

## Compensation as a Remedy for Rape Victims: International, Islamic and Malaysian Legal Perspectives

*Nor Aida Ab. Kadir*

University of Sultan Zainal Abidin, Malaysia

---

**Abstract:** The idea of remedying crime victims is not a new concern. Previously, crime victims have limited rights pursuant to legal justice system; they did not have to be notified of court proceedings or of the arrest or release of the defendant, they had no right to attend the trial and they had no right to make a statement to the court at sentencing or at other hearings. Besides, victim assistance programs were rarely exists. Fortunately today, the rights of crime victims are fought by many and the assistance programs for victims of crime can easily found. The fundamental rights for victims of crime include the right to be treated with fairness and respect, the right to attend and be present at criminal justice proceedings, the right to be heard in the criminal justice process, the right to be informed of proceedings and events in the criminal justice process, the right to protection from intimidation and harassment, the right to restitution from the offender, the right to privacy, the right to apply for crime victim compensation and several other rights. Our focus is purely regarding to right for applying compensation. For the offences against human body like rape, some countries use compensation as a remedy for the crime victims. This paper will look at the definition of rape under international, Islamic and Malaysian law; as well as the application of compensation as a medium to remedy rape survivors. The discussion will be limited to international and Islamic legal perspectives pertaining to compensation to rape victims. Apart from that, this writing also will deliberate the possibility of compensating rape victims in Malaysia since there is no specific law deals with it.

**Key words:** Compensation • Rape victim • Remedy

---

### INTRODUCTION

Compensation can be defined as the amount received after an injury or loss, particularly that paid by an insurance company either of the party causing the damage or by one's own insurer [1]. However to be precise, compensation in law is one of the methods of reparation other than restitution and rehabilitation. It provides a remedy in monetary form in order to recompense the loss party. In rape cases, compensation is internationally recognised as a remedy to the rape victims [2]. Using compensation to remedy rape victims is definitely not uncommon as it has been applied in some countries such as Australia, United Kingdom, Canada, United States and few others. Regrettably it is still not applicable in Malaysia even though a step to its application has been taken by several non-government organisations (NGO). Furthermore, the availability of compensations for rape victims under Islamic law also will

be identified. The existence of compensation as a device of remedying rape victims at international level and in Islamic law indicates that it is practical and legally upright to be applied. It is a great hope to see that Malaysia can be able to compensate rape victims to diminish their dilemma and difficulties suffered by them.

**Why Compensation?:** Victims of rape may suffer financial difficulty besides their physical injuries and emotional trauma. The trauma might be haunted them throughout their life. Recovering from violence like rape is not easy; it leads to a lot of pressure and stress. The victims cannot avoid themselves to think or worry about how to pay for the medical expenses and counselling, or other treatments needed or about how to replace lost income due to disability that may be suffered from the rape incident. Those who are violently raped not only lost their dignity but it can be extended to become physically disable and not able to work. These hardships faced by the rape

survivors made them lack or loss of income and have to struggle to survive. This can come to the worst scenario if the victim is the breadwinner to her family.

Here, the rationale of compensation is to provide substantial financial assistance to rape victims and their families. Although no amount of money can remove the trauma and pain suffered by the victims, compensation can be essential element in the aftermath of rape incident. By recompensing for care that assists to restore victims' physical and mental health and by replacing the lost income for victims who no longer can work and for family members who lose a breadwinner, compensation plays a big role in assisting the rape victims to survive.

On the other hands, the inadequacy of present tort law to protect the victim of crime has led to the suggestion that penal systems should be oriented not on a policy of deterrence and retribution to the offender; but rather on enforcing the victim's claim for restitution by integrating compensation as a part of the offender's punishment [3]. Based on this argument, compensation seems to be a good practice in order to remedy the rape victims. Nevertheless it is not a device to overcome all the hardships of the rape survivors, compensation is perceived to provide small assistance to them.

#### **Compensation for Rape Victims under International Law:**

First of all, we will look at the offence of rape and the matter of compensation applicable under international law. In international law, rape is not considered as an independent concept but as an element of another category of crimes such as crime against humanity and war crime. In other words, rape is addressed in international law and by international tribunals as an element in the assessment of a wider scope of crime.

**Definition of Rape under International Law:** The term "rape" is never specifically defined under international law. However for the phrase of violence against women, we are referring the UN Declaration on the Elimination of Violence against Women:

"the term 'violence against women' means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life".

The Convention on the Elimination of All Forms of Discrimination against Women [4] also does not expressly

mention sexual violence and rape. However, CEDAW defines discrimination as any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

The matters pertaining to violence against women and sexual violence were then incorporated into the Vienna Declaration in 1993 and Beijing Declaration in 1995 [5-6]. In these two declarations, sexual and physical violence have been explicitly categorised as violations to human rights. What constitutes sexual violence is defined broadly within the Beijing Declaration and includes, but is not limited to violence occurring in the family and within the general community; sexual abuse of female children; rape and marital rape; sexual abuse; sexual harassment and intimidation; and sexual violence perpetrated or condoned by the state.

International humanitarian law prohibits rape in various treaties, such as the Geneva Conventions (e.g. article 27 of the Fourth Geneva Convention), the Hague Convention of July 1899 (Article I of the Annex to the II) and the Hague Convention of 1907 (Article I of the IV). However none of these Conventions provide a definition of rape.

Rape is first defined at the international level in the case of *Akayesu* [7]. The *Akayesu* judgment [8] of the International Criminal Tribunal for Rwanda (ICTR) defined rape in the context of genocide. The Tribunal considered "sexual violence, which includes rape, as any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts that do not involve penetration or even physical contact...."

On December 1998, in the *Furundzija* Judgment [9], an International Criminal Tribunal for the former Yugoslavia (ICTY) Trial Chamber convicted a Special Forces commander of rape and torture as war crimes under Common Article 3 of the Geneva Convention and it is recognized under Article 3 of the ICTY Statute. The trial chamber of the ICTY held that the actus reus element of rape as "(i) the sexual penetration, however slight: of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or of the mouth of the victim by the penis of the perpetrator; ...."

In *Prosecutor v. Kunarac, Kovac and Vokovic* [9], the Trial Chamber of ICTY has extended the definition of rape adopted in *Akayesu* and *Furundzija*, to include all situations in which consent is not ‘freely’ and ‘voluntarily’ given [10].

Meanwhile at the European level, the Istanbul Convention [11] on preventing and opposing violence against women and domestic violence condemns all forms of violence and discrimination against women including domestic violence, sexual harassment, rape, forced marriage, crimes committed in the name of so-called “honour” and genital mutilation, which constitute a serious violation of the human rights of women and girls and a major obstacle to the achievement of equality between women and men. The Istanbul convention provides a detailed definition of rape. Article 36 of this Convention criminalizes different forms of sexual violence, including rape. State parties are required to criminalize the following intentional conducts: “a: *engaging in non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object; b: engaging in other non-consensual acts of a sexual nature with a person; c: causing another person to engage in non-consensual acts of a sexual nature with a third person.*”

#### **Compensation for Rape Victims under International Law:**

International law has provided remedies for rape victims and it includes compensation. There are some elements relating to general and procedural types of redress, such as the state obligation to prevent crime and to respond to crime by providing appropriate systems of investigation, prosecution and punishment. There are also remedies providing redress to victims such as reparation, compensation, rehabilitation and satisfaction, etc [12].

Under the principles of international human rights law, the right to remedy appears for the first time in 1948 as a part of the Universal Declaration of Human Rights [13]. Article 8 of the Declaration highlights that everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted by the constitution or by law. Subsequently, Article 2(3) of the International Covenant on Civil and Political Rights requires states to ensure that any person whose rights or freedoms are violated shall have an effective remedy.

The Basic Principles and Guidelines on the Right to a Remedy and Reparation of Victims of Violations of International Human Rights and Humanitarian Law specify the rights of victims in relation to remedial action.

Principle 3 outlines the obligation of states to:

- *take appropriate legislative and administrative and other appropriate measures to prevent violations*
- *investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible ”in accordance with domestic and international law*
- *provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice . . . irrespective of who may ultimately be the bearer of responsibility for the violation; and*
- *provide effective remedies to victims, including reparation.*

In the eyes of international law, the recognition of the rights and duties of individuals give an opportunity to award compensation to victims of violations of human rights and international humanitarian law. The International Criminal Court (ICC) Statute provides various forms of reparations including compensation for victims (Article 75). Apart from that, Article 79 specifies that the Assembly of States Parties shall establish a trust fund for the benefit of the victims and their families [14].

The right of victims to compensation is considered in some human rights instruments. The International Covenant on Civil and Political Rights [15], generally requires States parties to ensure “that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy” (art. 2 (3)). The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power [16] says that:

*Offenders or third parties responsible for their behavior should, where appropriate, make fair restitution to victims, their families or dependents. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights.*

The same Declaration also requires from the government that it compensates victims when offenders are unable to afford compensation. This is stated in part 12 and read as:

*“When compensation is not fully available from the offender or other sources, States should endeavor to provide financial compensation to: (a) Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes; (b) The family, in particular*

*dependents of persons who have died or become physically or mentally incapacitated as a result of such victimization.*" (Adopted by General Assembly resolution 40/34 of 29 November 1985).

Therefore, based on the above Declaration, the establishment of national funds for compensation is encouraged. The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law reaffirm the need to strengthen and expand national funds for compensation to victims together with the expeditious development of appropriate rights and remedies for victims. Principle 18 mentioned that:

*"In accordance with domestic law and international law and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation, as laid out in principles 19 to 23, which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition."*

To be specific, all the major legal and policy instruments relating to violence against women affirm the importance of remedies. The UN General Assembly Declaration on the Elimination of Violence against Women [17] in article 4 (d) states that States should provide women subjected to violence with: "Access to the mechanisms of justice and, as provided for by national legislation, to just and effective remedies for the harm that they have suffered; States should also inform women of their rights in seeking redress through such mechanisms."

At the European level, based on the European Convention on the Compensation of Victims of Violent Crime [18]; Article 2.1 stated that Member States have a duty to make a contribution to the compensation of eligible victims, namely to those who have suffered 'serious bodily injury or impairment of health directly attributable to an intentional crime of violence' as well as to 'the dependents of persons who have died as a result of such crime'. While Article 2.2 said that the duty to compensate applies even if the perpetrator has not been

prosecuted or punished. The Compensation Convention in Article 4 provides that Member States must compensate eligible victims for, at least, loss of earnings, medical expenses, hospital costs, funeral expenses and loss of maintenance (in the case of dependents of deceased victims).

The European Union has also affirmed the right of victims to be compensated by offenders. Article 16 of the EU directive [19] provides that Member States must guarantee the entitlement of victims to receive a decision within a reasonable time, during criminal proceedings, concerning compensation by the offender, unless domestic law makes provision for the award of compensation in another way. Besides, Member States must encourage offenders 'to provide adequate compensation to victims'.

Apart from that, the Istanbul Convention has dealt with right to compensation through both perpetrators and State compensation. Article 30 of the Convention stipulates that:

*"1- Parties shall take the necessary legislative or other measures to ensure that victims have the right to claim compensation from perpetrators for any of the offences established in accordance with this Convention. 2- Adequate State compensation shall be awarded to those who have sustained serious bodily injury or impairment of health, to the extent that the damage is not covered by other sources such as the perpetrator, insurance or State-funded health and social provisions. This does not preclude Parties from claiming regress for compensation awarded from the perpetrator, as long as due regard is paid to the victim's safety. 3- Measures taken pursuant to paragraph 2 shall ensure the granting of compensation within a reasonable time."*

In addition, the Istanbul convention (on preventing and combating violence against women and domestic violence) requires state parties to provide protection to women against violence during peacetime, which is actually a new development. One of the convention aims is to promote international cooperation beyond the regional level in order to protect women from different types of violence. This situation will be representing the good signs in international law and proving the transformation process of international law to protect individuals not only during war, but also in peacetime [20].

With the new development in the international law, rape victims now are entitled to remedies including compensation not only during chaotic era such as war; but also in peacetime. This is definitely a great achievement as crimes (especially rape) not happen only in period of war. It happens every day all over the world. According to the United Nations, women are subjected to violence on a widespread scale and on a daily basis regardless of culture, religion, class or nationality (UN The World's Women 2005) [21] Notwithstanding this, the international legal system has struggled to consider of various forms of violence against women as human rights violations, primarily because of the theory of state responsibility for human rights abuses [22].

**Compensation for Rape Victims under Islamic Law:** The word *Shariah*, while simplified in English to mean Islamic law, carries a much more sentimental meaning among those of the Muslim faith [23]. Islam was revealed more than one thousand and four hundred years ago and consists of a complete system of life that is compatible for human beings of all ages. The revelation from Allah and the teachings of the Prophet Muhammad (p.b.u.h) are not only confined to the belief and moral systems, but also include laws that are suitable to be implemented by mankind. The matter of rape falls under Islamic criminal law. Islamic law pertaining to rape will be discussed as accordance to its definition and compensation available to rape victims.

**Definition of Rape under Islamic Law:** Rape in Arabic is known as *ightisab* or *zina bi al-ikrah*, which literally can be translated as forcible unlawful sexual intercourse. The word *ightisab*, or its root *ghasb* literally means usurpation, illegal seizure, coercion, ravishing, violation and rape [24]. This term can be said to possess element of force or in other words, rape is sexual intercourse which takes place without mutual consent of the parties involved.

Before defining rape in Islamic law, it is necessary to investigate the juristic definition of *zina* or illegal sexual intercourse, because most jurists take it into account as part of the definition. Knowing the legal meaning of *zina* is crucial since a conviction is based on what constitutes the crime of rape [25].

There was a *hadith* pertaining to Ma'iz al-Aslami, who had confessed that he had committed *zina*, 'You might have kissed or touched her'. Such actions are not considered to be the constituents of *zina*. However, Ma'iz denied them all. Then the Prophet asked him: '*Hal*

*nakattaha?*' (Did you penetrate her?). That is the most understandable word for sexual intercourse. In the same *hadith* as narrated by Abu Hurayra, the Prophet asked Ma'iz: 'Was the penetration like the stick entering the kohl jar or the rope entering the well?' He said: 'Yes'. The Prophet asked Ma'iz another question: 'Do you know what *zina* is?' He answered: 'Yes, I do and I committed an unlawful act which a husband and wife do lawfully'. In this *hadith*, the Prophet emphasised the criteria that must be fulfilled for the action to be classified as *zina*. The detailed reports of this event, as well as other *hadiths* are the main reference for jurists when formulating the legal definitions of *zina* and rape.

The Hanafis define *zina* as 'unlawful vaginal intercourse with a living woman who is not a right-hand possession (*milk al-yamin*), not in the quasi-ownership of the man or not freely married or quasi-married in an Islamic state'. While the other jurists; Malikis, Shafies and Hanbalis defined *zina* as the unlawful and mutually consensual vaginal or anal intercourse between a man who is sane and who has reached the age of puberty (*bulgh*) and a woman who is not in his ownership.

The Malikis who consider rape as a kind of *zina* define it as sexual intercourse by a legally capable Muslim of a vagina to which he had no right (*mulk*) by usurpation and without consent (Serrano, Delfina, 2007). The Hanafis define rape as sexual intercourse committed by a man in the genitals in other than his property (*mulk*) without consent and no deliberate action from the victim while Shafeis define rape as forcing the male organ or part of it into forbidden genitals of a male or female. Meanwhile the Hanbalis define rape as committing forbidden fornication by force. All the four schools of law have different views pertaining to the definition of rape but all of them agreed that rape is a crime, which should be categorised under *zina*. In other words, it involves the act of *zina* plus the element of force.

According to Azman Mohd Noor (2010), the four above Sunni jurists have also indicated that any sexual intercourse between two people performed out of the bond of marriage should be considered as *zina*. It must be punished by the *Hadd* which is 100 strikes of flogging for the single and stoning to death for the married.

However, some modern Muslim jurists categorised rape as part of *hirabah* (robbery). They have classified rape under the crimes of property seizers. Based on the definition described by some jurists for these crimes, any type of forceful assault upon the people involving some sort of taking of property is called highway robbery [26].

The issue of classification of rape either falls under *zina* or *hirabah* is still debatable. Some says that it is not right to put rape under *hirabah* because of its different nature and criminal conceptualisation. Although it can be considered as *ifsad fi al-'ard* which constitutes *hirabah*, it does not make sense to widen the scope of *hirabah* to include every crime. This is because *hirabah* has its own scope and definition. Furthermore, it is not right to say that punishment for adultery is more severe than *hirabah* without looking at its strict procedure. In addition, the penalty for an unmarried adulterer is 100 strokes and not the death penalty; whereas under *hirabah*, the death penalty could be passed regardless of the criminal's marital status. In addition, the offenders of *hirabah* are not labelled as waging war against Allah and His messenger [27].

Some jurists prefer to classify rape as a *hirabah* crime for reasons of prosecution. According to Asifa (1997), *zina* requires a high standard of proof. *Hirabah* does not require four witnesses to prove the offence, unlike *zina*. Meaning that, if rape is categorized under *hirabah*, it is easier to prove and justice to victims can be upheld. Rape as *hirabah* is a separate violent crime which uses sexual intercourse as a weapon. The focus in a *hirabah* prosecution would be the accused rapist, his intention and physical actions, rather than just guessing the consent of the rape victim, which, as we have seen, is likely to happen if rape is classified as a type of *zina*. In addition, there is no consideration of marital status in the case of *hadd* of *hirabah*.

A rape victim deserves means of access to justice and the right to be treated respectfully within the legal environment. The problem arises in some modern Islamic courts whether or not to adopt the same standard of proof as for *zina*. In Pakistan, the legal system has provided the same standard of proof requiring the testimony of four male witnesses. As a result, many rape offences fail to be convicted for lack of witnesses.

One can argue, that if rape was to be classified as *hirabah*, then what would happen if there was rape without violence and usurpation? Will it still be considered as *hirabah*? [28]. This is something to be taken into consideration because in some of rape cases, no violence occurs. It may be happen due to misconception and without element of force or duress and no injuries caused.

Behind all those arguments as regards to definition and classification of rape under Islamic law, the rape victims are entitled to compensation provided for in Islamic law.

**Compensation for Rape Victims in Islamic Law:** In Islamic law, the compensation as a remedy for women victims can be divided into three main categories. One of them is '*Diyah*' or 'blood money' as a general remedy for compensation which is well known among Muslims. The other two compensations are particular compensation for paying dowry for defloration and compensation for committing sexual intercourse.

***Diyah* as Compensation for Rape Victims:** *Diyah* can be defined as payment of indemnity for killing and injuring a human being [29]. Basically, *diyah* is applying in *Qisas* case. The purpose of *diyah* is primarily to mollify the feelings of the injured relations. Aggravated *diyah* perhaps, would serve this purpose. Furthermore, the Quran advises the offender that after the victim's family has forgone the right to *qisas*, he should grant any reasonable demand and compensate them with handsome gratitude [30].

According to Islamic criminal law, the punishment for homicide and the infliction of injury (*jirah*) is classified under the doctrine of *Qisas* (retaliation). Thus, whenever a person causes physical harm or death to another, the injured or the family of the deceased has the right of *Qisas* (retaliation). *Qisas* itself can be divided into three categories: homicide (*fi al-Nafs*), wounds or injuries (*dun al-nafs*) which is usually known as *qawad* or '*arsh* and murdering of an unborn child [31].

According to Azman bin Mohd Noor and Ahmad Basri bin Ibrahim [32], rape victims are protected and entitled to civil redress in the law of *Qisas* for wounds or injuries. Everybody has a right to retaliation or entitled to compensation for any harm done unlawfully to any of the body parts. All jurists agree that *diyah* may replace *Qisas* when it is not possible to apply it, or when a peaceful agreement is achieved. Hence, compensation seems to be a correct remedy for rape victims in Islamic law. The reason is simple; logically speaking in most of the rape incidents, injury would be inflicted to rape survivors.

It is agreed that *diyah* is recognised as a remedy for rape victims in Islamic law. Now the issues pertaining to it are; what is the appropriate amount to be paid and who should pay the *diyah*? With regard to the law of *diyah* for injuries and wounds, it is sufficient to mention here the letter from the Prophet s.a.w. to 'Amr bin Hazm when he was appointed to represent the Prophet (p.b.u.h) in Yaman. In this letter, the Prophet (p.b.u.h) explains the fixed amount of *diyah* as follows: "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.” This is narrated by al-Nasa’i in his *Sunan*, book of *al-Qasamah*, number of the hadith: 4770.

Based on the above, it is noted that the amount of *diyah* indicates the tradition of the Prophet (p.b.u.h). There is no specific amount for *diyah* in the Quran and the fine does not vary according to gender, or state of freedom of the victim. However, the Quran leaves open its quantity, nature and other related affairs to the customs and traditions of the society. Nevertheless, according to some traditional interpretation of Islamic sources, some believe that the amount of *diyah* dedicated to women is different from that of men; women receive half of what men do [33].

The Shafies impose *arsh/diyah* (blood money) if the man has caused injury to the hymen of virginity. Hymen is regarded as one’s personal belonging and the legal principle states that any infringement of others’ belonging renders compensation.

Wahbah Al Zuhayli mentioned that the amount of money to be determined by the judge assisted by the experts and paid to the victim for the loss suffered. Rape victims suffer more than physical injury. They also have psychological trauma and may develop psychological disturbances related to the circumstances of rape such as intense fears. According to Azman Mohd Noor & Ahmad Basri Ibrahim (2008), the rape victims most probably will experience social consequences such as difficulty to get married.

Besides the law of *qisas* for wounds or injuries, the victims can also claim for moral damages. This can be compensated based on the principle of Tort. Damages are generally assessed according to the extent of the loss and damage suffered by the victim, provided always that the damages were the natural result of the criminal act.

Now, the issue of who should pay the *diyah*? It is definitely a liability of the criminal offender. If he cannot afford to pay the *diyah*, his family is called upon first to compensate the amount. If the family is unable to pay, the clan or tribe may be required to pay. If the offender dies, it would be considered as a debt and it will be passed on to the offender’s heirs.

To conclude *diyah* as a remedy for rape victims, Islamic law provides compensation in term of *diyah* to assist the rape survivors. It is genuinely from the doctrine of *Qisas*. This doctrine describes that the victim or his family has the options of maintaining upon the punishment or accepting *diyah* (blood money) or *sulh* (settlement) or forgiving the offender. This kind of remedy is useful enough in assisting the rape victims even the amount of compensation will be decided by judges based on the degree of injuries as well as local tradition or custom practiced by the community.

**Dowry Payment as Compensation for Rape Victims:** Some jurists classify rape victims into two i.e. virgin and non-virgin. In Islamic law, it is essential to know that a victim of rape is a virgin or otherwise. In some countries, raping a virgin has often been deemed a more serious crime than that of a non-virgin woman. It was mainly due to the idea that women were men’s properties in the ancient era. Non-virgins were not as desirable as virgins on the marriage market [34]. Because of this, the act of defloration is considered as a crime. Defloration requires compensation and is subject to certain punishments on the offenders. Accordingly, if anyone breaks a girl’s hymen using an object or by committing rapes or adultery he or she is required to pay the girl ‘*Mahr-Al-mesl*’ (undesignated dowry) besides *diyah* for injuries as compensation and he will also be punished under *Ta’zir* or *Hudud*.

Thus, if a defloration results from rape, both Shiite and Sunni jurists have discussed this extensively from the perspective of injury or ‘*jinayah*’. They have presented this issue under the subject of injuries occurred in cases of coercive *zina*; injuries such as tearing of perineum and the compensation will be then in two forms; *diyah* and dowry [35]. The majority of jurists, including Malikis, Shafies and Hanbalis take the stance of punishing the offenders of rape with both the *hadd* and *sadaq* (dowry). Imam Malik generalizes the verdict to cover an insane woman and also an unconscious sleeping woman. His argument is based on the fact that rape involves the right of Allah and the right of an individual and these must be dealt with separately. Therefore both *hadd* punishment as well as the payment of the dowry has to be imposed to the rapist.

Meanwhile Malikis make no difference between a virgin victim and a non-virgin in terms of receiving dowry compensation. Regardless of the status of virginity, woman is entitled to dowry compensation in the event of rape. They support the notion of imposing a dowry in addition to the *hadd* penalty based on this hadith: “If any

woman gets married without the permission of her (father) *wali*, the marriage is nullified. If the man consummates the marriage with her, he is obliged to pay her the dowry for legitimizing the sexual relation. If there is a conflict, the sultan, i.e. authority, is the *wali* for those who have no *wali*.”

The Shafies supports the idea of imposing dowry based on *qiyas* (analogy) that the illegal intercourse in rape is similar to the one in invalid marriage (*nikah fasid*) where the so called-husband has to pay the fair *mahr* if there had been consummation. Similarly in rape cases, according to Al Shirazi, the rapist is considered to be liable for compensation (*daman*) in a rape case because of the intercourse.

However, there are jurists who disagree with the idea of paying dowry to rape victims. Abu Hanifah and Ibn Shubrimah are among of them. They contended that rapists are liable for the *hadd* penalty only and not for the dowry (*sadaq*). They argue that when the right of Allah meets the right of individuals, the right of Allah shall prevail. The Hanafis believe that the raped woman should not be paid dowry compensation because paying dowry has been legalized in Islam just for cases of marriage and then it is against the intention of lawmakers to apply the same rules in cases of rape which is classified under *zina*, not marriage. As a result, according to Jonathan Brown (2013), they believe that paying money to a woman victim of rape is similar to paying money to a prostitute. Apart from them, Ibn Rushd in *Bidayat al-Mujtahid* also said that no need to pay dowry to rape victims.

Even though the Islamic jurists are in different opinions pertaining to the payment of dowry as part of compensation for rape victims, something to be highlighted here is that there are some remedies available to rape survivors in *shariah* law. As far as this writing concern, rape is different from *zina* in terms of victimization, usurpation and absence of mutual wilful consent. It is a hope that a rape victim is entitled to legal remedies especially compensation under the principle of *diyah* and can help to recover their injuries physically, mentally and spiritually.

#### **Possibility of Compensating Rape Victims in Malaysia:**

We have gone through discussing the definition of rape and compensations available both in international and Islamic law. Until today in Malaysia, there is no specific law covers this matter. The lacking of legal provision for compensation is quite serious. Criminal victims in Malaysia are left to find their own resolution aftermath the crime. No attention is paid to the victims except to require

his or her presence as a witness in trial proceedings. For rape victims, they undeniably need protection due to injuries suffered; physically, mentally as well as emotionally. Most of the times, the victims are struggling to survive because life after the rape incident is no longer same like before. Financial hardship is one of the problems. Therefore, compensation as a remedy for rape victims is a proper courage to offer assistance to them.

#### **General Provisions**

**Section 426 of the Criminal Procedure Code:** Though there is no specific law on compensation for rape victims in Malaysia, the provision dealing with compensation to the victim of crime are provided under section 426 of the Criminal Procedure Code and other statutes. However the problem is the victims or his or her dependents have no legal right to claim compensation from the offender or state; and the provisions which are provided to deal with this problem are also not adequate or comprehensive. The courts have not been given wide powers to deal with the plight of victims of crime within the framework of inadequate provision in the Criminal Procedure Code or other statutes.

Section 426 of the Criminal Procedure Code provides that:

- 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:
- An order for the payment by him of the costs of his prosecution or such part thereof as the Court directs;
- 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.
- The Court shall specify the person to whom any sum in respect of costs or compensation as aforesaid is to be paid and the provisions of section 432(except paragraph (d) of subsection (i) thereof) shall be applicable to any order made under this section.
- The Court may direct that an order for payment of costs, or an order for payment of compensation, shall have priority and if no direction be given, an order for payment of costs shall have priority over an order for payment of compensation.
- The extent of amount which has been paid to a person, or to the representatives of a person, under an order for compensation, any claim of

such person or representatives for damages sustained by reason of the crime or offence shall be deemed to have been satisfied, but the order for payment shall not prejudice 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.

- Every order made under this section by a Magistrate shall be appeal able to the High Court.

It is clear from the above provision that the court can only make an order under this section when any person is convicted of any offence or crime. After that, he has to compensate the victim of crime in respect to the injury suffered and the quantum of compensation to be paid by the offender to the victim is to be determined by the court. In fixing the quantum the Court will consider various factors such as the nature of the crime, the injury suffered, the capacity to pay and other relevant circumstances [36].

Apart from that, it should be highlighted that the above provision [s.426 (i) (b)] is allocated as a venue for crime victims to get justice for them. According to Siti Zubaidah Ismail (2011), 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 to pay compensation for his or her victim.

The courts in Malaysia have applied this provision (section 426 of the Criminal Procedure Code) in some cases. The main point to be noted is, there must be conviction first before court can order compensation to be paid by the offender. In 1992, there was a positive development in the area of compensation in Malaysia when the High Court made an extraordinary compensation order for homicide in the unreported case of *PP v. Law Lu Keng*. In this case the respondent was charged for committing the offence of culpable homicide not amounting to murder punishable under section 304 of the Penal Code. He was only 19 at the time of the offence committed. He pleaded guilty. After the conviction he was released by the court on a RM 10,000 bond with one surety under section 294 of the Criminal Procedure Code. The Deputy Public Prosecutor appealed against the sentence to the High Court. The High Court then approving the sentence passed by the Lower Court; and ordered that the respondent to pay a sum of RM 10,000 to the widow of the victim under section 426 of the Criminal Procedure Code. Here, the amount of RM10, 000 is considered as compensation to the criminal victim.

However, no cases on rape have been reported using section 426 of the Criminal Procedure Code to compensate rape victims.

**Other Provisions:** Besides section 426 of the Criminal Procedure Code, we have section 428 of the same statute. 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 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 authorizes the court to allow time for the payment of any sum of compensation or costs. The court may direct payment to be made by instalments or issue a warrant for the levy of the said sum by distress and sale of any property belonging to such person.

The above provision is basically capable of being seen as punitive damages for the victims. However, according to Siti Zubaidah Ismail (2011), it is hardly used in any criminal cases. In addition, the main issue that matters is; it does not specify the amount or quantum to be paid. 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. This basis is not strong enough to justify the necessary of compensating rape victims.

**The Need to Establish a Systematic Compensation Body:**

Several Non-Government Organisations (NGOs) in Malaysia see the importance of setting up an agency to response to the plight of the rape victims. 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 Organisation 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). In September 2003, they submitted a Memorandum on Laws Related to Rape:

Proposals for Amendments to the government. 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), but unfortunately when tabled in the Parliament; it received sceptical and negative perceptions.

The effort of those NGOs is something good and should not be ended there. We really need a systematic compensation body which cares about the rights of rape victims especially regarding to right to get compensation. The model of such body can be from any countries which clearly having a good system relating to this. For instance United Kingdom; they first started the compensation scheme for crime victims in 1964. This scheme, known as The Criminal Injuries Compensation Scheme (CICS) 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 [37]. On 1st 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.

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).

Another example is the United States. They have many centres like Rape Crisis Centre of Catawba Country, Crossroad Sexual Assault and Response Centre and North Carolina Coalition against Sexual Assault. These centres are not only providing with compensation to deal with medical cost, but also other types of assistance like counselling and legal advice.

Malaysia should learn from those countries and take a move to having such body or centre which specifically skilled to fight for justice for rape victims.

### CONCLUSION

Rape victims deserve adequate legal protection. They have rights to a fair trial and to obtain compensation. International law has recognized rape as a crime and stated that the rape victims are entitled to compensation. The new development in international law i.e. the recognition that one can claim for compensation for rape

incident in peacetime is a great decision because rape crimes occur every day, it should not be treated as a war crime per se. According to Islamic law, every individual has a legal right to defend him or herself and to be protected from any physical violence. A person who reacts in self and honour defence or protecting his family or others from any sexual assault is not criminally responsible.

Rape is a crime against one's honour and dignity and must be resisted and prevented by whatever means. The rape victims also entitled for compensation by way of *diyah* or dowry. The above discussion clarifies that a rape victim should not be treated similar to one who commits *zina* as her claim of being raped is not an admission of committing *zina*. It is the victim's right and the right of the whole humanity to ensure that justice is done against the rapist who might repeat the same inhuman crimes in future. This paper also suggests that a rape victim in Malaysia should also entitled to legal remedies like compensation. Malaysia should learn from other countries which have special body to deal with compensation to rape victims. The rape survivors must be compensated accordingly for any material loss including but not limited to, medical treatment, moral damages and other kinds of related suffering unbearably borne by the victims. The legislative body of today and the government must outline an efficient form of compensation for damages to be paid to the victim in the light of Malaysian legal perspective. Malaysia really needs to protect rape victims and by giving compensation, part of their rights is guaranteed.

### REFERENCES

1. Law Dictionary. Retrieved from <http://dictionary.law.com/Default.aspx?selected=257>
2. Ismail, S.Z., 2011. Constructing Some Possibilities For Compensation As Part Of Legal Remedies For Rape Survivors: The Case Of Malaysia. World Academy of Science, Engineering and Technology, pp: 77.
3. Shafer, 1965. Restitution to Victims of Crime-An Old Correctional Aim Modernized, 50 MINN. L. REv. 243
4. Elimination of All Forms of Discrimination against Women (CEDAW)
5. Vienna Declaration 1993.
6. Beijing Declaration 1995.
7. Eriksson Maria, 2011. Defining rape: Emerging obligations for states under international law?, 38, Martinus Nijhoff Publishers.

8. Prosecutor v. Akayesu, ICTR-96-4-T, September 1998. Retrieved from <http://69.94.11.53/ENGLISH/cases/Akayesu/index.htm>.
9. Prosecutor v. Furundzija, IT-95-17/1 December 1998.
10. Rosalind Dixon, 2002. Rape as a Crime in International Humanitarian Law: Where to from Here? EJIL (2002), VOL.13 NO.3, pp: 697-719.
11. Istanbul Convention.
12. Doak Jonathan, 2008. Victims' rights, human rights and criminal justice: Reconceiving the role of third parties.
13. Universal Declaration of Human Rights.
14. Antonio Cassese, 2008. International Criminal Law, Oxford University Press Inc., New York.
15. The International Covenant on Civil and Political Rights.
16. The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.
17. The UN General Assembly Declaration on the Elimination of Violence against Women.
18. European Convention on the Compensation of Victims of Violent Crime (1983).
19. EU Directive.
20. Azari, H., 2014. Protection of women victim of rape: Islamic and International legal perspectives. Retrieved from [https://pure.uvt.nl/portal/files/4555520/Azari\\_Protection\\_25\\_11\\_2014.pdf](https://pure.uvt.nl/portal/files/4555520/Azari_Protection_25_11_2014.pdf) [20]
21. UN The World's Women 2005.
22. Edwards, A., 2010. Everyday rape: international human rights law and violence against women in peacetime, in *Rethinking Rape Law: International and Comparative Perspectives* edited by Clare McGlynn & Vanessa E. Munro.
23. Quraishi, A., 2000. Her honor: An islamic critique of the rape laws of Pakistan from a woman sensitive perspective, Women of Faith: Muslim Women Scholar-Activitists.
24. Driver, GR and Miles, John C, The Assyrian Laws (Oxford, UK: Clarendon Press, 1935) at pp: 39.
25. M.Noor, A., 2009. Punishment for Rape in Islamic Law, 5 MLJ cxiv, Malayan Law Journal.
26. Quraishi-Landes, Asifa, *Her Honor: An Islamic Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspective* (1997). Women of Faith: Muslim Women Scholar-Activitists in North America (2000), Syracuse University Press; Univ. of Wisconsin Legal Studies Research Paper Archival Collection. Available at SSRN: <https://ssrn.com/abstract=1524245>
27. Nagaty Sanad, 1991. The Theory of Crime and Criminal Responsibility in Islamic Law, Office of the International Criminal Justice, University of Illinois, Chicago.
28. M.Noor, A., 2010. Rape: A Problem of Crime Classification in Islamic Law, Arab Law Quarterly, 24(4).
29. Awang, A. and R. Diyah, 2012. (Blood Money) as Substitution to Capital Punishment: An Attempt towards Harmonisation between Shari'ah and Malaysian Penal Code, Australian Journal of Basic and Applied Sciences, 6(11).
30. Syed Ahmad al-Sagoff, 2006. Al-Diyah as Compensation for Homicide Wounding in Malaysia. Kuala Lumpur. International Islamic University Malaysia.
31. El-Awa and S. Mohamed, 1982. Punishment in Islamic Law. Indianapolis: American Trust Publiction.
32. M.Noor, A. and A.B. Ibrahim, 2008. The Rights of a Rape Victim in Islamic Law. IIUM Law Journal, 16(1).
33. Jabei Ameli (Second Martyr) 1979. Zein Aldin Masalek alafham fi sharh shara al islam, 2, Basirati.
34. Smith Merril, D., 2004. Encyclopedia of rape, Greenwood Publishing Group.
35. Brown Jonathan, 2004. Rape in Islamic law, in the Oxford Encyclopedia of Islam and Law, New York: Oxford University Press.
36. Mohammad Akram, 2008. An Approach to The Victims Of Crime In Malaysia, presented at 5th Asian Law Institute Conference Thursday and Friday, 22 and 23 May 2008, Singapore.
37. David Miers, 1997. Compensation for Criminal Injuries, London: Butterworths