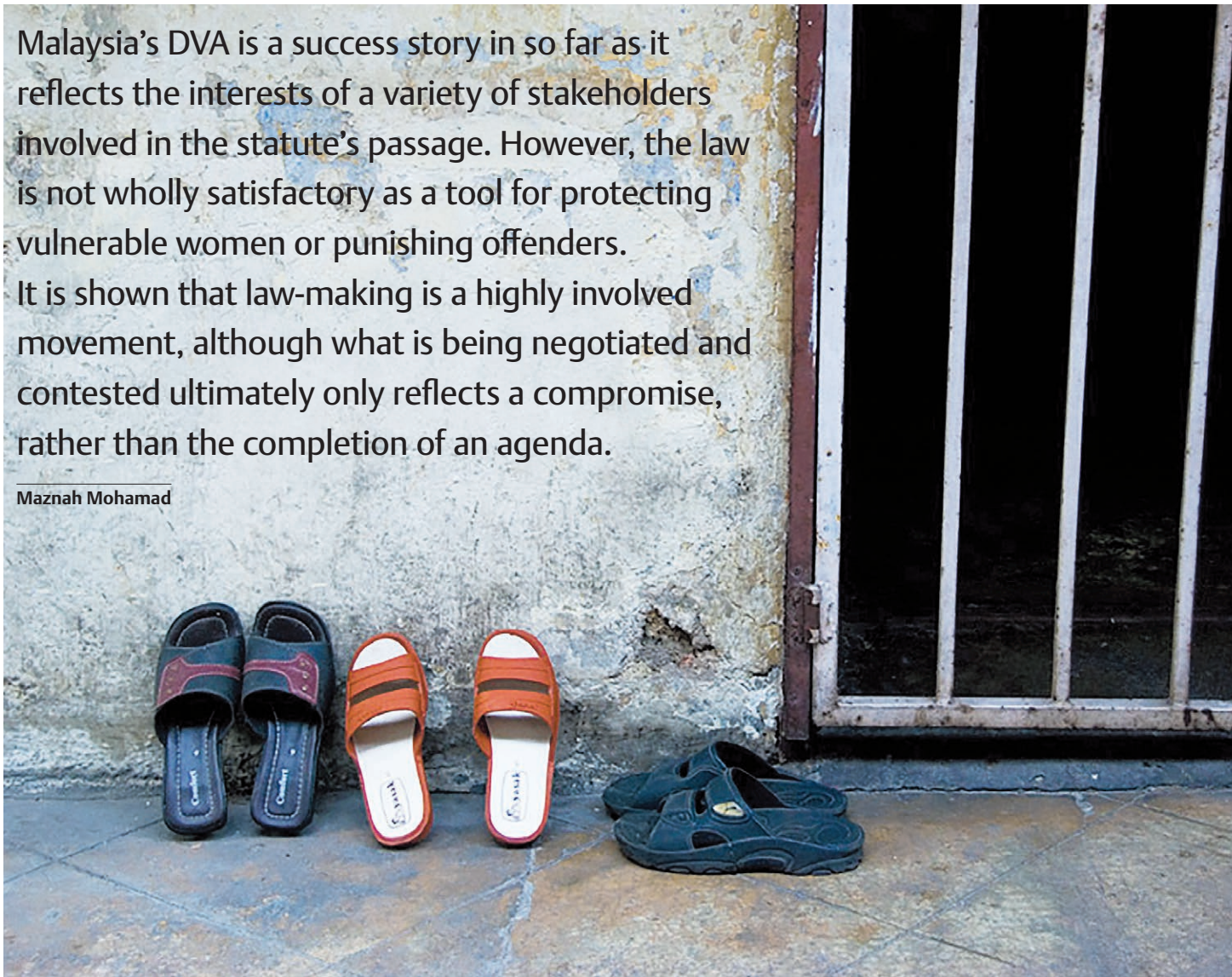


# Malaysia's DVA: the clash of gender, cultural and religious rights

Malaysia's DVA is a success story in so far as it reflects the interests of a variety of stakeholders involved in the statute's passage. However, the law is not wholly satisfactory as a tool for protecting vulnerable women or punishing offenders.

It is shown that law-making is a highly involved movement, although what is being negotiated and contested ultimately only reflects a compromise, rather than the completion of an agenda.

Maznah Mohamad



## Violence undefined

In the pre-DVA years, the legal system, either Syariah or civil, treated violence against married women as mere matrimonial misconduct rather than an offence punishable by law. The Married Women Ordinance 1957 considered a man and a woman in marriage to be one person and, therefore, not entitled to damage claims against one another when an injury is inflicted upon their persons (or body). This law allowed the couple to sue one another if there was damage to their *property*, but not to their *bodies or reputation!* Yet another legislation that worked against Muslim women at that time was the separation of civil and Syariah jurisdictions on matrimonial matters. This proved to be a great obstacle for Muslim women as a few cases showed that the Syariah court was less reliable in guaranteeing women safety from their abusive spouses.

However, for both Muslim and non-Muslim parties, domestic violence was wholly attached to a matrimonial condition, and it was only if women decided to end the marriage that spousal abuse could be used as a justification for it. Most legal cases involved women plaintiffs who were ready and able to do so. However, had they chosen to stay in a violent marriage, no amount of complaints over wife-battery could lead to conviction, since the law did not recognize it as an offence.

In the Syariah courts there were some highly inconsistent rulings in cases of violence against Muslim women. As in the civil court, a complaint of violence could only be made to the Syariah court upon application for divorce under either *taklik* or *fasakh*. *Taklik* divorce is automatically and judicially granted to a woman (without spousal consent) if the court is satisfied that a husband has breached some stipulations inserted in the marital contract; wife-beating being one of them. If wife-beating is not stipulated in the marriage contract for divorce, then a woman can apply for divorce under the terms of *fasakh*, as one of the conditions for a *fasakh* divorce is cruelty and wife-beating.

Islamic stipulations, such as the rejection of female witnesses and the acceptance of sworn oaths as claims to truth in courts, were also applied to deny women their right to be free from their violent husbands. In another case the complainant was denied divorce by *fasakh* despite providing a witness to the assault and submitting a medical report as evidence of her injury. The *kadi* ruled that the testimony of her witness, her female domestic helper, could not be accepted. According to the *kadi*, under Islamic law (*hukum Syarak*), only the testimonies of two male witnesses or one male witness together with two female witnesses can be accepted in court.

## The campaign years

Rising awareness about the battery of women in their own homes, the unequal treatment that abused women experienced under different jurisdictions, and the accumulated experiences of women's shelters in dealing with domestic abuse cases, were some of the many reasons for public

support of a domestic violence law in Malaysia. One of the first few conceptual issues that arose was whether this law, covering family matters, would be drafted as a criminal or a civil legislation and whether it would cover Muslims as well.

In Malaysia, it was the legal aspect of family that was being debated rather than its cultural significance. This was because Malaysia did not have an explicit 'family code' or any written constitutional provision extolling 'family' as the moral fibre of the nation (as in the Indian, Philippine and Indonesian cases); instead, the family's supposed sanctity was guarded by civil or Islamic law. Legal developments around the above concerns reinforced the delineation of jurisdictional turfs between the 'Islamic family' and the 'Other family'. Much of the DVA campaign was thus taken up by advocacy, debates and resistance around the question of who had authority over the Islamic family. There followed a long, combative and arduous process of organizing and negotiating. During this period religion came between the bill and its passage. Much resistance came from the Muslim/Syariah faction (or the Syariah Islamists), which considered anything pertaining to Muslim marriage within their jurisdiction. Nevertheless objections also came from those reluctant to accept domestic violence as a criminal offence.

There was thus uncertainty over whether the original DVA was meant to be a civil or a criminal law, as some believed that family offences did not deserve criminal treatment. Most importantly the bill drafting committee had to find a way to avoid the conflict of jurisdiction between Muslims and non-Muslims. The way out was to include all Muslims and non-Muslims under a common law, with the DVA drafted as a criminal legislation. Having passed this hurdle, the bill then needed to accommodate the views of Islamic scholars who expressed dissatisfaction with marital rape being included in the definition of domestic violence, claiming that this was not acceptable under Islamic law. Neither a civil nor a criminal domestic violence legislation seemed likely to please all factions, all of the time.

Although the DVA was finally approved by Parliament, the struggle to have it gazetted and implemented continued. It was two years later, in 1996, that the 'Cinderella Act' or the DVA 1994 could be enforced. English-language dailies, such as the *New Straits Times* (NST) steadfastly supported women's interests in getting the DVA enforced. Women journalists at these publications carefully strategized the publication of public debates to suit the agenda of the law's final adoption. Islamic religious authorities, who were represented at meetings to draft the act, were purported to be changing their minds. Zaleha Ismail, the then Minister of National Unity and Social Development, was also hesitant about the implementation of the DVA, remarking that the Islamic faction was not "in favour of the Act applying to Muslim women as they feel all matters pertaining to Muslims should come under the jurisdiction of the Syariah court, the power of which they fear could be undermined if the Act applies to all".<sup>1</sup>

## Enforcing the law

Even after parliamentary endorsement of the DVA in 1995, the government and politicians representing the ruling party were anxious about how the law would resonate with their 'sensitive' constituencies, namely the Islamic lobby, which was then aggressively pushing for exclusive judicial control over Muslims. Within 10 days of what appeared to be a continuous repartee communicated through the press, the minister finally relented by announcing in the parliament that the act would be enforced in early.

Amidst the seemingly positive atmosphere surrounding the acceptance of the DVA, a new controversy erupted in 1997. The police, perhaps playing its role as the *de facto* vanguard of the patriarchal state, seemed to resist the law's implementation. Oddly enough, Minister Zaleha Ismail, who had been hesitant about the DVA's enforcement, found herself at the receiving end of police and male 'power'. The dispute was finally settled when then Acting Prime Minister, Anwar Ibrahim, intervened, noting that the police should have conducted their investigations into reports of domestic violence "in a manner acceptable to all". Police officers were subsequently asked to attend courses on public relations, so that they could be "more courteous" and "hopefully, help improve the public image of the police".<sup>2</sup> With the termination of the conflict between Islamists, police and women activists, the system seemed to be on women's side. However, the DVA was still not a satisfactory piece of legislation. It was a version that accommodated the interests of many parties. It was not the law envisaged by its early initiators, who wanted to introduce a bill that explicitly recognized domestic violence as an offence, "as a statement from society that domestic violence won't be tolerated".

As the DVA needs to be read with the Penal Code, the law is quasi-criminal, combining civil and criminal procedures. The ambiguity of the law, being both civil and criminal, is not the actual obstruction to the solution. Even if gendered violence is defined within the ambit of the Penal Code it will not be sufficiently addressed by it, given the complex nature of 'hurt' and 'harm' inflicted by intimate partners on each other. Malaysia's DVA is a success story insofar as it mirrored the compromises and accommodations that contributed to the statute's passage. However, the law does not satisfy all parties nor does it have sufficient provisions to fully criminalize the offence of domestic violence.

## Ongoing issues

By tracing the history of the passage of the DVA one sees how marital violence was conceived and defined by the courts in the early years before the DVA campaign took root. Legal judgements in the Syariah and civil systems revealed the dissimilar experiences of Muslim and non-Muslim women when they sought justice against their abusers in court. By the mid-1990s, domestic violence began to be slowly recognized and named as a grave offence; the right to guard the body against harm was recognized. This period saw an intense contestation involving the government, media, police and civil society interests. It was an unmistakable moment for gender consolidation. Although it was a historic law, the relevance of the DVA's provisions and the effectiveness of its implementation are still continually being assessed and critiqued. The stocktaking years revealed some of the difficulties of the DVA in resolving family matters, ranging from the seemingly simple procedure of obtaining a Protection Order to intimidating court procedures unsuitable for family deliberations, as well as the dilemmas around intervention and the autonomy of victims to decide if and how violence upon them should be criminalized.

The legal campaign was a potent opportunity at raising rights consciousness. But it was also a manifestation of the limited capacity of law and the state in affecting social transformation. The campaign for the DVA allowed for much rethinking around the question of one's own subjectivity (and empowerment) in relation to gender, family, ethnicity, religion and nation. However, the implications of the law also drove home the realization that domestic violence has yet to be deeply understood as a form of gendered violence and explicitly criminalized under the Malaysian legal system.

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## Notes

1 See Muharyani, O. 1996a. 'Still waiting for the Act', *New Straits Times*, 1 February, p.8.

2 See Deutsche Presse-Agentur. 1997. 'Malaysian cops to undergo ethics course to polish image', *Deutsche Presse-Agentur*, 27 August, online source: <http://tinyurl.com/DPA-Malaysian>, last accessed 15 October 2012.

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