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INTIMATE PARTNER VIOLENCE WITHIN THE MALAYSIAN LEGAL FRAMEWORK

**¹Mohd Safri Mohammed Na'aim, ²Ramalinggam
Rajamanickam & ³Rohaida Nordin**

¹Centre of Foundation Studies, Universiti Teknologi MARA,
Cawangan Selangor, Malaysia

^{2&3}Faculty of Law,
Universiti Kebangsaan Malaysia, Malaysia

¹Corresponding author: safri7246@uitm.edu.my

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ABSTRACT

The Domestic Violence Act 1994 (Act 521) (DVA 1994) governs matters relating to domestic violence in Malaysia. The DVA 1994 uses the term “domestic violence” rather than “intimate partner violence” (IPV). Under section 2 of the DVA 1994, the term “domestic violence” not only describes the types of domestic violence, but it also identifies the victims of domestic violence. Those who fall under the category of domestic violence victims may apply for legal protection such as protection orders, compensation, and rehabilitation programmes. However, unlike domestic violence, the term “IPV” is not defined by the DVA 1994. This may raise questions regarding the status of IPV victims, whether they are protected under the said Act. This research examined the definition of domestic violence and IPV, how the DVA 1994 protects domestic violence victims, and to what extent legal protection is given to IPV victims. This article adopted

the doctrinal legal research, involving a thorough examination of the DVA 1994, the Penal Code (Act 574), the Criminal Procedure Code (Act 593) (CPC), and case law. This research found that the definition of IPV within the DVA 1994 arguably covers only spouses and former spouses, leaving other unmentioned intimate relationships such as cohabitating partners outside the application of the Act. Although not covered by the DVA 1994, if individuals in such relationships are harmed by their partners, they can lodge a police report for violation of the criminal provisions of the Penal Code for legal action to be taken.

Keywords: Domestic Violence Act 1994, intimate partner violence, domestic violence, legal protection, victims.

INTRODUCTION

The prevalence of domestic violence is a serious phenomenon as it happens all over the world, irrespective of race, religion and place (Attalla & Rome, 2019). The effects of domestic violence on the victims are not only physical, but also emotional, which can be detrimental. Prior to the 1970s, the issue of domestic violence had not been given sufficient attention. Erez (2002) argued that domestic violence was considered to be normal and a part of marriage that women had to endure and tolerate. Most of the women victimized by domestic violence were not given sufficient legal protection (Bumiller, 2010). Hague and Wilson (2000) claimed that at the time, most of the cases were secretly resolved with the help of close family and friends. However, starting from the 1970s, alarmed by the increasing number of domestic violence cases against women and the fact that they were not given proper legal protection, women movements began to rise in a fight for women's rights and victims of domestic violence (Erez, 2002). Subsequently, the movement rallied to urge the governments of their respective countries to take responsibility by enacting special laws with the aim of providing legal protection for victims of domestic violence (Zorza, 1992). This happened in countries such as the United States and England, and later was widespread around the globe. As a result, more countries began to enact laws for protecting victims of domestic violence, including Malaysia. In Malaysia, the Joint Action Group (JAG) was founded with the participation of the Women's Aid Organisation, the Association of Women's Lawyers, the Malaysian

Trades Union Congress—Women’s Section, the University Women’s Association, and the Consumers’ Association of Selangor and Federal Territory (Colombini et al., 2011). Kumaralinggam (2003) stated that the JAG steadfastly called for the government to create more specific and focussed laws, which would provide better safeguards for domestic violence victims. These efforts eventually paid off when the Domestic Violence Act 1994 (Act 521) (DVA 1994) was enacted in 1994. When debating the bill of domestic violence in the House of Representatives, the then Minister of National Unity and Community Development, Dato’ Napsiah binti Omar stressed that domestic violence could not be viewed as a personal problem. She further emphasized that domestic violence was a criminal act that called for immediate legal action due to the alarming increase in domestic violence cases (House of Representatives, 1994). A reading of the preamble of the DVA 1994 elucidates that the Act aims to provide legal protection for domestic violence victims.

The DVA 1994 is not static in nature; in response to the realities and ongoing constraints faced by victims of domestic violence and to provide better protection for them, the Act was amended in 2012 by the Domestic Violence (Amendment) Act 2012 (Act A1414) and in 2017 by the Domestic Violence (Amendment) Act 2017 (Act A1538). The DVA 1994 was substantially revised in 2012, as more than half of the sections were amended, and several new provisions were included. Among the amendments made was the insertion of section 2 (d) by expanding the meaning of domestic violence to include causing psychological abuse. Sections 4 and 6 were also amended by broadening the scope of interim protection order (IPO) and protection order (PO). Another amendment was the introduction of section 18A by making offences involving domestic violence seizable offences. Among the amendments made in 2017, were as follows: addition of section 3A by introducing the emergency protection order (EPO); amendment of section 4(4) of the DVA 1994 to provide more clarity as to when the IPO ceases to be in force; amendment of section 13 of the DVA 1994 to allow the application of PO not only after criminal proceedings concerning domestic violence have been instituted, but also prior to the commencement of the proceedings subject to the conditions attached to it; amendment of paragraph (a) of section 6 to bestow more power to the court under the PO to grant the right of exclusive occupation to victims of domestic violence of a shared residence; adding paragraph (e) of section 6, which empowers the

court to prohibit the person against whom the order is made from taking away the vehicle normally used; and amendment of section 19(2) by inserting paragraph (c) to the effect of placing on the police a burden of responsibility to update the status of the domestic offence investigation to the victim.

It is important to note that although the initial efforts and campaigns were to address domestic violence cases which involved women as the majority of victims, the law passed by Parliament not only provided legal protection for female victims of domestic violence, but also to other categories of people. The name given to the Act applied the gender-neutral phrase “domestic violence” rather than using terminology specifically associated with women. The term “domestic violence” in Malaysia does not exclusively provide protection for women, but also extends to other categories of people such as husbands, former husbands, a child, an incapacitated adult, or any other member of the family. It includes many forms of violence and also covers a range of family relationships. Hence, the generality of the Act is to address the reality of situations in which domestic violence is not only a problem for women, but also other categories of victims mentioned earlier. That being said, unlike the words “domestic violence”, the term “IPV” is not defined in the DVA 1994. While the latter term has been increasingly used, particularly at the international level, no explicit definition is given to its meaning within the Act. The absence of the meaning of IPV in the DVA 1994 has left a lacuna on whether or not IPV victims are protected under the DVA 1994. Hence, this research aims to examine two important terms: “domestic violence” and “IPV” and the scope of legal protection provided by the Act for victims under the DVA 1994 and IPV under other relevant laws.

METHODOLOGY

This research adopted the legal research approach whereby doctrinal legal research was employed to thoroughly examine legal provisions which include the DVA 1994, the Penal Code (Act 574), the Criminal Procedure Code (Act 593) (CPC) and case law as the primary sources. In addition to that, this research also analysed journals and academic writings relevant to this field for discussion. The data collected from this research was critically analysed to examine the definitions of domestic violence and IPV as well as the legal protection provided by

the Act for victims under the DVA 1994 and IPV under other relevant laws.

RESULTS

Definition of Domestic Violence

Amongst one of the key components of the DVA 1994 is the definition of domestic violence. It is important to note that the meaning of domestic violence is explained under section 2 of the same Act. The definition of domestic violence not only describes the types of domestic violence; it also identifies the victims of domestic violence. Therefore, while the term “domestic violence” is merely a definition in nature, it is important because the meaning of domestic violence underpins the implementation of the Act, namely in deciding what constitutes domestic violence and, more importantly, who can be considered as victims of domestic violence.

When the DVA 1994 was first enacted, the term “domestic violence” as stipulated in paragraphs (a) to (e) of section 2 was limited to *“willfully or knowingly placing, or attempting to place, the victim in fear of physical injury; causing physical injury to the victim by such act which is known or ought to have been known would result in physical injury; compelling the victim by force or threat to engage in any conduct or act, sexual or otherwise, from which the victim has a right to abstain; confining or detaining the victim against the victim’s will; causing mischief or destruction or damage to property with intent to cause or knowing that it is likely to cause distress or annoyance to the victim.”* The early definition of domestic violence was criticized for failing to consider the reality of victims of domestic violence who have also experienced some form of psychological abuse. The definition of domestic violence was therefore amended in 2012 by inserting three additional paragraphs: (f), (g) and (h) to broaden the meaning of domestic violence to include, *“psychological abuse which includes emotional injury to the victim”* and *“causing the victim to suffer delusions by using any intoxicating substance or any other substance without the victim’s consent, and if consent was given, it was deemed unlawfully obtained; or in the case where the victim is a child, causing the victim to suffer delusions by using any intoxicating substance or any other substance.”* To provide a more comprehensive

definition of domestic violence, the DVA 1994 was again amended in 2017 by inserting three more paragraphs: (ea), (eb) and (ec) to include *“dishonestly misappropriating the victim’s property which causes the victim to suffer distress due to financial loss; threatening the victim with intent to cause the victim to fear for his safety or the safety of his property, to fear for the safety of a third person, or to suffer distress; communicating with the victim, communicating about the victim to a third person, with intent to insult the modesty of the victim through any means, electronic or otherwise.”*

The definition of domestic violence therefore means the commission by a person, whether by himself or through a third party, of one or more of the following acts from paragraph (a) to (h) of section 2 of the DVA 1994 against his or her spouse, his or her former spouse, a child, an incapacitated adult, or any member of the family. Presently, the definition of domestic violence has in it a comprehensive list of harm which includes physical, psychological, emotional, sexual, financial abuse and abuse of the victim’s dignity (Mohd Safri et al., 2019). One case that explains how domestic violence can happen to a former spouse is *Mangaleswary Ponnampalam v. Giritharan E Rajaratnam* [2015] 6 CLJ 561, where the court held that *“A person can still commit an act of domestic violence against his or her former spouse even after divorce.”* This case basically affirmed the application of section 2 of the Act in which legal protection is also extended to an ex-spouse. Consequently, even if the parties are divorced and living separately, protection under the DVA 1994 can be sought by the victim. Conversely, those who do not fall under this list of victims fall outside the ambit of the Act, even if they were harmed by their perpetrators.

Definition of Intimate Partner Violence

The term “IPV” is not formally recognised by Malaysian law. Since the term “IPV” has not been defined by the Act, it is important to consider some definitions given by international organisations, namely the World Health Organization (WHO) and academic scholars. WHO (2010) defines IPV as *“behaviour within an intimate relationship that causes physical, sexual or psychological harm, including acts of physical aggression, sexual coercion, and psychological abuse and controlling behaviours.”* From a more scholarly perspective, IPV was defined by Patra et al. (2018), as *“any behavior within an intimate*

relationship (married, unmarried, and live-in) that causes physical, psychological, or sexual harm to those in that relationship.” On the other hand, Flinck et al. (2005) defined it to *“include physical and sexual violence, threats of violence and psychological and emotional abuse and the perpetrator could be a current or former spouse, boyfriend, girlfriend or dating partner.”* Based on the meanings given, IPV means those who are in an intimate relationship which is not limited to a marital relationship, but includes relationships outside the context of marriage such as cohabitating and dating partners who suffer from violence, namely physical, mental, sexual or psychological abuse perpetrated by their partners. The term “IPV” is neutral and not gender biased, meaning that IPV affects both men and women. However, it has been argued that women are most affected by IPV, and that men are more likely than women to commit such violence (Hamberger & Larsen, 2015). The global prevalence of IPV has been estimated at around 30 per cent for women aged 15 years and above (Devries et al., 2013). It is also important to note that IPV has been viewed as violence against women and perceived as a form of gender-based human rights violation (Obreja, 2019).

IPV is a subset of domestic violence, which means IPV is part of domestic violence (Hawcroft et al., 2019). In contrast, domestic violence does not necessarily refer to IPV, but could indicate violence that happens in other forms of familial relationships like child abuse and elderly abuse. The question arises as to why the term “IPV” has been increasingly used when the term “domestic violence” itself is all-inclusive in nature and thus includes IPV. According to a study by Erez (2002), more victims of domestic violence are women in intimate relationships compared to men, with the acts of violence being perpetrated by men. Therefore, the use of the term IPV is more appropriate to refer to violence in such intimate relationships. This is because by using the term “domestic violence” loosely to indicate violence may not reflect and address the violence that happens against women in an intimate relationship. Thus, in discussing violence in a marital or loving relationship, some scholars prefer the term “IPV”, which is more specific. That being said, Randle and Graham (2011) found that there is growing evidence that men are not only perpetrators of violence, but also victims of violence in intimate relationships. When looking at the meanings of IPV provided by various scholars, it can be inferred that while IPV is more prevalent among women, there are also men who are victims of IPV. The use of IPV exclusively for

women is therefore not appropriate because the phrase, “IPV” itself is gender-neutral, and includes victims consisting of women and men in intimate relationships, not only through marriage, but outside of marriage as well. Hence, IPV covers both male and female victims and perpetrators in intimate relationships (Ahmadabad et al., 2017).

Further, at the international level, in a broader context, the use of the term “IPV” generally not only reflects violence in intimate heterosexual relationships, but also homosexual relationships in certain countries (Rollè et al., 2018). A homosexual refers to a person who is sexually attracted to people of the same sex. For western countries such as the United States, England and New Zealand, same-sex relationships are not only recognised, but also to a certain extent, given legal protection to same-sex partners in cases of IPV (Pettinicchio, 2012). Examples of countries that provide legal protection for same-sex intimate partner violence under their respective domestic violence laws can be seen in Table 1.

Table 1

Countries that Provide Legal Protection for Same-Sex Intimate Partner Violence Under Their Respective Domestic Violence Laws

Country	Law	Scope of Protection
United States	Violence Against Women Act of 1994	Legal protection also extends to same-sex couples (LeBrun, 2015).
England	Domestic Violence, Crime and Victims Act 2004	Offers protection to a wider range of persons by including same-sex couples under the term of “cohabitants” (section 3 of the Domestic Violence, Crime and Victims Act 2004).
New Zealand	Domestic Violence Act 1995	The protection is extended to a person who is in a domestic relationship with another person, including the person who “has a close personal relationship with the other person” (section 4 of the Domestic Violence Act 1995).

Table 1 shows three countries, namely the United States, England and New Zealand that have laws related to domestic violence that extend legal protection to same-sex couples. Although the words “same-sex couples” are not used in the Domestic Violence Act 1995 of New Zealand, the generality of the words used in section 4 of the Act carries a broad meaning, which is that protection is also given to same-sex couples.

It is important to note that not all countries grant legal protection under their respective domestic violence laws to those who are in same-sex relationships, particularly Muslim countries. For the purpose of this research, a country is regarded as an Islamic country based on its membership with the Organisation of Islamic Cooperation.

Table 2

Muslim Countries that do not Provide Protection against Domestic Violence Involving Same-Sex Intimate Partners Under Their Respective Domestic Violence Laws

Country	Law	Scope of Protection
Malaysia	Domestic Violence Act 1994	Legal protection is given to spouses and ex-spouses (section 2 of the DVA 1994).
Brunei	Brunei Married Women Act	Legal protection is given to spouses and former spouses (Section 18A of the Brunei Married Women Act).
Pakistan	Domestic Violence (Prevention and Protection) Act 2013	Legal protection is given to persons who live, or have at any point of time lived together in a household when they are related by marriage (section 2 of the Domestic Violence (Prevention and Protection) Act 2013).

Table 2 shows three Muslims countries - Malaysia, Brunei and Pakistan, which do not extend legal protection under their respective domestic violence laws to same-sex couples. In the context of IPV,

legal protection is given to spouses and former spouses in Malaysia and Brunei, whereas in Pakistan legal protection is given to those who are related by marriage.

In short, IPV does not merely mean marriage relationships, but may also extend outside of marital relationships such as cohabitating relationships. In general, cohabitation can be defined as “*unmarried partners who live together as a couple*” (Karuppiah, 2017). Furthermore, recent evidence has indicated that IPV also extends to homosexual relationships for countries such as the United States, England, and New Zealand. However, for Muslim countries such as Malaysia, Brunei and Pakistan, the meaning of domestic violence does not extend to same-sex relationships. The protection given to those who suffer from domestic violence is confined only to spouses in Pakistan but extends to both spouses and former spouses in Malaysia and Brunei. In deliberating the Domestic Violence (Amendment) Bill 2017 at the House of Senate, Dato’ Seri Rohani binti Karim, the then Minister of Women, Family and Community Development, explained that the Act did not extend to couples who had no marriage bond, despite having intimate relationships. The reason why protection is not extended to unmarried cohabitants may be because this may seem to indicate acknowledgement of such relationships that are not recognised by Islam, a religion that is professed by Muslims, who represent the majority in this country. Hence, this may not be in line with the religious values, beliefs and sensitivities of the majority of people in Malaysia.

That being said, although they are not covered by this Act, such victims can still lodge a report for violation of the provisions of the Penal Code such as sections 323 and 325 of the Penal Code (House of Senate, 2017). Discussion in the following part examines the protection for victims of domestic violence under the DVA 1994 and the protection for IPV victims who do not fall within the purview of the DVA 1994 under Malaysian criminal law.

Intimate Partner Violence within the Framework of the Domestic Violence Act 1994

In the context of the DVA 1994, IPV victims who fall within the ambit of the Act comprise spouses and former spouses who suffer harm or

abuse mentioned in any of the paragraphs: (a) to (h) of section 2 of the DVA 1994 perpetrated by their abusive spouses or former spouses. Conversely, other categories of IPV victims such as cohabiting partners are not within the ambit of the Act, thereby falling outside the application of the Act. Thus, the definition of IPV can be referred to the meaning given by WHO or other academic scholars as previously discussed, which contain most of the list of harm prescribed in the DVA 1994, namely physical, psychological, emotional and sexual abuse. That being said, the list of harm either in the context of domestic violence or IPV may differ from one country to another, depending on the unique and distinctive legislation of domestic violence of each country which it wants to address and solve. For example, in Malaysia, under section 2 of the DVA 1994, the meaning of domestic violence has been broadened to also include financial abuse and abuse of the victim's dignity, thereby further protecting the best interests of victims of domestic violence.

In respect of legal protection, IPV victims who are spouses and former spouses may seek legal protection as provided for in the DVA 1994. Examples of legal protection that victims of domestic violence are afforded include compensation, access to rehabilitation programmes and protection orders. In order to prevent further abuse from being perpetrated against victims of domestic violence, perpetrators can be restrained from committing certain acts for a specific duration of time through protection orders. Protection orders can be divided into three types: emergency protection order (EPO), interim protection order (IPO), and protection order (PO). The details of each will be explained in the following paragraphs.

The EPO was introduced via the inclusion of section 3A of the DVA 1994 in 2017. It provides quick protection in times of emergency for domestic violence victims. According to paragraph (a) or (b) of section 2 of the DVA 1994, victims of domestic violence can apply for an EPO if there is an attempt by a spouse or former spouse to cause fear of physical harm or actual physical injury to the victim as stated in section 3(1) of the DVA 1994. To ensure that immediate protection can be availed to the victim, its application can be made even without being preceded by any police report in accordance with section 3(6) of the DVA 1994. Notably, one unique feature of the EPO is that it can be applied during the weekends (Bernama, 2017). Moreover, under

section 3A (8) of the DVA 1994, the EPO is valid for seven (7) days from the date of issuance of the order.

Conversely, in an ongoing investigation of a domestic violence-related offence, the court can issue interim protection in the form of an IPO as stipulated in section 4(1) of the DVA 1994. An IPO will be granted if the court is satisfied that it is necessary for the victim's personal safety and protection as stated in section 4(3) of the DVA 1994. In contrast with the EPO and PO, no specific duration is mentioned for IPO. The period of an IPO depends mostly on how long it takes for an investigation to be completed. The situation in which an IPO ends is explained in section 4(4) of the DVA 1994. This allows victims to know the exact time that their EPO is no longer in force, which then enables other measures to be sought to protect the victims. For example, pursuant to section 4(4)(a) of the DVA 1994, this occurs when a police officer informs a victim in writing that there is no further action to be taken against a spouse or former spouse. A charge in court against a victim's perpetrator of abuse, i.e. spouse or former spouse, is insufficient by itself to end the IPO unless a police officer informs the victim in writing to press charges against the abusive spouse or former spouse, and the victim does not apply for a PO within seven (7) days after being informed by the police in accordance with section 4(4)(b) of the DVA 1994.

The issuance of IPO is not absolute. This is evident from a reading of section 12B of the DVA 1994 that states an IPO may be set aside within fourteen (14) days from the date the order is served. The right to set aside an IPO was discussed in *Mangaleswary Ponnampalam*, where after considering the submission made by the parties, the Court of Appeal dismissed the appeal, and affirmed the decision of the Magistrates' Court in setting aside the IPO. One of the grounds for setting aside the IPO was that it would be unfair to keep the respondent (husband) waiting for the completion of the police investigation. This case shows that the delay by the police in completing the investigation could be grounds for the IPO to be set aside by the court. Hence, while placing responsibility on the police to inform about the status of the investigation is applauded, it is even more crucial that investigations of domestic violence cases are monitored diligently to ensure that the investigations are being carried out in an expeditious and meticulous manner.

Examples of cases in which IPO had been successfully applied can be seen in *Datuk SM Faisal SM Nasimuddin Kamal v. Datin Wira Emilia Hanafi & 4 Others* [2017] 1 LNS 226 whereby from the facts of the case, it was revealed that the first defendant who was the wife of the plaintiff successfully obtained an IPO from the Magistrate to prevent the plaintiff from committing violence against her and her children. In addition to this, reference can also be made to the case of *Tee Bee Chin v. Goh Swee Por* [2018] 1 LNS 168, whereby from the facts of the case it was disclosed that an IPO was granted by the Magistrates' Court to protect the petitioner wife (PW) from the aggression of her respondent husband (RH) pending the investigation of domestic violence committed by the latter against her. In this case, the IPO had lapsed since the RH was charged under section 323 of the Penal Code at the Magistrates' Court. Therefore, one of the applications made in this case was the application for injunction against molestation under section 103 of the Law Reform (Marriage & Divorce) Act 1976 (Act 164) (LRA 1976) pending judicial separation against the RH for continuously being protected. A reading of the LRA 1976 indicates that the Act is silent as to the meaning of molestation. Thus, reference to case law is important to know the court's interpretation of its meaning. In this case, the court referred to a number of cases to explain the meaning. One of them was the case of *Chan Ah Moi @ Chan Kim Moy v. Phang Wai Ann* [1995] 3 CLJ 846, whereby the Court held that:

“Section 103 of the Law Reform (Marriage and Divorce) Act 1976 allows the Court to make an order to refrain the other party to a marriage from acts of molestation. Such an order is not restricted to physical harm or threats of such harm. It was said that even psychological harm to the applicant is included and this will include pestering, causing trouble, vexing, annoying and putting to inconvenience.”

It can thus be inferred that in this case, the word “molestation” was interpreted broadly to include both physical and psychological harm. The Court also referred to the case of *Shireen a/p Chelliah Thiruchelvam v. Kanagasingham a/l Kandiah* [2011] MLJ 123, where the court stated that the fact that the plaintiff had obtained an IPO was sufficient grounds under section 103 of the LRA 1976 to grant an

injunction to ensure the safety of the plaintiff and the children. Taking into account the legal authorities referred and the whole facts of the case, namely the injuries sustained by the PW, an IPO was granted against the RH, who was subsequently charged in the Magistrates' Court. Therefore, in light of section 103 of the LRA 1976, the court granted the injunctive relief as prayed for by the PW for her continued protection pending judicial separation. This case shows that for married non-Muslim couples who become victims of domestic violence and sustain such harms, in addition to the DVA 1994, they may also apply for injunction under section 103 of the LRA 1976 pending judicial separation or divorce. Further, the grant of IPO may be used as evidence to substantiate such application. It is important to note that the LRA 1976 is only applicable to a married non-Muslim, and does not extend to a Muslim as stated in section 3(3) of the Act.

The PO is a court-granted order, similar to the EPO. Victims of domestic violence may seek a PO both before or after criminal proceedings, which concerns domestic violence against abusive spouses or former spouses. In the first situation, after the victim is informed by a police officer (in writing) that criminal proceedings will be instituted against the individual whom the order is made in relation to the commission of an act of domestic violence, the victim may seek a PO within seven days (section 13(1)(a) of the DVA 1994). As for the second situation, where the accused is charged with an offence involving domestic violence under the Penal Code or any other written law, the victim may seek a PO throughout the stages of the criminal proceedings as stated in section 13(1)(b) of the DVA 1994. The validity of a PO is only for twelve (12) months in accordance with section 6(1A) of the DVA 1994 and can be extended for an additional period of twelve (12) months as stated in section 6(2)(b) of the DVA 1994. The court may, under section 5 of the DVA 1994, order an abusive spouse or former spouse to be restrained from committing domestic violence against the victim. Importantly, it should be noted that the PO's scope is considerably broader than the IPO. This is because in order to provide more protection to victims of domestic violence, the court may issue additional orders, which are listed in paragraphs (a) to (f) of section 6 of the DVA 1994 as follows:

“(a) subject to subsection (4), the granting of the right of exclusive occupation to any protected person of the shared residence by excluding the person

- against whom the order is made from the shared residence, regardless of whether the shared residence is solely owned or leased by the person against whom the order is made or jointly owned or leased by the parties;*
- (b) *prohibiting or restraining the person against whom the order is made from-*
- (i) *entering any protected person's safe place, shelter, place of residence or shared residence or alternative residence, as the case may be;*
 - (ii) *entering any protected person's place of employment or school;*
 - (iii) *entering any other institution where any protected person is placed;*
 - (iv) *going near any protected person at a distance of at least fifty metres or at a distance the court thinks reasonable; or*
 - (v) *making personal contact with any protected person other than in the presence of an enforcement officer or such other person as may be specified or described in the order;*
- (c) *requiring the person against whom the order is made to permit any protected person to enter the shared residence, or to enter the residence of the person against whom the order is made, accompanied by an enforcement officer for the purpose of collecting the protected person's or persons' personal belongings;*
- (d) *requiring the person against whom the order is made to avoid making communication by any means with any protected person and specifying the limited circumstances in which such communication is permitted;*
- (e) *requiring the person against whom the order is made to permit any protected person to have the continued use of a vehicle which has previously been ordinarily used by the protected person or persons; and*
- (f) *the giving of any such direction as is necessary and incidental for the proper carrying into effect of any order made under any of the above-mentioned paragraphs."*

In addition to protection orders, in an effort to ensure the interests of victims of domestic violence are safeguarded financially, the DVA 1994 permits the court to make a compensation order to recompense the victims for injury or loss sustained as a result of domestic violence. The process is made by way of a civil application as stipulaed in section 2 of the Act, which states that “*in respect of civil proceedings for compensation under section 10, the court is competent to hear such claims in tort.*” An example of a case where the court awarded compensation under section 10 of the DVA 1994 can be seen in *Chin Yoke Yin v. Tan Theam Huat* [2015] 11 MLJ 577. In this case, the wife (petitioner) had applied for dissolution of marriage, in addition to compensation under section 10 of the DVA 1994. The court held that in addition to dissolving the marriage, the respondent (husband) was also ordered to pay compensation to his wife amounting to RM4,000.00 for the injuries caused. In granting the compensation, the court had relied on the evidence given by two doctors and a medical report. This case shows that such evidence is crucial for the court to allow the application for compensation.

Where an application for PO is made, section 11(1) of the DVA 1994 states that the court can order one or more of the parties involved in the dispute to enter a rehabilitation programme, in addition to issuing a PO. That being said, should the court desire to make an order referring the victim to a rehabilitation programme, the consent of the victim must be obtained first. As for questions concerning the issue of an order under section 11(1) of the Act, section 11(3) of the DVA 1994 explains that the advice of a social welfare officer or other trained or experienced person may be considered by the court.

Legal Protection for Intimate Partner Violence Victims Who are not Protected under the DVA 1994

IPV victims who fall under categories other than spouses and former spouses such as cohabiting partners who live together without any marital bond are not within the scope of the DVA 1994, thus making them ineligible to seek legal protection under the Act. The question is what protection can be availed to victims of IPV who do not fall under section 2 of the DVA 1994 (“IPV victims outside the scope of the DVA 1994”)? While they are not within the scope of the Act, this does not mean that they are not able to seek recourse under any other relevant law. Dato’ Seri Rohani binti Karim, the former Minister of Women,

Family and Community Development, had explained that victims who were abused by their respective partners and who were also cohabiting partners could file a police report for violating relevant provisions, namely in the Penal Code (House of Senate, 2017). The Penal Code is not a specific law regulating matters concerning domestic violence; rather, it is a law which governs criminal matters. The question may surface as to what is the connection between making a police report and legal protection that can be availed to IPV victims outside the scope of the DVA 1994. Lodging a police report is important in the context of criminal law because it can be a starting point for the commencement of investigations.

Besides, by lodging a police report, not only can it trigger an investigation, but action can be taken by the police to address the complaint lodged to mitigate the potential threat or harm against the victim. For example, if the offence committed is a seizable offence, that person can be arrested without a warrant. An example of an offence which falls under this category is voluntarily causing grievous hurt under section 325 of the Penal Code. Through immediate arrest, cohabiting victims will feel safer as the perpetrators are held and kept away from them. On the other hand, in respect of non-seizable offences, the police officer cannot make an arrest without a warrant; for instance, voluntarily causing hurt under section 323 of the Penal Code. The determination of whether an offence is seizable or non-seizable can be referred to the 3rd column of the First Schedule of the CPC. If there is sufficient evidence, then the suspect can be charged in court for violating a criminal provision. If the accused is charged in court, he may either plead guilty or claim trial. If the accused pleads guilty, the court shall convict and punish the accused accordingly. If the accused pleads not guilty, then the trial will take place. This leads to the question of whether the accused should be detained or bail can be granted pending the disposal of the case. Hence, the issue of bail is of relevance and importance because without any recourse to the protection order, cohabiting victims might be exposed to threat and harm if the accused is not detained and released during the course of a trial.

In general, there are two types of bail: bailable and non-bailable offences, which are mentioned under sections 387 and 388 of the CPC, respectively. Referring to section 2 of the CPC, the term “bailable offence” is defined as “*an offence shown as bailable in the*

First Schedule or which is made bailable by any other law for the time being in force,” whereas ‘non-bailable offence’ means any other offence. Hence, the First Schedule, particularly column 5 is important as it explains what offences can be categorised as bailable and non-bailable. For the former, based on the case of *Public Prosecutor v. Dato’ Balwant Singh* [2002] 4 CLJ 155, Augustine Paul J emphasized that “*Where a person is charged with a bailable offence, he is entitled to be released on bail as of right.*” The question arises as to whether the accused can be subjected to additional conditions, such as a prohibition from approaching the victim or reporting to the nearest police station. Referring to the case of *Public Prosecutor v. Dato’ Mat Safuan* [1991] 1 CLJ 385 (Rep), the court held that except for the amount of bail, the court cannot impose any conditions in respect of a bail allowable under section 387 of the CPC. This is because the section “*gives no discretion to the officer or Court to withhold bail when the person arrested is prepared to provide such bail.*” Examples of offences which fall under this category are: voluntarily causing hurt under section 323 of the Penal Code and assault or use of criminal force under section 352 of the Penal Code. For example, when a woman has been injured by her cohabiting partner and the injury is not particularly serious within the definition of section 320 of the Penal Code, the charge that can be made against the perpetrator is an offence under section 323 of the Penal Code. In this instance, if the accused pleads not guilty, there will be a trial. Since it is a bailable offence, the accused can be released on bail while awaiting trial. In this scenario, IPV victims outside the scope of the DVA 1994 are less protected.

In contrast to bailable offences, non-bailable offences are regarded to be at the discretion of the court as decided in *Lim Kiap Khee v. Public Prosecutor* [1987] CLJ (Rep) 717. Section 388 (2) was applied in *Muslim Ab Karim & Anor v. Public Prosecutor* [2017] 1 LNS 1502. In this case, the accused was charged under section 14 of the Anti-Trafficking in Persons and Smuggling of Migrants Act 2007, which carries a sentence of imprisonment of not less than three years, but not exceeding twenty years and may also include a fine. According to the First Schedule of the CPC, for laws other than the Penal Code, any offence where the sentence is more than three (3) years imprisonment is also considered a non-bailable offence. It is therefore clear that the offence under section 14 of the Anti-Trafficking in Persons and

Smuggling of Migrants Act 2007 is considered a non-bailable offence. After considering the case as a whole, the High Court set aside the order of the Sessions Court Judge, which disallowed the applicants' bail. Both applicants were thus released on bail of RM2,000.00 with one surety for each charge with the following additional conditions, namely, not to disturb the victim; to submit international passport (if any) to the Court; and to report to the police station every two months.

Also in this case, the court referred to *Public Prosecutor v. Dato' Balwant Singh*, and explained that non-bailable offences can be divided into three categories. First, if there are reasonable grounds to believe that the accused is convicted with an offence punishable by death or life imprisonment, no bail shall be allowed except where there are no reasonable grounds for the accused to have committed such offence or if the accused is a woman, or is a child below sixteen years old, or is infirm or a sick person. Second, if there is no reasonable basis for believing that the accused is convicted with an offence punishable by the death penalty or life imprisonment, then bail may be given at the court's discretion. Third, if the offence is not punishable by the death penalty or life imprisonment, then the court has the discretion to grant bail. This means that in the case of a non-bailable offence, the public prosecutor should object to the granting of bail, particularly for offences that can carry the death penalty or life imprisonment such as murder under section 302 of the Penal Code. For non-bailable offences that do not carry the death penalty or life imprisonment such as causing grievous hurt under section 325 of the Penal Code and causing grievous hurt by dangerous weapons and means under section 326 of the Penal Code, the public prosecutor should also object to bail for the accused if, among other things, the victim is worried for her safety because she is afraid the same offence will be repeated or the possibility of witnesses including the victim being harassed. That being said, if the court allows the accused to be released on bail for specific reasons as may be put forward by the defence, the public prosecutor can apply for additional conditions to be imposed on the bail to protect the interests of the victims of IPV as was decided in *Muslim Ab Karim & Anor*.

Hence, for IPV victims outside the scope of the DVA 1994 that have been grievously injured by their abusive partners, a charge under section 325 of the Penal Code can be brought against the perpetrators. In this case, two situations may happen. Firstly, the public prosecutor

should object to bail or if bail is granted by the court, the public prosecutor can apply for additional conditions to be imposed on the bail to protect the interests of the victims of IPV outside the scope of the DVA 1994. In this way, their safety can be better assured.

Besides, while the cohabiting victim may not be able to claim compensation pursuant to section 10 of the DVA 1994 because he or she falls outside the application of the Act, section 426 (1A) of the CPC permits the court to issue an order of compensation to a victim in criminal cases, which includes cohabitating victims, subject to several conditions. For the sake of clarity, the text is reproduced in full as follows:

“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.”

This provision is general in nature and is applicable to both victims of domestic violence under the DVA 1994 and also IPV victims outside the scope of the DVA 1994 subject to several conditions. The conditions are that the compensation order can only be made if the accused is found guilty of the offence charged and upon an application made by the public prosecutor to such compensation.

CONCLUSION

In short, the term “domestic violence” is important because it underpins the implementation of the DVA 1994, namely in deciding what constitutes domestic violence and, more importantly, who can be considered as victims of domestic violence, thereby providing them with legal protection. In light of the DVA 1994, IPV victims who fall within the ambit of the Act comprise spouses and former spouses.

Hence spouses and former spouses may seek legal protection as provided for in the Act. Among the kinds of legal protection available to victims of domestic violence are protection orders, compensation and access to rehabilitation programmes. In contrast, IPV victims who fall under categories other than spouses and former spouses such as cohabiting partners are not within the scope of the DVA 1994, thus making them ineligible to seek legal protection under the Act. Although not covered by the DVA 1994, if individuals in such relationships are harmed by their partners, they can lodge a police report for violation of the criminal provisions of the Penal Code in order for criminal action to be taken. In respect of non-bailable offences, the public prosecutor should object to bail or if the bail is granted, then the public prosecutor can apply for additional conditions to be imposed on the bail to protect the interests of the cohabiting victims. Unlike non-bailable offences, unless section 387 of the CPC is amended to grant more power to the court to impose reasonable conditions attached to the bail, under bailable offences, legal protection through bail cannot be availed because bail is generally the right of the accused, unless the accused cannot afford to pay the amount of the bail set by the court. Besides, while victims of IPV outside the scope of the DVA 1994, namely cohabiting victims, may not be able to claim compensation pursuant to section 10 of the DVA 1994 because they fall outside the application of the Act, section 426 (1A) of the CPC still allows compensation to be sought in a criminal case on the condition that the accused is found guilty of the offence charged and upon an application made by the public prosecutor to such compensation.

It may be argued that in order to further protect the interests of IPV victims outside the scope of the DVA 1994, the easiest suggestion is to include the word cohabitants as part of the definition of victims of domestic violence. Expansion of the definition will allow all IPV victims from different categories to have the benefit of comprehensive legal protection under the DVA 1994. However, this proposal should be cautiously thought out and considered. On one hand, undisputedly, all categories of victims of IPV will be better protected because they can benefit from the legal protection provided for in the DVA 1994. On the other hand, it should be noted that this recommendation appears to acknowledge cohabiting relationships that are not recognised by Islam, a religion that is professed by Muslims who represent the majority in this country. Hence, this may not be in line with the religious

values, beliefs and sensitivities of the majority of people in Malaysia. In addition, according to Islamic criminal law, such relationships if involving Muslims is also in violation of certain legal provisions in this country. If this situation occurs in the Federal Territory of Kuala Lumpur and involves Muslims, they would be in violation of section 27 of the Syariah Criminal Offences (Federal Territories) Act 1997 for committing the offence of *khalwat* (close proximity). Not only that, if adultery was to have taken place involving Muslims during the period of cohabitation, they would also have violated section 23 of the same Act for committing the offence of sexual intercourse out of wedlock. This could be the reason why the Government has yet to expand the meaning of victims of domestic violence under the DVA 1994. Further, it may also be suggested to confine the application of the term “cohabitation” to non-Muslims only. This is because legally, cohabitation among non-Muslims is not a crime (Karuppiah, 2017). This way, their rights in the context of IPV can be better protected. While it is true that it is not an offence, the question is whether acknowledging the act of cohabiting without a marital bond goes against the spirit of the LRA 1976. A reading of the preamble of the Act shows that such an act provides for monogamous marriages and the solemnisation and registration of such marriages; the Act itself is silent as to the recognition of cohabitation. Besides, the term “cohabitation” itself is broad and far-reaching, comprising unmarried partners who are in heterosexual, and also homosexual relationships. This wide definition of cohabitating partners must be carefully dealt with because the recognition and giving of rights arising out of such relationships may in the long term affect the institution of marriage.

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