

## THE ACT OF BULLYING FROM MALAYSIA'S PERSPECTIVE (funding from UKM Research Grant GGPM-2017-078)

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### ABSTRACT

This paper examines the act of bullying as an effort to explore the relevant laws applicable in Malaysia based on selective legal issues. It is an initial stage to discover relevant provisions under the Penal Code of Malaysia. The scope of research is generally on the issues arising from the provisions of the law. The methodology used is socio-legal analysis with reference to legal text materials, court cases and examples. The expected outcome will enable some insights to explore the current applicable laws in Malaysia.

Key words: Act of bullying, Penal Code, legal issues, relevant laws, Malaysia.

### INTRODUCTION

Bullying is one of many social and widespread issues that needed attention. Bullying is not a new issue and most rampant nowadays as seen from reported news. In Malaysia, the case of a university student from Universiti Pertahanan Nasional Malaysia (UPNM) is one example of such. The case of bullying went viral last year after the death of Universiti Pertahanan Nasional Malaysia (UPNM) student, cadet officer Zulfarhan Osman Zulkarnain, who according to the prosecution team was due to the fact he was beaten, kicked and burnt with a hot steam iron by 19 other students for refusing to confess he had stolen a laptop (The Star 2018). Deputy public prosecutor Othman Abdullah told the High Court that the prosecution would also prove the involvement of the 19 in murdering, abetting to murder and causing injury to the deceased and would submit a post-mortem report showing the deceased had suffered injuries and the cause of death was severe burns. (The Star, 2018). The students are all 22 years old. All were charged with voluntarily causing grievous hurt, which carries a maximum jail term of seven years and fine if convicted. Five out of the 19 students were charged with murdering Zulfarhan Osman and one was charged with abetting the five in the murder. All six face the mandatory death sentence upon conviction. The offence was allegedly committed at room 04-10 Jebat Hostel Block, UPNM, between 2.30am and 5.30am on May 21 and in the same room between 1.30am and 4.30am on May 22. The case is now pending full trial at the High Court of Malaysia.

Bullying if not curbed will be detrimental with negative impact to the society and destruct the well-being of the nation. Bullying is considered as a severe form of anti-social behavior. The effect of bullying is grave which could lead to psychological impact such as emotional distress and mental health issues. The offence of bullying can be observed on more factors than one; the age of the offender and victim as well as the severity of the act so as to ascertain the laws applicable. Generally the Penal Code of Malaysia covers all offences affecting the human body while the Child Act could also be applicable whenever a child is involved. This paper will explore the act of bullying and the Penal Code of Malaysia. This paper is an initial effort to explore the act of bullying and the consequence of the act. It will not deal on cyber bullying.

### DEFINITIONS

Bullying is an abuse and mistreatment of someone vulnerable by someone stronger, more powerful. While there is not a universally accepted definition of bullying, the NSW Legislative Council Inquiry into the Bullying of Children and Young People, 2009 concluded that there were three critical features that appeared in most definitions. Those features are:

- **repetition:** repeated hurtful behaviour;
- **intent to harm:** an intention to cause physical, psychological and/or emotional harm; and
- **power imbalance between the perpetrator and the victim:** through differences including physical size, strength, age or status within a peer group.

Bullying can include any one or more of the following:

- **physical:** punching, pushing, tripping, kicking;
- **verbal:** teasing, using offensive names, abusing, constant criticism, inappropriate comments about a person's appearance, belittling;
- **non-verbal:** writing offensive notes, rude gestures, graffiti;
- **psychological:** spreading rumours, hiding or damaging possessions, inappropriate use of information technology, unauthorised use of camera phones; and

- **emotional:** deliberately excluding others from a group, refusing to sit next to someone, overtly encouraging other people to actively ignore or avoid a person.

According to Mario A. Sullivan And Joachim Marjon (2017), there are many definitions of bullying, but generally it is considered to be unwanted and aggressive behavior that is repeated or has the potential to be repeated. Bullying can take many forms, including making threats, spreading rumors, physically or verbally abusing someone, and purposefully isolating someone from a group.

In Malaysia, bullying is not statutorily defined. However, the act of causing hurt or death resulting from bullying may lead to charges under the Penal Code.

#### THE LAW

##### Penal Code (Revised 1997) [Act 574]

Sections	Provisions
<b>Section 44. "Injury".</b>	The word "injury" denotes any harm whatever illegally caused to any person, in body, mind, reputation or property
<b>Section 304. Punishment for culpable homicide not amounting to murder.</b>	Whoever commits culpable homicide not amounting to murder shall be punished-  (a) with imprisonment for a term which may extend to thirty years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death; or [Am. Act A1210: s.6]  (b) with imprisonment for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.
<b>Section 319. Hurt.</b>	Whoever causes bodily pain, disease or infirmity to any person is said to cause hurt.
<b>Section 321. Voluntarily causing hurt.</b>	Whoever does any act with the intention of thereby causing hurt to any person, or with the knowledge that he is likely thereby to cause hurt to any person, and does thereby cause hurt to any person, is said "voluntarily to cause hurt".
<b>Section 322. Voluntarily causing grievous hurt.</b>	Whoever voluntarily causes hurt, if the hurt which he intends to cause or knows himself to be likely to cause is grievous hurt, and if the hurt which he causes is grievous hurt, is said "voluntarily to cause grievous hurt".  <i>Explanation</i> -A person is not said voluntarily to cause grievous hurt except when he both causes grievous hurt and intends or knows himself to be likely to cause grievous hurt. But he is said voluntarily to cause grievous hurt if, intending or knowing himself to be likely to cause grievous hurt of one kind, he actually causes grievous hurt of another kind.  <i>ILLUSTRATION</i> A, intending or knowing himself to be likely permanently to disfigure Z's face, gives Z a blow which does not permanently disfigure Z's face, but which causes Z to suffer severe bodily pain for the space of ten days. A has voluntarily causes grievous hurt.
<b>Section 324. Voluntarily causing hurt by dangerous weapons or means.</b>	Whoever, except in the case provided for by section 334, voluntarily causes hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or any scheduled weapon as specified under the Corrosive and Explosive Substances and Offensive Weapons Act 1958, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance, or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with imprisonment for a term which may extend to ten years, or with fine, or with whipping or with any two of such punishments.
<b>Section 326. Voluntarily causing grievous hurt by dangerous weapons or means.</b>	Whoever, except in the case provided by section 335, voluntarily causes grievous hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or any scheduled weapon as specified under the Corrosive and Explosive Substances and Offensive Weapons Act 1958, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive

	substance, or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to fine or to whipping.
<b>Section 337. Causing hurt by an act which endangers life or the personal safety of others.</b>	Whoever causes hurt to any person by doing any act so rashly or negligently as to endanger human life or the personal safety of others, shall be punished with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand ringgit, or with both.
<b>Section 338. Causing grievous hurt by an act which endangers life or the personal safety of others.</b>	Whoever causes grievous hurt to any person by doing any act so rashly or negligently as to endanger human life or the personal safety of others, shall be punished with imprisonment for a term which may extend to two years, or with fine which may extend to two thousand ringgit, or with both.
<b>Section 323. Punishment for voluntarily causing hurt.</b>	Whoever, except in the case provided for by section 334, voluntarily causes hurt, shall be punished with imprisonment for a term which may extend to one year, or with fine which may extend to two thousand ringgit, or with both.
<b>Section 325. Punishment for voluntarily causing grievous hurt.</b>	Whoever, except in the case provided by section 335, voluntarily causes grievous hurt, shall be punished with imprisonment for a term which may extend to seven years, and shall also be liable to fine.
<b>Section 336. Punishment for act which endangers life or the personal safety of others.</b>	Whoever does any act so rashly or negligently as to endanger human life or the personal safety of others, shall be punished with imprisonment for a term which may extend to three months, or with fine which may extend to five hundred ringgit, or with both.
<b>Section 351. Assault.</b>	Whoever makes any gesture or any preparation, intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault.
<b>Section 354. Assault or use of criminal force to a person with intent to outrage modesty.</b>	Whoever assaults or uses criminal force to any person, intending to outrage or knowing it to be likely that he will thereby outrage the modesty of that person, shall be punished with imprisonment for a term which may extend to ten years, or with fine, or with whipping, or with any two of such punishments.
<b>Section 349. Force.</b>	<p>A person is said to use force to another if he causes motion, change of motion, or cessation of motion to that other, or if he causes to any substance such motion, or change of motion, or cessation of motion as brings that substance into contact with any part of that other's body, or with anything which that other is wearing or carrying, or with anything so situated that such contact affects that other's sense of feeling:</p> <p>Provided that the person causing the motion, or change of motion, or cessation of motion, causes that motion, change of motion, or cessation of motion in one of the three ways hereinafter described-</p> <p>(a) by his own bodily power;</p> <p>(b) by disposing any substance in such a manner that the motion, or change or cessation of motion, takes place without any further act on his part, or on the part of any other person;</p> <p>(c) by inducing any animal to move, to change its motion, or to cease to move.</p>
<b>Section 350. Criminal force.</b>	Whoever intentionally uses force to any person, without that person's consent, in order to cause the committing of any offence, or intending by the use of such force illegally to cause, or knowing it to be likely that by the use of such force he will illegally cause injury, fear, or annoyance to the person to whom the force is used, is said to use criminal force to that other.
<b>Section 352. Punishment for using criminal force otherwise than on grave provocation.</b>	Whoever assaults or uses criminal force to any person otherwise than on grave and sudden provocation given by that person, shall be punished with imprisonment for a term which may extend to three months, or with fine which may extend to one thousand ringgit, or with both.

**Intention**

In ascertaining an act of crime, intention and criminal act must be proved. Thompson LP delivering the decision of the Federal Court in *Tan Hoi Hung v. Public Prosecutor [1966] 1 LNS 194*; [1966] 1 MLJ 288 quoted with approval the following passage in Kenny's *Outlines of Criminal Law* :

"Intention indicates that a man is consciously shaping his conduct so as to bring about a certain event; 'motive' indicates the reason why he desires that event and therefore why he pursues the selected course of conduct so as to achieve it.

In other words, if a man knowingly does something then not only does he intend to do it but in the absence of anything to the contrary, he must be taken to intend the natural and probable consequences."

Intention is a matter of inference. In *Tham Kai Yau & Ors v. Public Prosecutor [1976] 1 LNS 159*; [1977] 1 MLJ 174 Raja Azlan Shah FJ said at page 176:

"It cannot be disputed that intention is a matter of inference. The deliberate use by some men of dangerous weapons at another leads to the irresistible inference that their intention is to cause death. This inference should therefore make it a simple matter to come to a decision as to intention, in any case, such as the present, where the weapons used by the appellants were deadly weapons and where the person killed was struck more than one blow."

### **Burden of Proof**

As for the quantum of proof required to establish the defence, it is settled law that the quantum is the civil standard of proof, ie, proof on the balance of probabilities. The following observations by Syed Agil Barakbah J (as he then was) in *Mohamed Yusof bin Hj Ahmad v. PP [1980] 1 LNS 220*; [1983] 2 MLJ 167 at page 171 although in the context of a statutory presumption is relevant:

"He was applying the test which requires the defence to prove their case on the balance of probabilities ie, whether it was likely in the circumstances to accept that the defence story exists. The element of truth is of course required but the element of probabilities is the main factor so that if the court accepts the defence story as probable even though not convinced of the truth, then the defence has succeeded in proving to the contrary the presumption that has arisen."

In dealing with **section 105 of the Evidence Enactment** which is the precursor to **section 105 of the Evidence Act**, Spencer Wilkinson J in *Raman v. PP [1958-49] MLJ Supp 146* said:

"In criminal matters, whilst it is true that **s. 105 of the Evidence Enactment** casts the burden upon an accused person of proving the existence of circumstances bringing the case within any special exception contained in the Code, it has always been held, not only that this burden is not a heavy one but also that the accuse is entitled, if he can, to bring himself within the exception by reference to facts proved by the prosecution evidence."

Section 105 of the Evidence Act 1950 [Act 56] on the burden of proving that case of accused comes within exceptions provides that:

"When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the court shall presume the absence of those circumstances.

#### *ILLUSTRATIONS*

(a) A accused of murder alleges that by reason of unsoundness of mind he did not know the nature of the act.

The burden of proof is on A.

(b) A accused of murder alleges that by grave and sudden provocation he was deprived of the power of self-control.

The burden of proof is on A.

(c) Section 325 of the Penal Code provides that whoever, except in the case provided for by section 335, voluntarily causes grievous hurt shall be subject to certain punishments.

A is charged with voluntarily causing grievous hurt under section 325.

The burden of proving the circumstances, bringing the case under section 335, lies on A.

### **Provocation**

There were also cases where the perpetrator of the act of bully was killed by the victim as a result of his act done consistently against the victim. For example in the case of *Public Prosecutor v. Tsang Yuk Chung* (1988) which is a case from the High Court of Singapore. The accused, Tsang Yuk Chung, was charged as follows:

“That you Tsang Yuk Chung on or about 15 October 1985 at about 11.20 am at the pantry/gallery room on board the vessel 'Kilmun' berthed alongside berth J6, Jurong Port, Singapore, did commit murder by causing the death of one Leung Sang, and you have thereby committed an offence punishable under s 302 of the Penal Code (Cap 103, 1970 Ed).”

According to the facts of the case, the accused met the deceased during the flight to Sydney. The deceased was also joining the 'Kilmun' as a second cook. At the beginning, his relationship with the deceased was normal. They even had drinks together in the following month. Subsequently, the relationship deteriorated when the deceased began to bully him. They had quarrels which ended up in the killing of the deceased. The accused was convicted on the said charge.

## SUGGESTIONS

Bullying can be a profoundly traumatic and damaging experience for all involved (New South Wales, Parliament Legislative Council, 2009). It is a serious offence that can even lead to death. However, under section 52B of the Penal Code an offence is considered a serious offence only if the offence is punishable with imprisonment of ten years or more. Section 52B of the Penal Code provides that:

**“Section 52B. Serious offence.**

The words “serious offence” denote an offence punishable with imprisonment for a term of ten years or more.”

Bullying is a criminal act to be established in the court of law under the Penal Code. Bullying is considered a seriously irresponsible and violent act which must be regarded as a serious offence under section 52B of the Penal Code. Depending on the severity of the criminal act, a person who bullies may be charged for voluntarily causing hurt or grievous hurt which carries minimal punishment. Voluntarily causing hurt under section 323 of the Penal Code is punishable with imprisonment for a term which may extend to one year, or with fine which may extend to two thousand ringgit, or with both while section 321 of the Penal Code on causing grievous hurt only carries a maximum jail term of seven years and fine if convicted under section 325 of the Penal Code, thus made it not categorised under serious offence.

It is thus suggested that bullying be categorised as a serious offence and the minimum punishment should be ten years or more.

## CONCLUDING REMARKS

Bullying may result in severe injury and even death. The living proof is the case of the UPNM student, the late Cadet officer Zulfarhan Osman Zulkarnain. As such, it is in the public interest that an appropriate sentence should be imposed to punish the offender and to deter potential wrongdoers from committing the same. A specific provision could be drafted for the offence of bullying that denotes bullying as a serious offence under the Penal Code of Malaysia.

Further research is also needed in terms of the suggested amendments to cater for the offence of bullying. Apart from that awareness among the public is necessary to understand the seriousness of the act of bullying as a serious crime which could lead to death either to the perpetrator or the victim.

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