

## Adequacy of Legislation in Protecting the Rights of Muslim Women Against Spousal Violence in Malaysia

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**Abstract:** Violence against women occurs in all countries and transcends social, economic, religious, and cultural groups. One of the most common forms of violence against women is violence by their husbands or other intimate male partners. Over the past two decades, violence by an intimate partner has been identified throughout the world as a serious physical and mental health concern. In the Muslim community, spousal violence has become one of the main issues of concern due to different interpretations of Islamic teaching on gender roles between men and women within varying historical and cultural contexts. Misinterpretation of the Qur'anic injunctions within the cultural context of some Muslim communities resulted in the justification of the men's abusive acts towards their spouses. In Malaysia, various laws have been enacted to curb the current problem of domestic violence including spousal violence. This paper seeks to examine the rights of Muslim women in Malaysia in particular, against spousal violence under the Syariah (In Malay language, Shari'ah is known as Syariah) and the Malaysian Laws and discuss to what extent these laws are adequate in controlling the problem of spousal violence in Malaysia. The paper also briefly highlights the issue of marital rape in Islam and whether or not it should be classified as a form of spousal violence. Finally, the paper discusses some possible recommendations as to the relevant legislation and other legal measures that may spur improvement to the present situation in reducing the number of spousal violence cases in the country.

**Key words:** spousal violence, Malaysian legislation, Muslim women, Islamic law

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### INTRODUCTION

Spousal violence occurs in all countries and transcends social, economic, religious, and cultural groups. Worldwide, one of the most common forms of spousal violence is abuse of women by their husbands or other intimate male partners. Over the past two decades, spousal violence has been identified throughout the world as a serious physical and mental health concern. Spousal violence, in particular, was recognized, at the Fourth World conference on Women held in Beijing in 1995 as a human rights concern worldwide. Various terms are used to characterize the violence between spouses. For example terms such as *spouse abuse*, *domestic violence*, *family violence*, *partner violence*, *intimate partner abuse*, and *battering* are popular but they do not differentiate between men and women (Gelles, 1995). However, research has shown that women are far more likely than men to be victimized. Early feminist scholars documented in extensive detail the degree to which women were subjected to domestic violence, brutality, sexual assault, and social isolation when seeking assistance (Browne, 1987; Dobash and Dobash, 1979). These scholars pointed out that women who are battered are often economically and socially dependent on their abusive male partners for material support and social 'respectability', which compounds economic and cultural influences.

Muslim women are not immune to this social and health concern. A few studies conducted on violence within Muslim communities in the Middle East have uniformly demonstrated that violence inflicted by husbands on their spouses is the most common form of family violence experienced (Abed Al-Wahhab, 1994; A Mosaed, 2004; Hajj Yahia, 2000). One of the main reasons is the different interpretation of Islamic teaching on roles of men and women within varying historical and cultural contexts. In some cultural practices of Muslim societies, they promote the uninhibited superiority of men and thus validate the men's abusive behaviour towards their spouses as a form of control.(Al Mosaed, 2004).

Malaysia, as one of the countries with a high population of Muslim citizens, has always been against any form of violence especially to women. This paper examines the rights of Muslim women in Malaysia in particular, against spousal violence under the Malaysian Laws and considers to what extent these laws are adequate in controlling the problem of spousal violence in Malaysia. The paper also briefly discusses the recognition of violence against women by the international institutions, spousal violence from the Islamic perspective and the issue of whether marital rape can be classified as an act of spousal violence.

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### ***International Recognition of Violence Against Women:***

After decades of global feminist activism, violence against women is now recognized as an important human rights violation by international institutions and many initiatives are taken by these institutions to closely study the phenomenon in order to alleviate it. For example, in 1992, the United Nations Committee on the Elimination of Discrimination against Women adopted the broad interpretation of violence against women as an infringement of human rights (General recommendation No. 19). The Committee clarified that violence against women could be described as gender-based violence since it was linked closely with discrimination perpetrated against women through social attitudes and practices based on the biological differences between men and women. Violence against women was also perceived as infringing on women's rights under both general norms of international law and the specific norms of the Convention on the Elimination of All Forms of Discrimination against Women. Consequently, violence against women was analyzed in terms of the infringement of a comprehensive range of human rights: the right to life, the right not to be subject to torture or to cruel and inhuman treatment, the right to equal protection in times of international or internal armed conflict, the right to equality in the family, the right to equal protection of the law, the right to liberty and security of person, the right to the highest standard of health and the right to just and favourable conditions of work (Gender and Development Discussion Paper Series No. 21). However, despite all the efforts, violence against women remains pervasive, particularly violence inflicted by husbands within the domestic sphere.

### ***Islamic Perspective on Spousal Violence:***

Marriage in Islam is seen as a sacred covenant that emphasizes on love, mutual respect and understanding between two individuals. Both husband and wife have a distinctive role to play and certain obligations to fulfill and to ensure that a balance of harmony is achieved in the family. Islam provides that the responsibilities of the husband are the rights of the wife and vice versa. The husband as a leader of the household is responsible to protect and maintain his wife, which is one of her basic rights. In return, the wife is responsible for caring for the husband and the family including the obligation of being obedient to the husband in the course of the marital relationship (Siddiqi, 1984). As stated in the Qur'an:

*"Men are the protectors and maintainers of women, because Allah has made one of them to excel the other, and because they spend (to support them) from their means. Therefore the righteous women are devoutly obedient and guard in the husband's absence what Allah would have them to guard"* (The Qur'an, 4:34).

The husband's leadership in relation to his family does not imply dictatorship over his wife. Men in Islam are made the protectors and maintainers because of their superior physical strength and economic responsibilities towards the family (Kausar, 2002). In the event of disputes between the parties, Islam totally prohibits the husband from acting cruelly towards his wife. He is encouraged to resolve the problems with kindness and to consider the positive aspects of his wife. As stated in the Qur'an:

*"O! you who believe! You are forbidden to inherit women against their will. Nor should you treat them with harshness; ... on the contrary live with them on a footing of kindness and equity. If you take a dislike to them it may be that you dislike a thing and Allah brings about through it a great deal of good."* (The Quran, 4:19).

Kind treatment towards the wife is also supported in a number of traditions of Prophet Muhammad (s.a.w.). For example, in one hadith, Mu'awiyah al-Qushairi said:

*"I went to the Messenger of Allah and asked him: 'What do you say (command) about your wives?' He replied: 'Give them the same food you have for yourselves, and clothe them with the same clothes you clothe yourselves and do not beat them, nor revile them'"*(Abu Dawud, 1995: Hadith no. 2142).

In another tradition, the Prophet said:

*"Among the Muslims, the most perfect as regards to his faith is the one whose character is most excellent, and the best among you are those who treat their wives well."* (Abu Isa, 2000: Hadith no. 1195).

All the above authorities clearly point to the fact that men are chosen as the leaders of the family not for their superiority over women but due to their physical ability which make them better equipped to earn a livelihood and bear the physical strains for the family (Kausar, 2002). The husbands' responsibilities towards the wives cannot be seen as an absolute authority that justifies violence to be inflicted on the wives.

### ***Misconception of Husband's Authority in Islam:***

Islam allows some degree of disciplining towards a recalcitrant wife (*nushuz*), i.e. when there is a serious misconduct committed by a wife and other preliminary efforts taken by the husband to correct such misconduct have failed (Ammar, 2007). The Qur'an provides:

*"As to those women on whose part you see ill conduct, admonish them (first),(next) refuse to share their beds, (and last) beat them (lightly); but if they return to obedience, seek not against them means (of annoyance); for Allah is most High and Great"* (The Qur'an, 4:34).

Most Muslim scholars agree that the reason behind the revelation of this verse is to give guidance on how to handle delicate family situations with care and wisdom. The word 'beating' which is used in the verse does not mean physical abuse. The Prophet explained that it must be 'a light tap that leaves no mark and faces should be

avoided' (Maududi, 1989). Abu Hurairah reported the Prophet as saying: "When one of you inflicts a beating, he should avoid striking the face." (Abu Dawud, 1994: Hadith no. 2145). In a commentary on the hadith, it was observed that the face is the most vulnerable part of the body. Thus, the Prophet has forbidden striking it. One may feel the effect of beating on the face more than any other part of the body. Private parts must also be avoided (Hasan, 1994). Some scholars opine that any beating should only be symbolic, as where a 'miswak' or tooth-stick or similar light object is used. In addition, beating can only be resorted to if the husband believes that it would improve the situation, otherwise it is preferable to abandon this measure. It must also be reminded that the act of beating is considered the last resort after the other two options, i.e. admonishing and boycotting or severing from conjugal relationship, failed to be effective in disciplining the wife.

However, the above verse has been misinterpreted and misused to justify the right of men to beat their wives as a method to discipline them. This can be attributed to the lack of comprehensive religious knowledge pertaining to family laws. It has been argued that recourse to beating, as far as possible, should be avoided because Islam clearly encourages all marital disputes to be solved peacefully, i.e. through mediation (Zaidan, 2000). The Qur'an supports this position:

*"If you fear a breach between them twain (the man and his wife), appoint (two) arbitrators, one from his family and the other from hers: if they both wish for peace, Allah will cause their reconciliation. Indeed Allah is Ever All-Knower, Well-Acquainted with all things"*(The Qur'an, 4:35).

The verse indicates that an arbiter from each spouse's side should be brought to mediate the disputes and to effect reconciliation with Allah's help (Ali, 1994). In addition, the Prophet also condemned the act of wife beating. For instance, in one hadith narrated by Abdullah bin Zam'a, the Prophet says:

*"None of you should flog his wife as he flogs a slave and then have sexual intercourse with her in the last part of the day."* (Sahih Al-Bukhari, 1996: Hadith no. 87355).

Thus, it is clearly understood that Islam does not condone domestic violence or wife battering. If the wife is defiant or disobeys the husband without any lawful reason, three measures have been mentioned, but it does not mean that all the three are to be taken at one and the same time, but they are to be administered with the sense of proportion according to the nature and extent of the offence.

#### ***Islamic Perspective on Marital Rape:***

One of the fundamentals of marriage in Islam is to legalize sexual relationship between husband and wife. Sexual relations through legitimate ways are also regarded as an *ibadah* (religious duty), where both husband and wife will be rewarded, if it is done in a proper manner. Thus, it is proper to conclude that there is no such offence as marital rape in Islam. This is because, if a husband is prosecuted for having sex with his wife then it would defeat the purpose of marriage which is to legalise sexual relationship. However, this does not mean that the husband has unlimited access to his wife. There are some circumstances where a husband is restrained from having sex with his wife. For instance, when the wife is in her menstruation period, when the husband has a sexually transmitted disease or if the sexual intercourse is carried out in an unnatural way, which is totally against Islam. Nevertheless, a wife cannot withhold her consent in having sex with her husband if she is in good health and is physically capable of having such intimate relations. On this matter, the Prophet (s.a.w.) clearly said:

*"If a woman spends the night deserting her husband's bed, without a reasonable cause, she is sinful."* (Sahih Al-Bukhari, vol. VII, 93, 1987).

In another hadith which was narrated by Abu Huraira (r.a), the Prophet (s.a.w.) said that:

*"If a man invites his wife to sleep with him and she refuses to come to him, then Angels send their curses on her till morning."* (Sahih Al-Bukhari, vol. VII, 93, 1987).

Even though the above hadiths seem to indicate that the husbands can have unlimited access to their wives, the Prophet abhorred those who acted cruelly towards them, as what has been stated in some of the hadiths that were discussed earlier. Thus, if the wife does politely refuse to have sex with the husband and has valid reasons for such refusal, the husband should understandingly restrain himself. Such mutual understanding is required to promote marital harmony.

#### ***Spousal Violence in Malaysia:***

In many jurisdictions, particularly Asia, violence inflicted on wives is seen as a private matter and considerations of family and culture or tradition tend to prevail over the women's interests. In most Asian countries including Malaysia, cultures and traditions play a big role in the lives of the people. The belief that men are superior and females are subordinates still exists in the culture and traditions of the various races in Malaysia, including the Malay Muslims, since the family systems of these races are based on the patriarchal concept. Under this concept, men are perceived to be the leaders and the breadwinners of the family whereas women are assigned to a lower position in the family and society, such as being the "reproducer and nurturer of children" (Hoff, 1990). Based on this belief, a husband is acknowledged to have absolute authority over his wife including the right to use violence as a method of disciplining her.

As for the Malays, their culture is deeply rooted in the religion of Islam. According to Islam, the husband, as the head of the family, is responsible for the protection and maintenance of the family, and in return the wife must be obedient to the husband. Nonetheless, such responsibility has been commonly misused by some irresponsible Muslim men to justify their acts of violence towards their wives.

***Legal Protection Under the Malaysian Laws:***

In general, Malaysia practices two separate legal systems in matters concerning family issues. The Islamic family law governs family issues concerning Muslims, while civil law governs the family matters of non-Muslims. Nevertheless, in relation to spousal violence, the main law, i.e. the Domestic Violence Act (Amendment) Act 2012 (hereinafter referred to as “DVA”) grants reasonable protection to the victim irrespective of race, religion, cultural and family background. It was designed to grant both civil and criminal remedies for the victims of domestic violence. Generally, the DVA provides protection to all family members including the wife against violence committed within the domestic sphere. Section 2 of DVA gives a wide interpretation of domestic violence which includes attempting to place fear of physical injury, causing physical injury, compelling by force or threat to engage in sexual conduct, confining or detaining the victim against her or his will and causing mischief or damage to the property of the victim with intent to cause distress or annoyance to her or him, psychological abuse which includes emotional injury and causing the victim to suffer delusions by using intoxicating substance or other substance. In the case of a battered wife, she can seek protection by making a complaint to the police or welfare officer and criminally charge the husband, or apply for an interim protection order or a long term protection order.

Apart from the remedies available under the DVA, battered Muslim wives may also find refuge in several other laws enacted prior to the said Act. The abuser husband may be charged under the Penal Code (another federal law which is applicable to both Muslims and non-Muslims) for causing personal injury to the wife under the provisions pertaining to offences against a person that generally apply to any person.

The Islamic Family Law Act and Enactments of each state in Malaysia similarly have provisions regulating violence against person and property. For instance, section 127 of the Islamic Family Law Act (Federal Territories) (Amendment) Act 2006 (hereinafter referred to as “IFLA”), provides that

*“Any man who ill-treats his wife or cheats his wife of her property, or a woman who ill-treats her husband or cheats her husband of his property, commits an offence and shall on conviction be punished with a fine not exceeding one thousand ringgit or to imprisonment not exceeding six months or to both”.*

Section 128 of IFLA further provides:

*“Any person who fails to give proper justice to his wife according to Hukum Syarak commits an offence and shall be punished with a fine not exceeding one thousand ringgit or with imprisonment not exceeding six months or both”.*

Although the above provisions are rather general, they clearly signify the fact that Islamic law does not allow any form of ill treatment including wife battering. Islamic law also emphasizes the need to ensure that proper justice is given to wives.

Apart from the above, a battered Muslim wife is given the right to apply for divorce either by *fasakh*, *ta’liq*, *khulu’* or an injunction against molestation. *Fasakh* divorce is a divorce by judicial decree and the relevant ground is cruelty of the husband as laid down in section 52(1)(h) of IFLA. Under this provision, the word ‘cruelty’ has been interpreted differently in several cases due to the requirement that the beating must be habitual. For instance, in *Hairun v. Omar* (1990) 8 J.H. (2) 282, the wife claimed *fasakh* on the ground that the husband had treated her with cruelty by assaulting her. The learned Shariah judge held that the husband had assaulted the wife and he found that the action of the husband in assaulting the wife exceeded what was allowed in Islamic law. However, he applied section 52(1)(h) & (i) of the Selangor Islamic Family Law Enactment 1984 literally by saying that what was done by the husband could not be said to be habitually assaulting the wife and therefore the case was dismissed. The wife appealed and the Shari’ah Appeal Board held that the learned judge had wrongly interpreted the provision of the Enactment and that the physical assault on the wife, even though was just a single beating, was sufficient to constitute cruelty in Islamic law and under section 52(1)(h) & (i). The Shari’ah Appeal Board reiterated that *fasakh* due to cruelty is not limited to physical assault only but it also includes emotional abuse such as refusal to speak to the wife without any justified reason or giving more attention to other women in order to despise the wife.

Thus, section 52(1)(h) & (i) may be invoked by a wife who has been physically or mentally abused to apply for divorce by *fasakh*. A wife who was mentally abused has to prove that the husband has done the act habitually. However, if the wife was physically abused, it is sufficient to prove a single act of beating as a ground for *fasakh* divorce, as what has been decided in *Hairun v. Omar’s* case. In *Abdul Hanif v. Rabiiah* (1997) 2 JH 47, the chairman of the Shariah Appeal Court of Federal Territories held that a wife who was physically abused need not provide any witness to prove the case as it is impossible to do so. In such a case, it is sufficient for the wife to give circumstantial evidence or *qarinah*.

Another form of divorce is *ta'liq* divorce. It is usual to have a condition at the time of marriage or after marriage that if the husband assaults the wife, she has the right to apply for *ta'liq* divorce. When the husband assaults the wife, this means he has failed to uphold the condition. In such a situation, the battered wife may make a complaint to the judge and apply for *ta'liq* divorce. Section 50(1) of IFLA confers a statutory right on a married woman to apply to the Shariah Court to declare that such a divorce has taken place. The Court shall make the enquiry into the validity of the application and only if the court is satisfied, it then declares the divorce valid. In the case of *Hasnah v. Saad* [1975] 3 JH 84, the wife applied for *cerai ta'liq* because her husband had hurt her face near the right ear. She produced a medical certificate to support her claim. The husband denied her charges and claimed the bruises were self-inflicted. However, the Court gave judgment in favour of the wife and declared that she was divorced by one *talaq*.

Another type of divorce available to a battered wife is *khulu* divorce. This is a divorce by redemption where a wife may request for a divorce from the husband by offering him money or gifts as stated in section 49 of IFLA. Apart from divorce, a battered wife may also apply for specific injunction from the court to restrain the violent husband from assaulting her. This remedy is available under section 107(1) of IFLA, which provides:

*"The Court shall have power during the pendency of any matrimonial proceedings or on or after the grant of an order of divorce, fasakh or annulment, to order any person to refrain from forcing his or her society on his or her spouse or former spouse and from other acts of molestation."*

Apart from the specific injunction in IFLA, a general injunction to restrain the perpetrator from doing any act, which may jeopardize the victim is also available in section 200 of the Shariah Court Civil Procedure (Federal Territories) Act 1998.

### ***Is Marital Rape a Domestic Violence in Malaysia?***

The definition of domestic violence under the DVA does not include marital rape. The Penal Code under section 375(4) also specifies that a man cannot be charged for raping his wife unless she is under the age of 13, is divorced, judicially separated, the marriage has been nullified, or has obtained a restraining order on her husband. Nevertheless, in 2007, amendments were made to Section 375 of the Penal Code, making forced sexual intercourse on a woman by her spouse a crime. In other words, a husband could still be prosecuted if it can be shown the husband used force and caused the wife to be injured during the intercourse. The new section 375A of the Penal Code provides:

*"Any man who during the subsistence of a valid marriage causes hurt or fear of death or hurt to his wife or any other person in order to have sexual intercourse with his wife shall be punished with imprisonment for a term which may extend to five years".*

In 2009, a case was reported in a news paper (New Strait Times, 2009), where a 35-year-old mechanic became the first man to be tried and convicted under Section 375A of the Penal Code. In this case, the husband was charged under that section for using force against his wife by dragging, slapping and choking her during sexual intercourse. He was sentenced by the court to a maximum of five years imprisonment. The man was also sentenced to 10 years imprisonment and three lashes of caning for forcing his wife to have anal sex. Anal sex, even when consensual, is a crime punishable under section 377C, which carries the maximum of twenty years of imprisonment in Malaysia.

### ***Weaknesses of the Laws:***

Despite the available remedies offered by the above laws, they are still subject to many weaknesses, which hinder the battered wife from seeking protection under them. According to section 3 of DVA, in order to charge the perpetrator for domestic violence, the Act must be read together with the provisions of the Malaysian Penal Code. The Penal Code is an Act relating to criminal offences and all actions under the DVA are only to be taken if there is any information relating to the commission of any offence under the Penal Code. This means domestic violence per se is not a specific crime punishable with new penalties under the DVA. This therefore makes the power of the police less effective as action could not be taken immediately.

Before the recent amendments to the DVA (which was gazetted in February 2012), the victims usually were left without immediate remedies. Previously, when an act of domestic violence has been alleged, the police have to adhere to the procedure laid down in the Criminal Procedure Code (hereinafter referred to as "CPC"); that is, to first determine the nature of the offence as to whether it is a seizable and non-seizable offence. Under the CPC, the police are only required to conduct immediate investigations in cases of seizable offences. Seizable offences are described as serious offences where the offender uses "dangerous weapons or means" to cause hurt or grievous hurt, which is defined as permanent loss of sight or hearing, fracture or dislocation of bones. A "non-seizable offence" on the other hand means an offence for which a police officer may not ordinarily arrest without a warrant according to the third column of the First Schedule. It has been argued that in most cases of domestic violence, the violence inflicted by the perpetrator would usually be classified as non-seizable offence. It has been reported that usually the violence inflicted involves the act of punching, kicking, assault, battery, etc., which fall under section 319 of the Penal Code. This section provides that, "Whoever causes bodily pain,

disease, or infirmity to any person is said to cause hurt". Thus, previously, a victim could not seek immediate protection as the police are not compelled to investigate or arrest the perpetrator immediately until and unless a warrant is issued by the public prosecutor or a magistrate. With the new amendment to the Act, the above problems would be resolved, as the Act has inserted a new provision making all domestic violence cases to be seizable offences. This means that the police may act upon any complaint regarding domestic violence immediately without having to wait for any warrant of investigation or warrant of arrest.

Apart from the above, an application for divorce due to domestic violence is seen as a last resort remedy particularly if the victim is a homemaker, and totally dependent on the husband. In addition, the injunction against molestation is not an immediate injunction of relief as it can be applied for only when there is a pending matrimonial proceeding. Similarly, this injunction cannot be invoked by a wife who wishes to continue with the marriage but only wants to protect herself from further violence inflicted by her abuser husband. It is also improbable that the wife will have the courage to apply for divorce as the procedure would be time-consuming, costly and emotionally demanding, as she will have to face the husband in open court.

Despite the weaknesses in the Malaysian laws in providing adequate protection to battered wives, it is submitted that recognition given to such acts as crimes committed within the domestic setting, particularly under the DVA has effectively created greater awareness among women. For instance, statistics from the Royal Malaysian Police Force reveal that from the year 2006 to 2007, there was a 10 percent increase in the domestic violence cases committed by the husband (Lai, 2008). Although, the statistics may indicate that the incidences of wife battering are on the rise, it may also be assumed that the increase in the number of reports relating to wife battering signifies greater awareness among the victims of their rights to take action under the DVA.

### **Conclusion:**

Any act of violence against wives clearly contradicts the concept of love, care, and respect between spouses as ordained in Islam. The Prophet has advised that women or wives should be treated kindly and not cruelly as the marriage tie is a sacred bond which is reinforced with love, kindness, mercy, compassion, care and understanding. Under the States' Islamic Family Law Enactments or Act in Malaysia, the provisions are adequate to provide remedies for a woman to apply for divorce. However, there are no comprehensive details with regards to the mechanism on how protection for Muslim women pending a divorce proceeding is to be implemented. Thus, the States' Enactments or Act cannot stand by themselves to provide comprehensive protection to Muslim women which invariably justifies the need for a specific enactment on spousal violence. Battered Muslim women in Malaysia may also find refuge in the new amended DVA, which provides more avenues and the Penal Code. It is a fact that protection against spousal violence cannot solely rely on legal sanctions. More efforts have to be taken to make society be aware and concerned about the dimensions of the problem through campaigns, seminars and conferences. These efforts may spur improvements to the present situation to reduce the number of cases of spousal violence in this country.

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