. Rape is definitely a criminal offence and it would amount to (sexual) assaults under the tort law. However, the perpetrator must be tried first (though not necessarily convicted) at the criminal court. Barret-Lennard J. in *KM Natersahib & Anor v. Meyer Bros.* [1940] MLJ 252 had this to say:

When an act is both crime and a civil wrong, prosecution for the criminal offence is generally a condition precedent to a civil action in tort at any rate...

However, the problem with the tort system is that, not only it is adversarial in nature, it may also take years to settle. So far, it is unheard of such case where a rape victim files a civil suit against her perpetrator under the cause of assault. Getting compensated is probably the last thing a victim will initiate unaided. With all the trauma, shame and blame she gets, most probably she hardly thinks about all the documentation needed to start a civil litigation and subsequently getting money out of her misery. But the rights is there and with the right advice or legal assistance and a little bit of gut, that victim will make a victorious history. Perhaps!

6. Conclusion

It is time that Malaysia gives a serious consideration to establish a compensation board to cater for the needs of rape victims and other crime victims in general. NGOs have played their part in bringing the attention to the plight suffered by these victims. It is now the duty of the Government to see this issue not from the criminal law perspective anymore (that is how to punish the rapist), but from the perspective of rape victims, by understanding their plights and their needs to overcome the unwanted sufferings. Undoubtedly, rape occurrence demands an all-rounding attention from many parties to assist rape victims in dealing with the traumatic episode. What has been done by the government pertaining to law or imposing harsher punishment by the court, is hardly beneficial to the victims, or would change anything that happened to them. The damage has been done and nothing, so it seems, is repairable. Not many considerations are given towards the welfare of rape survivors. Compensation is not only needed for survival, but also as something to be hold as a token of justice obtained from the legal process and the entire criminal justice system. Therefore, to give a compensation for a rape victim is a matter of both personal and public importance.

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